

Much has been said and written about Australian values. They are often articulated in terms of ‘mateship’, a concept characterised by a willingness to help others and stand with those in danger. In earlier years the generous egalitarianism suggested by this term was marred by prejudices and repressive legal policies, but, at least since the great social watershed of the 1960s, there has been widespread pressure for change. Some have seen this as evidence of a moral decline, but the challenges have generally been reliant upon moral principles, such as fairness, equality and recognition of human rights.

Some things accepted in earlier years were clearly wrong. The 1950s and 60s were characterised by an enforced prissiness. Hotels closed at 6.00 pm and Sunday trading was prohibited. Some 15,000 books were banned¹, one apparently because of a single word spoken by a parrot. In 1969 the NSW Vice Squad actually raided a store, seized a poster of Michaelangelo’s statue of David and charged the manager with obscenity,² apparently because that naughty Italian had sculpted David without pants. Yet women, Aboriginal people, migrants, people with disabilities, those with different sexual orientations and others suffered widespread abuse and discrimination, sometimes entrenched in laws and public policies.

Of course, some changes have been controversial. No-fault divorce was introduced in 1975. Lesbiansim was never illegal in Britain or Australia and male homosexual acts ceased to be illegal no later than 1994³, though, as Ian Warden once said, the only thing consenting adults could not do in Canberra was build a front fence together. Commonwealth Acts have addressed discrimination on the basis of race,⁴ sex,⁵ disability⁶ and age.⁷ Abortion has been progressively legalised throughout the Australian states,⁸ Same-sex marriage has been introduced and there is a continuing discussion about drug decriminalisation.

Christian voices were raised on both sides of the debates about these issues, but I would like to raise more fundamental questions about underlying values, the role of the secular law and the importance of Christian voices.

Christian values

In truth, the public face of Christianity has not always been a pretty sight. It is true that countless Christians have displayed extraordinary compassion and service. Some founded poorhouses,

¹ <https://www.australiangeographic.com.au/topics/history-culture/2018/10/the-books-australia-banned/>.

² https://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/david_a.html.

³ State laws criminalising such conduct were progressively repealed and the issue was conclusively determined by the *Human Rights (Sexual Conduct) Act 1994* (Commonwealth).

⁴ [Sex Discrimination Act 1984](#)

⁵ [Sex Discrimination Act 1984](#)

⁶ [Disability Discrimination Act 1992](#)

⁷ [Age Discrimination Act 2004](#)

⁸ All states and territories but South Australia have fully decriminalized abortion at stages of pregnancy ranging from 16 to 24 weeks. In SA abortion is permissible only when necessary to protect the life or physical or mental health of the woman or when the child is likely to be born with serious handicaps. A bill intended to fully decriminalize abortion is expected to be presented to the state parliament in early 2020.

orphanages, homes for the aged, hospitals and even leper colonies. Others established schools and universities. Still others took leading roles in campaigns for social reform, such as the fight against slavery. Christianity has also had an enormous influence on our culture and especially on music, art, philosophy and ethics. Even viewed without the lens of faith, it has been a profound force for good. Yet, sadly, the conduct of many Christians has often seemed strikingly discordant with the words and actions of this Galilean carpenter who spoke of love, gave his life for others and prayed that even his executioners might be forgiven.

Of course, criticism is sometimes due to misconceptions, misreporting, and a failure to understand the Christian imperative to comply with perceived biblical principles. But there have been insensitive, even cruel, outbursts and many people have been hurt. Christians have also been seen to deny scientific conclusions, cover up child abuse, ignore social inequities and court political power in order to impose their beliefs upon others. Rightly or wrongly, the term “Christian” is now seen by many as a mark of bigotry and intolerance.⁹

But what are Christian values? A broad-brush answer can surely be drawn from the great commandments: ‘Love the Lord your God with all your heart and with all your soul and with all your mind.’ and ‘Love your neighbor as yourself.’ Jesus said: “All the Law and the Prophets hang on these two commandments.”¹⁰ And in the last hours of his life he added a new one: “As I have loved you, so you must love one another.”¹¹

Of course, love alone does not resolve every ethical dilemma,¹² and Christians have different approaches to morality. Many are essentially deontologists.¹³ They may acknowledge the need for kindness, but they otherwise insist that the heart of Christian morality consists of a duty to obey the rules. Fundamentalists often cite Old Testament passages, which they generally insist must be construed literally and taken to reflect the will of God. This is not the occasion for a debate about biblical interpretation or, I hope, a burning for heresy, but I find this deeply troubling. There are wonderful passages in the Old Testament, but there are also some that

⁹ For an example of the distress and frustration this causes many Christians see, John Pavlovitz, *The Kind of Christian I refuse to be*, October 21, 2016, <https://johnpavlovitz.com/2016/10/21/the-kind-of-christian-i-refuse-to-be/>.

¹⁰ Matthew 22: 37 - 40.

¹¹ John 13:34-35.

¹² Responses motivated by love but uninformed by knowledge, discernment and perception can be irresponsible and even dangerous. See Ronald Preston, “Christian Ethics”, *A Companion to Ethics*, Blackwell, 1991 at 98 et seq.

