

# THE DIVORCE OF LAW AND MORALITY

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## I INTRODUCTION

John Austin said ‘the existence of law is one thing; its merit or demerit another... A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text.’<sup>1</sup> Considered by many as the founder of legal positivism,<sup>2</sup> Austin argued against the natural law proposition of law and morality being inherently bound, instead insisting on a strict separation.<sup>3</sup> This paper will address morality to mean Christian morality. Through analysis of the moral standards of our legal system, it is clear that they have been informed by Christian morality. ‘Inextricably’ means impossible to disentangle, however the history of slavery and the Nuremberg Trials clarify that law and Christian morality have indeed been separated. Natural law theorists claim morality is objective. However, the inevitable and observable subjectivity of morality confirms that law and morality are not inextricably joined.

## II MORAL STANDARDS

Both legal positivists and natural law theorists acknowledge that morality derived from Christianity and that it contributed considerably to the moral

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<sup>1</sup> John Austin, *The Province of Jurisprudence Determined*, (Cambridge: Cambridge University Press, 1995) 157.

<sup>2</sup> Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspective*, (Australia: LexisNexis Butterworths, 2013) 67.

<sup>3</sup> *Ibid.*

standards reflected in our legal system. Sir Matthew Hale described such a connection between the law and Christian morality in *Taylor's Case*:<sup>4</sup> 'blasphemous words, were not only an offense to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court... Christianity is parcel to the laws of England.'<sup>5</sup> Australia inherited its legal system from England, therefore this is applicable to Australia too.

Henry de Bracton, known as the 'Father of the Common Law'<sup>6</sup> stated that '[t]he king shall be under God and the law, because the law makes the king. For there is no king where will rules rather than the law.'<sup>7</sup> Every person, even the King, is subject to the Rule of Law. This vital statement was reiterated by Sir Edward Coke during his infamous conflict with King James, reminding the King that 'the king shall be under God and the law, for the law makes him king'.<sup>8</sup> This also has been seen as where the separation of powers originated.<sup>9</sup> By making the King answerable to a higher power, it created a system of checks and balances.<sup>10</sup> Christianity has also had an immense influence on the development of the Court of Equity, the Magna Carta and the United States Declaration of Independence. Sir Anthony Mason, former Chief Justice of the High Court of Australia agreed that with Christianity's profound influence, saying that 'the Ten Commandments are reflected in the principles of the criminal law, the civil law and family law, though the nature of the sanctions

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<sup>4</sup> (1676) 86 ER 189.

<sup>5</sup> Ibid.

<sup>6</sup> H W Titus, 'God's Revelation: Foundation for the Common Law' in H W House (ed), *The Christian and American Law: Christianity's Impact on America's Founding Documents and Future Directions*, (Grand Rapids: Kregel Publications, 1998) 13.

<sup>7</sup> Henry De Bracton, *On the Laws and Customs of England* (Cambridge: Harvard University Press, 1968) 25.

<sup>8</sup> Augusto Zimmermann, 'A Law above the Law: Christian Roots of the English Common Law' (2013) 1 *Glocal Conversations* 85, 88.

<sup>9</sup> Charles Denecke, *Review: Summa Theologica by S. Thomas Aquino* (Speculum, Vol 23, 1948) 331-332.

<sup>10</sup> Ibid.

vary from time to time and from jurisdiction to jurisdiction.’<sup>11</sup> Mason stated that decisions of the High Court from the mid 1980s to 1995 follow the long-standing criminal law principles of liability and punishment shaped by Christian morality. Criminal intent is vital,<sup>12</sup> and a sentence should be proportionate to the crime.<sup>13</sup> Even HLA Hart, a legal positivist, when asked ‘Has the development of law been influenced by morals?’ he responded with ‘[t]he answer to this question is plainly "Yes"’.<sup>14</sup> Fellow positivists, like John Austin agreed that there was a ‘frequent coincidence’ of positive law and morality.<sup>15</sup> Jeremy Bentham and those following his philosophy also agree that parts of the legal system are formed based on moral principles.<sup>16</sup>

Hart separated legal positivism into hard and soft. Hard legal positivists contend that moral standards cannot be incorporated in the law, whereas soft legal positivists argue the alternative. Hard legal positivists believe that judges who base reasoning on morality are violating their legal duty by acting outside the law.<sup>17</sup> Soft legal positivists present the more commanding argument however. They believe that moral criteria aids in the validation of positive law. Just because there is a debate as to whether law and morality are inextricably joined, does not mean that Christian morality does not inform our legal system.

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<sup>11</sup> Sir Anthony Mason, ‘Law and Morality’ (1995) 4(2) *Griffith Law Review* 147, 148.

<sup>12</sup> *Ibid*, 152.

<sup>13</sup> *Ibid*; *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472.

<sup>14</sup> Mason, above n 4, 148.