¹³ Deontological theories (from the Greek *deon* or duty) hold that some actions are intrinsically right or wrong, regardless of the motives for which they are performed or the likely consequences. Teleological theories (from *telos* or goal), hold that the rightness or wrongness of an action is determined by its tendency to produce consequences which are intrinsically good or bad."C. D. Broad, *Five Types of Ethical Theory* (3rd ed.; New York: Harcourt, Brace, 1944) esp. 206-16. See also Kurt Baier, "Ethics: Deontological Theories," and "Ethics: Teleological Theories," *Encyclopedia of Bioethics*, ed. W. T. Reich, New York: Free Press, 1978 at 412-21; and Lisa Sowle Cahill, *Teleology, Utilitarianism, and Christian Ethics*, *Theological Studies*, Sage, December 1, 1981 Volume: 42 issue: 4, at 601-629. Virtue or aretaic theories are primarily concerned with the qualities that make a good person and hence influence his or her conduct. See, for example, Kyle D. Felder, *Exploring Christian Ethics*, Westminster John Knox Press, Louisville, 2006, especially chapter 3. Hursthouse, Rosalind and Pettigrove, Glen, "Virtue Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2018/entries/ethics-virtue/>>.

explicitly urge the mass murder of men, women and children.¹⁴ Committed literalists might criticise me for inappropriate wimpishness, but I baulk at massacres.

Some avoid unpalatable passages by ‘cherry-picking’. For example, those who cite the Old Testament as authority for the death penalty, invariably gloss over the suggested applications: cursing a parent, adultery, homosexual acts, witchcraft, working on the Sabbath, and being a newly-married woman unable to produce “tokens of virginity”.¹⁵ My favourite was, of course, showing contempt for a judge.¹⁶ Others avoid harsh implications by assuming that rules generally give rise only to prima facie duties.¹⁷

Even within Judaism, there has been disagreement about the nature of morality and a significant movement away from legalism. As early as the 3rd century, Rabbi Simlai said that Moses gave Israel 613 commandments, David reduced them to 11 (Psalm 15) and Micah to three: “do Justice, Love mercy and walk humbly with your God”. Then Isaiah reduced them to two: “keep justice and do righteousness”. (Isaiah.56:1) and Habakkuk ultimately reduced them to one: “the just shall live by faith”. (Habakkuk.2:4)¹⁸

Some early Christians argued that gentile converts should be obliged to comply with the law of Moses, but this was emphatically rejected by the council of elders and apostles, with Peter asking “Why do you try to test God by putting on the necks of Gentiles a yoke that neither we nor our ancestors have been able to bear?”¹⁹

Paul is often cited as authority for moral strictures, but, as Peter conceded, his letters contain some things that are difficult to understand,²⁰ and, at the risk of offending his more ardent fans, I suggest that they need to be considered carefully. Paul himself said that he had become all things to all people so that by all means he might save some.²¹ This approach was laudable, but it was bound to create some potential for confusion and his statements have been cited not only as authority for the subjugation of women, but also in defence of entrenched social evils such as

¹⁴ See, for example, Deuteronomy 13:13-19, 1 Samuel 15:3 and Ezekiel 9:5-7. Psalm 137 includes the line: “Daughter Babylon, doomed to destruction, happy is the one who repays you according to what you have done to us. Happy is the one who seizes your infants and dashes them against the rocks.”

¹⁵ *Leviticus* 20:9, *Leviticus* 20:10, *Leviticus* 20:13, *Exodus* 22:18, *Exodus* 35:2, *Deuteronomy* 22:20 and *Romans* 13: 1-6.

¹⁶ *Deuteronomy* 17:12

¹⁷ Jonathan Dancy, “An ethic of prima facie duties”, *A companion to Ethics*, Blackwell Companions to Philosophy, 1990, chapter 18.

¹⁸ A. MacKinney, Habakkuk II. Justification By Faith. Its Development, *TheBibleForStudents.com*. See also “Rabbi Simlai”, *McClintock and Strong Biblical Cyclopedia*, <https://www.biblicalcyclopedia.com/S/simlai-rabbi.html>

¹⁹ An agreed position was finally declared by letter; “It seemed good to the Holy Spirit and to us not to burden you with anything beyond the following requirements: You are to abstain from food sacrificed to idols, from blood, from the meat of strangled animals and from sexual immorality.” Acts 15:5-24.

²⁰ 2 Peter 3:16.

²¹ 1 Corinthians 9:19-23.

slavery,²² anti-Semitism,²³ apartheid²⁴ and submission to Nazism.²⁵ Yet Paul insisted that Christians had been set free from the Old Testament law, berating those he described as the “stupid Galatians” for wanting to re-embrace it, and boldly proclaiming: “It is for freedom that Christ has set us free.”²⁶

Sadly, the Galatians have often prevailed. Paul’s ground-breaking declaration of freedom has been ignored by generations of Christian moralists. Many have effectively re-embraced what Paul calls “the curse” of the Old Testament law,²⁷ whilst others have treated Paul’s own comments about morality as a new set of rules to be imposed on others. And we are still putting burdens on the necks of people unable to bear them.

This deontological focus and a preoccupation with sexuality seems to have led to some degree of tunnel vision. In 2018 some 5.3 million children died under the age of 5, mostly from preventable causes, with almost half dying in the first month of life.²⁸ Yet, whilst Christian organisations, such as World Vision, worked to save children, many Christians seemed wholly preoccupied with same-sex marriage.

Others Christians are essentially teleologists. For them, the moral imperative is to seek the best outcomes. They affirm that we are called to love others and, as St Thomas Aquinas said, to love is “to will the good of another.”²⁹ Whilst this approach is sometimes derided as “situation ethics”, critics should remember that when his disciples were reproached for picking corn on the Sabbath, Jesus explained that “The Sabbath was made for man, not man for the Sabbath”.³⁰ The hunger of his disciples trumped the fourth commandment. If the law and the prophets hang on love of God and love of others, then concern for people should often have priority over rules.

Then there are Christians who embrace virtue ethics. They remind us that morality extends to our motives and character and they argue that these qualities may guide our moral choices.³¹ I admire them, but doubt that I have enough virtue to sustain an entire ethical philosophy.

²² Whilst many Christians fought to abolish slavery, it was tolerated if not supported by the church for centuries. Indeed, Jefferson Davis, the President of the Confederate States of America, claimed that it was established by God and sanctioned by the bible. Davis, J., “Inaugural Address as Provisional President of the Confederacy”, Montgomery, A L, 18 February 1861, *Confederate States of America, Congressional Journal*, 1:64-66.

²³ Clarke, P.B. & Linzey, A. (eds), *Dictionary of Ethics, Theology and Society*, Routledge, London, 1996, at 36-40

²⁴ Apartheid was defended by the Nederduitse Gereformeerde Kerk, though denounced by other churches Ibid at 41–43.

²⁵ Mason, K., *Constancy and Change*, The federation Press, Sydney, 1990 at 9.

²⁶ Galatians 5:1

²⁷ Galatians 3:13.

²⁸ World Health Organisation, *Children: reducing mortality*, 19 September 2019, <https://www.who.int/news-room/fact-sheets/detail/children-reducing-mortality>.

²⁹ St. Thomas Aquinas, *Summa Theologica*, I–II, 26, 4.

³⁰ Mark 2:27.

³¹ Peter urged us to “... make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness, mutual affection; and to mutual affection, love. For if you possess these qualities in increasing measure, they will keep you from being ineffective and unproductive in your knowledge of our Lord Jesus Christ.”: 2 Peter 1:5-8.

Of course, ethical decisions often require us to balance competing considerations rather than invoke a single theory of universal application. Yet some things seem clear. Christian theology affirms that all people are made in the image of God³² and we are commanded to love them. That love is not to be constrained by requirements of natural affection or reciprocity. We are required not only to treat people fairly and respect their rights, but also to respond to them with understanding, empathy and kindness. We are called to defend the vulnerable, to do justice but love mercy, and to remember that even the most morally dissolute person is a child of God.

Attitudes to the secular law

What of the secular law? In theory at least, law and ethics are substantially separate realms: ethics is concerned with how people should behave, whilst law is concerned with how they should be required to behave. This distinction has not always been recognised.

Early writings on the English common law all had a strong religious flavour³³ and for many years Christianity was actually accepted as part of the law of England³⁴ and America.³⁵ Unfortunately, its demands for justice and mercy sometimes fell on deaf ears. People were executed or transported for petty thefts, often prompted by poverty. Lord Eldon opposed laws for the abolition of slavery, the closure of debtors' prisons and the emancipation of Roman Catholics. He reportedly wept in court when informed that the death penalty would no longer be available for petty larceny. It was said that he feared "an ordered universe was shivering into fragments."³⁶ Women had limited rights of inheritance and their husbands had substantial powers over their lives and property. Children of unwed mothers were stigmatized as bastards and the ownership of slaves was legally recognised. All this was said to be authorised by Christian morality.

The blessings of this religious influence were not apparent to litigants. The commandment to "judge not" led authorities to seek the truth by ordeal. One form involved burning or scalding a person and reviewing the results after 3 days. Another involved binding someone and throwing him into a river or pond. If he floated, he was presumed guilty but, if he sank, it would be assumed that God had declared him innocent.³⁷ Of course, many drowned being vindicated.³⁸ The Norman innovation of trial by battle was based on the belief that God would strengthen the

³² Genesis 1:27.

³³ David Melinkoff has cited Glanvil (12th century), Bracton (13th century), Fortescue and Littlejohn (15th century) and St Germain (16th century): David Melinkoff, *The Conscience of a Lawyer*, West Publishing Co., Los Angeles, 1973, at 145. See also William Blackstone, *Commentaries on the Laws of England*, William Carey Jones Ed, San Francisco, Bancroft- Whitney Co, 1916 (originally published 1765-1769), at 41-43.

³⁴ Richard Whately, *Elements of Rhetoric*, (1872) Sheldon & Co., NY at 13. This view was accepted as early as 1676 in *Rex v. Taylor* 27 and, 28 Car. II), 3 Keble 607 and effectively dispelled by the House of Lords in *Bowman v Secular Society Limited* [1917] AC 406.