<sup>15</sup> Austin, above n 1, 162.

<sup>16</sup> HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1957) 71 *Harvard Law Review* 593, 599.

<sup>17</sup> *Ibid*.

### III MORALITY AND LEGAL THEORIES

The debate centred around whether law and morality are inextricably joined has traditionally been argued by natural law theorists and legal positivists. How do we explain ‘morality’? There is no single definition, but it can be seen as ‘guiding one’s conduct by reason...giving equal weight to the interests of each individual’ to make a distinction between right and wrong, or good and bad.<sup>18</sup> Lord Patrick Devlin addressed how to best describe morality by arguing that:

No society has yet solved the problem of how teach morality without religion. So the law must base itself on Christian morals and to the limits of its ability enforce them (...) without the help of Christian teaching the law will fail.<sup>19</sup>

Christian morality is guided by Divine law, however there is debate as to whether law and morality are fused.

Natural law theorists assert that the existence of a law is dependent on its morality; that morality and law are inextricably joined. Some natural law theorists, including St Thomas Aquinas, accredit natural law’s authority to God, arguing that it is instilled in human nature by God directly.<sup>20</sup> Aquinas added the notion that an ‘eternal law’ is intrinsically connected to the common good.<sup>21</sup> Theorists in agreement with Aquinas, hold that all just positive law is derived from natural law.<sup>22</sup> As such, if a positive law deviates from the natural

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<sup>18</sup> James Rachels, *The Elements of Moral Philosophy*, (New York: McGraw-Hill, 4<sup>th</sup> ed, 2003) 14.

<sup>19</sup> P Devlin, *Morals and The Criminal Law* in R A Wasserstrom (ed.), *Morality and the Law* (Belmont: Wadsworth, 1971) 25.

<sup>20</sup> C E Rice, *50 Questions on the Natural Law: What Is It and Why We Need It*, (San Francisco: Ignatius Press, 1999) 51.

<sup>21</sup> Zimmermann, above n 2, 2.

<sup>22</sup> Jonathan Crowe, ‘Clarifying the Natural Law Thesis’, (2012) 37 *Australian Journal of Legal Philosophy* 159, 159.

law, it is invalid or not a true law.<sup>23</sup> ‘We must obey God rather than men’.<sup>24</sup> In modern times, natural law theorists including Immanuel Kant, and Hugo Grotius, advocate that natural law is based on ‘objective ethical principles, which are accessible to humans by virtue of their rational capacities’.<sup>25</sup> They are not denying that God can reveal moral truths, but believe that many moral truths can be understood by ethical reflection other than revelation.<sup>26</sup> Agreeing with St Paul, they believe that there is a law ‘written on the hearts’ of human beings and that fundamental laws against murder and theft are knowable without God’s special revelation.<sup>27</sup> Grotius argued that ‘natural law would retain its validity even if God did not exist’.<sup>28</sup> Kant, a German philosopher and atheist, argued that reason alone could discover the ethical truth.<sup>29</sup> Kant, in contrast to Aquinas, separated reason from nature.<sup>30</sup> Therefore, natural law theorists believe that moral principles are objectively valid and are discoverable through reason and by Divine law.<sup>31</sup>

Legal positivists on the other hand argue that the only element dependent on whether a law is in fact binding is that it was created by an appropriate apparatus and appropriate legal authority.<sup>32</sup> The legitimacy of law is not dependent on its morality or immorality, and law in fact needs to be kept

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<sup>23</sup> Ibid.

<sup>24</sup> *Holy Bible: New Living Translation* (Illinois: Tyndale House Publishers, 1996) Acts of the Apostles 5:29.

<sup>25</sup> Jonathan Crowe, ‘Existentialism and Natural Law’ (2005) 26(1) *Adelaide Law Review* 55.

<sup>26</sup> Robert P George, ‘Natural Law’ (2007) 52 *American Journal of Jurisprudence* 55, 63.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Robin Gill (ed.), *The Cambridge Companion to Christian Ethics* (Cambridge: Cambridge University Press, 2001) 159.

<sup>30</sup> Ibid, 86.

<sup>31</sup> Philip Soper, ‘Some Natural Confusions about Natural Law’ (1992) 90(8) *Michigan Law Review* 2393, 2405.

<sup>32</sup> Zimmermann, above n 2, 54.

separate from moral judgements.<sup>33</sup> Positivists insist that the status of law as legally compelling is not effected by whether or not it is just.<sup>34</sup> ‘Law may very well be moral, and certainly should be moral, but rather is not necessarily moral’.<sup>35</sup> HLA Hart, described as the most influential legal theorist of the 20<sup>th</sup> century, argued that just because a rule violated standards of morality or was not morally desirable, does not make it an invalid law.<sup>36</sup> Therefore, legal positivist can be seen to maintain a strict separation of law and morality.