³⁵ Banner, S. (1998). When Christianity Was Part of the Common Law. *Law and History Review*, 16(1), 27-62. doi:10.2307/744320.

³⁶ Smith, F. E. (Lord Birkenhead), *Fourteen English Judges*, Cassell & Co Ltd, London, 1926, at 237.

³⁷ J.H. Baker, *An Introduction to English Legal History*, 3rd Ed., Butterworths, London, 1990, note 12 at 5. See also R. Bartlett, *Trial by Fire and Water* Clarendon Press, Oxford, 1986.

³⁸ These practices waned after the Lateran Council in 1215 prevented the participation of clergy, but the cold water ordeal was revived when women were accused of witchcraft, "drowning them to prove their innocence." See Blackstone, *Commentaries on the Laws of England*, Book IV, Ch 27 at 337.

arm of the righteous.³⁹ Women were permitted champions, but if an aggrieved damsel wanted to kill her adversary personally, gender equity was ensured by requiring him to fight with one hand tied behind his back whilst buried to his waist in a pit.⁴⁰ Of course, the good times couldn't last, and the modern system of trial by jury gradually emerged as the preferred system of justice. Yet the brutality continued. An Englishman was burnt at the stake for heresy as late as 1612⁴¹ and by 1815 more than 200 offences were punishable by execution.⁴²

It would be nice to dismiss such brutality as historical footnotes of no continuing relevance, but, sadly, many who clamor about the need for Christian standards still seem reticent about compassion and a disturbingly number of Christians still support the use of torture⁴³ and the death penalty.⁴⁴

Whilst both the Mosaic law of Judaism and the Sharia law of Islam were understood to be legally enforceable, the early Christian church did not adopt a comparable approach. St Augustine and other church fathers insisted that the power of the state be separate from that of the church.⁴⁵ This principle is now generally recognised. In modern pluralist societies there may be differing moral expectations and, as Samuel Beckett, ruefully observed, "God is a witness that cannot be sworn".⁴⁶ So how should the moral content of our laws be delineated?

One may start, I suggest, by recognising a prima facie duty to respect the rights and autonomy of others. This has been justified on various grounds,⁴⁷ including Christian concepts of freedom and equality. As early as the 16th century, theologians in the Spanish School of Salamanca reasoned that, since all humans share the same nature, they should also share the same rights, such as equality and liberty, including liberty of thought.⁴⁸ Democracy involves more than majority-rule

³⁹ Sir William Churchill *A History of the English Speaking Peoples* (1990) Dorset Press, New York, Book 1, at 218.

⁴⁰ Neilson, G, *Trial by Combat*, 1890, n 14 at 8-9.

⁴¹ Richard Cavendish, "Edward Wightman Executed for Heresy", *History Today*, Volume 62 Issue 4 April 2012, <https://www.historytoday.com/archive/months-past/edward-wightman-executed-heresy>.

⁴² National Justice Museum, *What was the 'Bloody Code'?*, <https://www.nationaljusticemuseum.org.uk/what-was-the-bloody-code/>.

⁴³ Pew Research Centre, *The Religious Dimensions of the Torture Debate*, Updated May 7, 2009, <https://www.pewforum.org/2009/04/29/the-religious-dimensions-of-the-torture-debate/>.

⁴⁴ J baxter Oliphant, *Public support for the death penalty ticks up*, Pew Research Centre, June 11, 2018, <https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>.

⁴⁵ During the 11th to 13th century this principle was supplanted by the 'two swords' concept as the Catholic Church established itself as the superior legal authority of western Christendom, but this was in turn challenged in the reformation and the enlightenment. Witte, J., "Facts and Fictions About the History of Separation of Church and State", *Journal of Church and State*, Vol. 48, pp. 15-46, 2006.

⁴⁶ Beckett, S., *Watt*, Calder & Boyars, London, 1970 at 6.

⁴⁷ Almond, B., 'Rights', *A Companion to Ethics*, ed by P. Singer, Basil Blackwell, Oxford, 1993, 259 at 265. See also Hobbes, T., *Leviathan*, (first pub. 1651) Basil Blackwell, Oxford, 1946; Locke, J., supra; Rousseau J. J., *The Social Contract*, (first pub 1762) trans by M. Cranston, Penguin, Harmondsworth, 1984; Mill, J. S., *Utilitarianism and On Liberty* (first pub 1863) both in *Collected Works*, Vol 10, ed by J. M. Robson, University of Toronto Press, Toronto, 1971; Melden, A. I., *Rights and Persons*, Basil Blackwell, Oxford, 1974; Dworkin, R., *Taking Rights Seriously*, Harvard Press, Cambridge Mass., 1977; and Gewirth, A., *Human Rights: Essays on Justification and Applications*, University of Chicago Press, Chicago, 1983.

⁴⁸ See, for example the discussion by Paolo Carozza in *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights* *Human Rights Quarterly* - Volume 25, Number 2, May 2003, pp. 281-313.

and governments should be alert to the risk of what has been described as “the tyranny of the majority”.⁴⁹ Yet there must obviously be some regulation if we are to have safe and effective communities. How then may the law be justified? And to what extent should it be permitted to override our freedom?

Legal philosophers have made numerous attempts to answer these questions, invoking virtue theory,⁵⁰ natural law,⁵¹ natural rights,⁵² the ‘harm principle’,⁵³ societal needs,⁵⁴ or social contract theory.⁵⁵

Perhaps the most creative contribution has been made by John Rawls who posited an “original position” in which those making political decisions imagine that they are subject to a “veil of ignorance” depriving them of all knowledge of their own personal characteristics and social and historical circumstances.⁵⁶

Of course, this approach is very teleological, but I think it is also very Christian.⁵⁷ The “golden rule” requires us to do unto others as we would have them do unto us. Rawls’ formulation invites us to move beyond our own presuppositions and imagine what it would like to be the others. It asks us to consider what laws would seem fair and appropriate if we were to stand in their shoes.

Rawls argues that most people would accept two principles. First, each person should have an equal right to the most extensive liberties compatible with similar liberties for all. Second, social and economic inequalities should satisfy two conditions: they should be attached to positions open to all under conditions of equal opportunity; and they should be of the greatest benefit of the least-advantaged members of society.

⁴⁹ Alexis de Tocqueville, *Democracy in America*, London, Saunders and Ottley, 1835-1840 (originally published as *De la démocratie en Amérique*). See also Mill, John Stuart, *On Liberty*, (3 ed.) London: Longman, Green, Longman Roberts & Green, 1864.

⁵⁰ See, for example, Lawrence B Solum, “Virtue as the end of law: an aretaic theory of legislation”, *Jurisprudence*, 9:1 (2018) 6-18.

⁵¹ For a reasonably succinct discussion of natural law concepts see John Finnis, “Natural Law Theories”, *Stanford Encyclopedia of Philosophy*, 2015.

⁵² Hugo Grotius, *The Law of War and Peace*, 1625); John Locke, *Two Treatises of Government*, 1690.

⁵³ John Stuart Mill, *On Liberty*, 1859. See also John Stanton-Ife, “The Limits of Law”, *Stanford Encyclopedia of Philosophy*, 2006, <https://plato.stanford.edu/entries/law-limits/>.

⁵⁴ Patrick Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1965; H.L.A. Hart, *Law, Liberty and Morality*, Oxford University Press, Oxford, 1963. See also Hart, ‘Social Solidarity and the Enforcement of Morality’, in *Essays in Jurisprudence and Philosophy (1983)* Oxford University Press, Oxford, at 248-262; Lon L. Fuller. *The Morality of the Law*, Yale University Press, New Haven, 1964; and Edmund Cahn, *The Moral Decision*, Indiana University Press, Bloomington, 1955.

⁵⁵ Jean-Jacques Rousseau, *The Social Contract, or Principles of Political Right*, 1762 ; J.W. Gough, *The Social Contract*, Clarendon Press, Oxford, 1936; T. M. Scanlon, *What We Owe To Each Other*, Harvard University Press, Cambridge, Massachusetts, 1998.

⁵⁶ John Rawls, *A Theory of Justice*, Harvard University Press. Cambridge, Massachusetts, Revised ed, 1999.

⁵⁷ Though Rawls apparently abandoned his Christian faith in response to the holocaust.

In theory, law engenders loyalty and consent through its utility and practicality and through its characteristics of certainty, fairness and justice.⁵⁸ Unfortunately, our Australian laws have been increasingly influenced by populism and government defensiveness. Long recognised rights have been undermined and standards of justice have been eroded. Let me offer a few examples.

First, our laws concerning refugees and their children have denied vulnerable people fair treatment and breached our commitments to international covenants. We have heard some defensive ranting about the UN telling Australia what to do, but if we give our word, we should keep it.

Second, the war on drugs has involved draconian laws that have trampled on basic rights, sent millions of people to prison⁵⁹ and shattered vulnerable families. Yet the policy has been a tragic failure. Portugal decriminalised all drugs in 2001. The predicted explosion of drug usage did not eventuate and there were positive benefits. Between 2001 and 2012 newly diagnosed HIV cases among injectable drug users declined from 1,016 to 56. There was a similar decline in hepatitis C and B cases and deaths due to drug usage fell from 80 to 16.⁶⁰ The Queensland Productivity Commission is the latest body to conclude that the war on drugs has been ineffective and that decriminalisation would improve lives without increasing drug use.⁶¹ Opponents of drug decriminalisation often claim it would “send the wrong message.” There is some evidence that some laws may have some influence on behaviour by the expression of values⁶² and reinforcement of moral norms,⁶³ but many legal changes have little, if any, impact.⁶⁴ Considerations of this kind do not outweigh the need for reform that could save lives.

Third, some of our approaches to criminal sentencing are misdirected and counter-productive. We have been led to believe that sentences are absurdly lenient and crime is raging out of

⁵⁸ Chief Justice Allsop, *Values in Law: How they Influence and Shape Rules and the Application of Law*, Federal Court of Australia 20 October 2016 para 38, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161020>.

⁵⁹ In America alone 451,000 drug offenders are likely to be in prison on any given day. Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2019”, March 19, 2019, *Prison Policy Initiative*, <https://www.prisonpolicy.org/reports/pie2019.html>.