#### IV LAW AND MORALITY

##### *A Examples of Separation*

##### 1. *Slavery*

Everyone has a moral right to be free from slavery, and at the same time, everyone has the obligation to ensure that slavery practices do not take place.<sup>37</sup> Government is no exception.<sup>38</sup> One of the Two Great Commandments is ‘love thy neighbour as thy self’.<sup>39</sup> Christianity also teaches that every person has equal worth as we were created in the image and likeness of God.<sup>40</sup> These teachings are strongly contradicted by slavery. Thus, slavery was outlawed upon recognising this inconsistency. In the United States the controversy over slavery contributed to the Civil War. Those in favour of slavery relied heavily on the argument that no higher law can be enforced preventing a citizen from

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<sup>33</sup> Brian Bix, *Jurisprudence: Theory and Context* (North Carolina: Carolina Academic Press, 6th ed, 2009) 33.

<sup>34</sup> Norman Barry, *An Introduction to Modern Political Theory* (London: Palgrave MacMillan, 2<sup>nd</sup> ed, 2000) 31.

<sup>35</sup> Frederick Schauer, ‘Constitutional Positivism’ (1993) 25 *Connecticut Law Review* 797, 801.

<sup>36</sup> Hart, above n 15, 599.

<sup>37</sup> George, above n 21, 58.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Holy Bible*, above n 23, Matthew 22:35-40.

<sup>40</sup> *Ibid.*, Genesis 1:27.

having the ‘constitutional right’ to retain their property.<sup>41</sup> Their property including other human beings.<sup>42</sup> The argument against slavery was that ‘no man nor set of men can have any natural or inherent right to rule over the rest’.<sup>43</sup> The British Empire was the first modern nation to outlaw slavery.<sup>44</sup> Natural law theorists would therefore argue that regardless of how long it took to outlaw slavery, upon recognising it violated natural law, it was made illegal. Therefore, law and morality are joined. A legal positivist with a more compelling argument would contend however, that for much of history such an immoral act was in fact law, even though the basic Christian moral teaching is to treat others as you wished to be treated. How can it be that something so fundamental as the human right to freedom was allowed to be violated for so long if morality and law are inextricably joined? It couldn’t be, therefore law and morality are not inextricably joined.

## 2. *Nuremberg Trials*

The resurgence of natural law’s popularity owes much to the Nuremberg Trials prosecuting the Nazi’s conduct from The Second World War. The defence appealed to legal positivism, arguing that there was a strict separation of law and morality.<sup>45</sup> They argued that the conduct was legal according to Nazi law and only violated a retroactive law.<sup>46</sup> The prosecution argued that no such separation existed, appealing to the universal jurisdiction and the universal nature of the crime.<sup>47</sup> They applied natural law stating that positive law must be

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<sup>41</sup> *Dred Scott v Sandford* (1857) 60 US 393.

<sup>42</sup> *Ibid.*

<sup>43</sup> St. George Tucker, ‘Blackstone’s Commentaries’, (1970) 70 *Columbia Law Review* 1475.

<sup>44</sup> Zimmermann, above n 2, 40.

<sup>45</sup> *Ibid.*, 43.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

based on principles of justice in order to be valid.<sup>48</sup> The Trials established the Nuremberg Principle which enforces a responsibility upon the individual to defy a law infringing a higher moral principle.<sup>49</sup> Even though the Trials established that law and morality should be inextricably joined, and reinstated that they were, the fact remains that when the Nazi's committed the crimes against morality, they were not crimes against positive law. As was the case for slavery, just because the conduct was immoral at the time, it was not illegal. There was in fact a separation. Inextricably joined means that they are impossible to separate, however it can be demonstrated that they have indeed been separated.

### 3. *Contemporary Law*

Sodomy was illegal for an extended period of time which reflected the Christian belief that it was immoral to engage in homosexual intercourse.<sup>50</sup> Homosexuals can no longer be prosecuted on the basis of their sexuality showing how law and morality are no longer joined. Ronald Dworkin a natural law theorist, believed that any behaviour that is a Basic Liberty should never be taken away regardless of a person having a different way of doing it.<sup>51</sup> As sex can be seen as a Basic Liberty, Dworkin is condemning the illegality of homosexuality. Sir John Fortescue, former Chief Justice of the King's Bench believed that 'freedom was instilled into human nature by God... So he who does not favour liberty is to be deemed impious and cruel.'<sup>52</sup> Adultery is another example which was once regarded as serious misconduct, but in

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> *Holy Bible*, above n 23, Leviticus 20:13; Romans 1:27.

<sup>51</sup> *R v Brown* [1994] 1 AC 212.

<sup>52</sup> John Fortescue, *De Laudibus Legum Anglie (c 1470)*, (Cambridge: Cambridge University Press, 1949) 105.