⁶⁰ Transform Drug Policy Foundation, *Drug decriminalisation in Portugal: setting the record straight*, Jun 17, 2017, <https://transformdrugs.org/drug-decriminalisation-in-portugal-setting-the-record-straight/>. See also Hughes, C. E. and Stevens, A. (2012) ‘A resounding success or a disastrous failure: Re-examining the interpretation of evidence on the Portuguese decriminalisation of illicit drugs’, *Drug and Alcohol Review*, vol. 31, pp. 101-113. Instituto da Droga e da Toxicodependência (2013) *Relatório Anual 2012 – A Situação do País em Matéria de Drogas e Toxicodependências*.

⁶¹ The Commission noted that the war on drugs had “failed to curb supply or use” and cost the state about \$500 million a year in law enforcement alone, with about 1,840 people jailed annually for drug crimes. <https://www.abc.net.au/news/2020-01-31/drug-offences-penalties-qld-police-prison/11918390>.

⁶² Sunstein, C.R., “Social Norms and Social Roles.” *Columbia Law Review* (1996) 96: 903–68; Cooter, Robert, “Expressive Law and Economics.” *Journal of Legal Studies* Volume 27, issue S2 June 1998, 585–608; McAdams, R.H., “The Origin, Development, and Regulation of Norms.” *Michigan Law Review* (1997) 96: 338–433 and McAdams, “An Attitudinal Theory of Expressive Law.” *Oregon Law Review* (2000) 79: 339–90.

⁶³ Bilz, K., and J. Nadler, “Law, Moral Attitudes, and Behavioral Change,” in Zamir, Eyal and Doron Teichman (Eds.), *The Oxford Handbook of Behavioral Economics and the Law*, Oxford, Oxford University Press, 2014 at 107.

⁶⁴ For example, abolition of a British law criminalising attempted suicide apparently led to no discernible change in public attitudes to its moral propriety. Walker, N., and M. Argyle, “Does the Law Affect Moral Judgements?” *British Journal of Criminology* (1964) 4, 570–581.

control. This is simply false. During the first 80 years of the last century our imprisonment rates remained stable at about 800 for every 100,000 Australian adults.⁶⁵ It has since surged to about 2,200 per 100,000 adults.⁶⁶ Yet the murder rate has fallen by about 50% and the overall crime rate has fallen by about 40%.⁶⁷ And contrary to common belief, about two-thirds of murder victims are male.⁶⁸

Politicians beating the ‘tough on crime’ drum have exploited community misapprehensions and we have become a frightened and vengeful society. Sentencing is increasingly driven by cries for retribution, rather than by measured approaches to protect the community and foster the rehabilitation of offenders. This is aggravated by a focus on consequences, even if wholly unintended, rather than on the culpability of the conduct.⁶⁹ As a consequence, some sentences are unduly harsh and others are too lenient to provide substantial deterrence. In some jurisdictions mandatory sentencing now applies to children as young as 10. There is much we could do to reduce criminal conduct, but ‘toughness’ has trumped fairness and even effectiveness.

Fourth, government actions are being enshrouded in secrecy and whistleblowers are being prosecuted rather than protected.

The prosecution of Bernard Collaery and the former ASIS officer known as ‘Witness K’ raises serious issues about the need for constraints upon abuses of power. The case made by Collaery on behalf of Timor Leste was that in 2004 the Australian government had ASIS bug Timorese cabinet discussions during the course of negotiations for the initial agreement concerning oil and gas reserves in the Timor Sea. Australia had already held a superior bargaining position due to the enormous imbalances in wealth, political experience and expertise. Yet the LNP government apparently decided that an even better deal might be obtained by adopting an unconscionable tactic to effectively cheat one of the poorest countries on earth.⁷⁰

⁶⁵ Andrew Leigh, *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, August 2019, at 5.

⁶⁶ Ibid at 14.

⁶⁷ Ibid at 12. Much of this decline has occurred recently. In 2000 the murder rate was 1.6 per 100,000 of population. In 2018 there were 222 murders which was 0.88 per 100,000. By comparison, the USA had 14,123 murders in 2018 which amounted to 4.32 per 100,000. See

<https://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/44e7066a7d173a95ca256bdc0012241f!OpenDocument>;

<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2018~Main%20Features~Victims%20of%20Crime,%20Australia~3>; and <https://www.statista.com/statistics/251877/murder-victims-in-the-us-by-race-ethnicity-and-gender/>.

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<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2018~Main%20Features~Victims%20of%20Crime,%20Australia~3>.

⁶⁹ For example, a drunken driver who has a fatal accident will spend several years in prison, whilst equally culpable but more fortunate drunken drivers usually escape with a fine and a period of disqualification, even if repeat offenders. Between July 2016 and June 2018 only 3% of first offenders and 17% of repeat offenders with an alcohol content in the ‘high range’, that is with more than triple the permitted level of alcohol in their blood, were sentenced to terms of imprisonment by NSW courts.

⁷⁰ <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>.