Australia today is not regarded with the same legal consequences or public disfavour.<sup>53</sup> Traditionally, it was regarded as highly immoral and so evil it was a criminal offence.<sup>54</sup> However, the law in Australia is no longer in keeping with the Christian teaching that ‘thou shalt not commit adultery’.<sup>55</sup> This shows that law and Christian morality have separated.

## B. *Subjective Morality*

### 1. *Judicial Interpretation*

An argument that positivists have supporting their notion that law and morality are separate is the concept that morality is subjective. Traditionally, Christian natural law theorist’s asserted that objective morality from Divine law was laid out in the Scriptures given directly from God. The purpose of courts and judges is to interpret and apply the law. The Divine law therefore is still open to human interpretation which leads to subjectivity. This presents a further argument between natural law theorists and positivists. Are judges, as part of their job, allowed to consider the morality of legal rules?<sup>56</sup> If law and morality are inextricably joined, then a judge must ignore an immoral law and only apply just law.<sup>57</sup> If two judges have differing interpretations of Divine law and what is moral, then this will remove consistency from our courts. This highlights how ultimately morality is subjective, therefore, law and morality cannot be inextricably joined as what is moral differs.

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<sup>53</sup> Mason, above n 10, 148.

<sup>54</sup> Ibid.

<sup>55</sup> *Holy Bible*, above n 23, Exodus 20:14.

<sup>56</sup> Soper, above n 19, 2409.

<sup>57</sup> Ibid.

## 2. *Government Institutions*

Natural law theorists oppose the idea that ‘human fiat’ determines the ‘legal’ obligations of a society.<sup>58</sup> Instead, they believe that the rule is to be tested against ‘true morality’ and laws are only enforceable if they conform with morality.<sup>59</sup> However, the argument against this is that only human institutions can test whether it is moral.<sup>60</sup> The claims of objectivity do not withstand the argument that it is government institutions and representatives who must assess what true morality requires.<sup>61</sup> Between 1910 and 1970, Australian government policy allowed the forcible removal of Indigenous children from their families and homes.<sup>62</sup> These children, known as the Stolen Generations, suffered psychological, physical and sexual abuse while in state care or with their adoptive white families.<sup>63</sup> One such victim, Ruth Hegerty, who was four years old when she was taken from her mum said, ‘people would say that it was for your own good, but my own good was to stay with my mum.’<sup>64</sup> They were forced to assimilate based on ‘black inferiority and white superiority.’<sup>65</sup> Only on February 13 2008, Prime Minister Kevin Rudd apologised on behalf of ‘successive Parliaments and governments’ for the mistreatment of ‘our fellow Australians.’<sup>66</sup> This demonstrates that the morality of human institutions determines which laws are implemented. In the Philippines, like many countries in the world, there is a war on drugs. Reports allege that police have

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<sup>58</sup> Ibid, 2412.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Australians Together, *The Stolen Generations*, Discover Stories (2014)

<<http://www.australianstogether.org.au/stories/detail/the-stolen-generations>>.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Australian Government, *Apology to Australia’s Indigenous peoples*,

<<http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>>.

killed close to 6,000 people and shot many dead in the street.<sup>67</sup> They are justifying these murders by saying that they are drug dealers. This is a subjective interpretation of morality as there is never a justification for killing people. Thus, a law will be enforced because human institutions say so based on subjective morality.

### 3. *Same-Sex Marriage*

As it currently stands, Australia is divided on the 'same-sex marriage' debate. Much of the population believes that it is immoral to discriminate against any two individuals based on their sexual preference, prohibiting them to wed. At the same time, many believe it to be moral to forbid 'same-sex marriage' as marriage is a religious sacrament intended by the Scriptures to be between a man and woman. This highlights how regardless of both sides having their morality guided by reason, they have reached different judgements of what morality is. Morality is subjective, and a homosexual couple may believe it moral for them to get married but as law and such morality are not inextricably joined, legally this is impossible in Australia.

## V CONCLUSION

According to the soft legal positivist approach, law and morality are not inextricably joined, but Christian morality does inform the legal system. Slavery, the Nuremberg Trials and contemporary law illustrate that law and

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<sup>67</sup> Marnie O'Neill, 'Death toll in Philippines drug crackdown nears 6000 as shocking new photographs of street executions are published', *news.com.au*, (online) 14 December 2016, <<http://www.news.com.au/lifestyle/real-life/death-toll-in-philippines-drug-crackdown-nears-6000-as-shocking-new-photographs-of-street-executions-are-published/news-story/98e0b3341e7430156cce2acb39b5733c>>.

morality have indeed been separated throughout history and aspects remain estranged today. The ultimate subjectivity of morality, shown through the Stolen Generations, the ‘same-sex marriage’ debate and our court system where judges are entrusted to interpret and apply the law, highlight how law and morality are not inextricably joined.