When the Labor Party came to power it denied knowledge of the impropriety and refused to renegotiate the deal. Had it not been for Collaery and witness K, a country with a tragically high child mortality rate⁷¹ would have been denied much-needed revenue to which it was morally entitled. The government responded to Timor-leste's application to the International Court of Justice by refusing to admit the truth and by obstruction of evidence.⁷² So who has been held accountable? No-one. Now even the judge faces the risk of prosecution if he breaches "orders" made by the Attorney-General. This is a serious departure from the traditional separation of powers. National security laws should not be invoked in order to conceal government misconduct.

Collaery and K are not the only whistleblowers being prosecuted for revealing things the Australian public needed to know. David McBride, a former defence lawyer, has been also charged for blowing the whistle on allegations of criminal conduct by Australian special forces in Afghanistan, including unlawful killings.⁷³

It has even been revealed that Canberra has had a secret prisoner. He was arrested, charged, and convicted in secret and served his entire sentence without even the ACT Minister for Justice, who is responsible for the prison, knowing of his existence.⁷⁴

We are told that draconian laws are necessary for our protection, but as William Pitt famously said, "necessity is the plea for every infringement of human freedom." Christians hold divergent views about many issues, but we can surely agree that our laws should be just, that they should protect our human rights and that they should be a bulwark for a free and democratic society.

Then there is the problem of climate change. Carbon dioxide levels were less than 300 per million for more than 800,000 years.⁷⁵ By May 2018 they were 410 parts per million. Emissions reached a staggering 37.1 billion metric tonnes in 2018⁷⁶ and they are still increasing. Many people are convinced that we may continue to distort the earth's atmosphere with impunity, but the consequences are likely to be grave, even in the near future.

⁷¹ Beverly Snell et al, "Health: Family issues in Timor-Leste", *Development Bulletin*, No 68, October 2005. https://s3.amazonaws.com/academia.edu.documents/32378540/db-68.pdf?response-content-disposition=inline%3B%20filename%3DCo-operating_with_Timor-Leste_Options_fo.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20191231%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Date=20191231T233232Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=52efab7a0d454686304e82f9dbde35cedd1c1d2da4216e49725ca93be709df87#page=94

⁷² For a succinct account of the government's subsequent calumny, see Ernst Wilhelm, "The saga of Bernard Collaery and Witness K continues" 28 August 2019, John Menadue - Pearls and Irritations, <https://johnmenadue.com>

⁷³ <https://www.theguardian.com/australia-news/2019/mar/07/whistleblower-charged-with-exposing-alleged-military-misconduct-not-afraid-to-go-to-jail>.

⁷⁴ <https://www.canberratimes.com.au/story/6506034/act-justice-minister-says-he-was-kept-in-dark-over-canberras-secret-prisoner/>; <https://www.abc.net.au/news/2019-12-05/witness-j-revealed-secret-trial/11764676>.

⁷⁵ Doyle Rice, "Earth's carbon dioxide levels continue to soar, at highest point in 800,000 years." *USA TODAY*. May 4, 2018, <https://www.usatoday.com/story/news/2018/05/04/global-warming-carbon-dioxide-levels-continue-soar/581270002/>.

⁷⁶ <https://www.scientificamerican.com/article/co2-emissions-reached-an-all-time-high-in-2018/>.

The World Health Organisation has estimated that between 2030 and 2050, climate change will cause about 250,000 additional deaths per year, from malnutrition, malaria, diarrhea and heat stress.⁷⁷ This estimate does not take into account deaths from factors such as other diseases, disruption of health services or population displacement.⁷⁸ We have already seen more extreme weather events and the climate is already playing an ever-increasing role in the emergence and spread of infectious diseases.⁷⁹ We may even be approaching tipping points leading to abrupt and irreversible changes.⁸⁰

Prince Charles has said that “Global warming, climate change, the devastating loss of biodiversity are the greatest threats that humanity has ever faced and one largely of our own creation.⁸¹ We are the only nation on earth with our own continent. We could provide a shining example of environmental responsibility. Yet our governments continue to drag their political heels and our laws do not effectively address these looming dangers.

Voices

So what of Christian voices? I have no blueprint to offer, but I suggest we ask a few questions.

Why are we speaking? Contrary to widespread opinion, we are not called to man the bastions of conservatism or embark upon crusades to have our moral beliefs legally enforced. Of course, we are free to affirm our personal beliefs, but I suggest we have a prima facie duty to champion the rights, freedoms and moral autonomy of others. Laws are not moral or philosophical statements; they are precisely defined rules with practical consequences.

Hence, if we are considering some proposed legislative change, we need to ask whether the perceived benefits are likely to outweigh likely detriments? Some Christians felt bound to oppose the decriminalisation of attempted suicide. I agree that one should not try to gate-crash the party in heaven without waiting to be invited, but prosecuting already distressed people could only add to their distress and increase the risk of another, perhaps successful attempt.

Are our assumptions valid? Right to life movements seem to assume that recriminalising abortion would save the lives of countless unborn children, but, in reality, abortions occur as frequently in countries where the practice is wholly prohibited or permitted only to save the woman’s life as it is in countries where it is available on demand.⁸² What does seem to make a

⁷⁷ World Health Organisation, *Climate change and health*, 1 February 2018 <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

⁷⁸ Andy Haines and Kristie Ebi, “The Imperative for Climate Action to Protect Health”, *The New England Journal of Medicine*, 2019; 380:263-273.

⁷⁹ Xiaoxu Wu et al. “Impact of climate change on human infectious diseases: Empirical evidence and human adaptation”, *Environment International*, vol 86, January 2016, pps 14-23.

⁸⁰ Timothy M. Lenton et al, “Climate tipping points — too risky to bet against”, *Nature*, 27 November 2019, <https://www.nature.com/articles/d41586-019-03595-0>.

⁸¹ Quoted in *Global Citizen*, Jan 23, 2020 <https://www.globalcitizen.org/en/content/prince-charles-climate-change-davos/>.

⁸² The most recent figure are actually 37 and 34 per 1,000 women, respectively. Susheela Singh et al, *Abortion Worldwide 2017: Uneven Progress and Unequal Access*, Guttmacher Institute, March 2018, <https://www.guttmacher.org/report/abortion-worldwide-2017>.

real difference is the availability of contraception.⁸³ Of course, further research may be necessary and such comparisons do not wholly foreclose the moral debate, but they may raise questions about whether the likely benefits of criminalisation outweigh likely detriments, such as the dangers of backyard abortions, and whether non-punitive strategies may be more effective.

Are there better alternatives? Laws directly criminalising drug usage have been as ineffective and counter-productive as those that launched the prohibition era. In contrast, the public campaign that treated tobacco smoking as a public health issue, albeit supported by an indirect legal approach targetting packaging and other marketing techniques, has been very successful. Legal coercion is not always more effective than persuasion.

Is our tone persuasive or combative? Public discussions now seem to reflect increasing intolerance of differing views and debate often seems to consist of little more than an exchange of offensive epithets. Can we not advance our contentions without alienating others? Can we not speak with understanding and compassion and avoid trampling on the sensitivities of those who may be vulnerable? And if we are trying to persuade people, should we not consider, not only what we want to say, but also what they are likely to hear?

Let me offer a perhaps controversial example. The Anglican Archbishop of Sydney recently told Anglican supporters of same-sex marriage they should leave the church rather than "betray God's word." He added: "Please leave us."⁸⁴ I respect the Archbishop's sincerity and courage, but I believe these comments were inappropriate. This may be seen as a scandalous criticism, especially when made by a self-confessed member of the Uniting Church who eats oysters in flagrant breach of *Leviticus*.⁸⁵

But what impression would you form if you were a gay person on the brink of venturing into a church in the Sydney diocese? First, people like you are not welcome. The Archbishop later explained that he was referring only to church leaders agitating for change about same-sex marriage. Would that have allayed your concern? Second, whilst heretics are no longer burnt at the stake, the church still has no place for dissidents. If you toe the party line, you are welcome. If not, get out. Is the church not supposed to be the family of God? Should love and acceptance be conditional upon agreement? And should those who, in good conscience, feel compelled disagree, really be accused of betraying God's word? The archbishop was concerned with evangelism. Would these statements have made you receptive?

In contrast, the Archbishop of Canterbury recently called for people to start healing divisions by reaching out to others. He added, "It could be someone you really disagree with..."⁸⁶ One does not need to abandon one's principles to acknowledge the rights of others, to reach out to them, to

⁸³ Ibid.

⁸⁴ Michael Koziol, "'Please leave us': Archbishop tells same-sex marriage supporters to abandon Anglican church", *Sydney Morning Herald*, October 15, 2019, <https://www.smh.com.au/national/please-leave-us-archbishop-tells-same-sex-marriage-supporters-to-abandon-anglican-church-20191015-p530tk.html>.

⁸⁵ Contrary to *Leviticus* 11:9–12.

⁸⁶ Heal divisions in 2020, says Archbishop of Canterbury", *BBC News*, 1 January 2020 <https://www.bbc.com/news/uk-50961483>.

make it clear that they are accepted. The Christian voice, like the Christian gospel, should be one of love and compassion for others.

What can we learn from those who disagree with us? None of us are infallible and there are sometimes more than one morally defensible view. We need to weigh our convictions against the competing arguments of others and be open to the possibility of learning from them. We may not change our view, but we may gain a better understanding of those we might otherwise be tempted to dismiss as people devoid of conscience and even find some rapport with them.

Are we really addressing the right issues? In a world in which human rights are being denied, democracy is being undermined, children are dying and climate change is threatening unimaginable disaster, should the moral debate really be focussed on issues of sexuality? Should we not see ourselves as called to defend the poor, the oppressed and the vulnerable? Earlier Christians were often ardent supporters of human rights. Why do we have so little to say about their erosion?

And if I may end with a last question: do our public voices really echo that of the Galilean carpenter we seek to follow? Jesus was not the doyen of the respectable middle class. He ate with prostitutes and other disreputable people and he offended religious leaders. He said he came to set at liberty those who were oppressed and he preached a gospel of forgiveness and reconciliation. He offered unconditional love and acceptance and he held out hope for those in despair. If we follow him, albeit with faltering steps, we should surely advocate for the poor, the sick, the abused and others who are suffering, not reduce his gospel of sacrificial compassion to a heartless moralism.