

**EXISTENTIALISM, LIBERTY AND
THE ETHICAL FOUNDATIONS OF LAW**

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A thesis submitted for the degree of Doctor of Philosophy

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March 2006

DECLARATION BY THE CANDIDATE

I DECLARE THAT the work presented in this thesis is, to the best of my knowledge and belief, original and my own work, except as acknowledged in the text, AND THAT the material has not been submitted, either in whole or in part, for a degree at this or any other university.

JONATHAN GEORGE CROWE

ACKNOWLEDGEMENTS

In completing an extended academic work, one invariably incurs substantial intellectual and personal debts. My intellectual debts, for the most part, appear sufficiently in the body of the thesis; I wish to focus here on the personal ones. Some debts, however, straddle the intellectual and the personal. My two academic advisors, Suri Ratnapala and Julian Lamont, fall into this category. I have benefited greatly from their patient and insightful comments. Perhaps even more importantly, I have profited from their examples of how to conduct oneself with integrity, openness and passion as a researcher, teacher and colleague.

Many staff members at the University of Queensland have gone out of their ways to make me feel welcome in both the Law School and the Philosophy Department. I am grateful to them. I would also like to acknowledge the collegiality and support of my fellow doctoral candidates, particularly Pierre-Jean Bordahandy, Elizabeth Dickson, Lisa Toohey and David Willis.

My task in completing this thesis has been considerably eased by financial assistance from the University of Queensland, in the form of an Australian Postgraduate Award, and the Institute for Humane Studies at George Mason University, in the form of a Humane Studies Fellowship. I have benefited from feedback received from participants at several conferences, including the annual meetings of the Australian Society of Legal Philosophy and the Australasian Society for Continental Philosophy. James Allan, Nicholas Aroney, Peter Cane, Ngaire Naffine and Brad Sherman provided helpful advice on specific issues.

My family and friends have provided emotional support, intellectual stimulation and, when needed, welcome distraction. My parents and siblings, Marilyn, Andrew, Alison and David Crowe, have been constant sources of support and encouragement, as has my extended family on both sides of the Pacific. Andrew Clare, Paul Clare, David de Jersey, Beth Hendy, Madeleine Marx-Bentley, Ben Moore, Kate Parlett, Claire Purcell, Fiona Sharwood Biedermann, Andrew Stumer, Kylie Weston-Scheuber and Nigel Zimmermann have all provided sustenance for my intellect and good humour.

Kylie, in particular, has been immensely important to me as an intellectual collaborator and kindred spirit.

My most heartfelt acknowledgement, however, belongs to Cicely Bonnin. Without her influence and example, this would have been a very different thesis and, I am convinced, a much worse one. She has been loving, supportive and encouraging, but also suitably interrogative and sceptical. On some points, she has influenced my thought so greatly that it is hard to remember where my original views ended and her input began. The errors are, of course, nobody's fault but my own; as for the rest, it would not have been possible without her.

PUBLICATIONS AND PRESENTATIONS BY THE CANDIDATE RELEVANT TO THE THESIS

PUBLICATIONS

Refereed Journal Articles

- Jonathan Crowe, 'Levinasian Ethics and Legal Obligation', forthcoming in *Ratio Juris*
- Jonathan Crowe, 'Existentialism and Natural Law' (2005) 26(1) *Adelaide Law Review* 55-72
- Jonathan Crowe, 'Preaching to the Converted? The Limits of Religious Arguments in Politics' (2005) 21(4) *Policy* 29-33
- Jonathan Crowe, 'Reinterpreting Government Neutrality' (2004) 29 *Australian Journal of Legal Philosophy* 118-139

Non-Refereed Article

- Jonathan Crowe, 'Is an Existentialist Ethics Possible?' (2004) 47 *Philosophy Now* 29-30

Book Reviews

- Jonathan Crowe, 'Review of *Skepticism and Freedom: A Modern Case for Classical Liberalism* by Richard A. Epstein' (2004) 20(3) *Policy* 60-61
- Jonathan Crowe, 'Review of *Adam Smith's Marketplace of Life* by James R. Otteson' (2003) 19(3) *Policy* 58-59
- Jonathan Crowe, 'Review of *Robert Nozick* by A. R. Lacey' (2002) 18(2) *Policy* 48-49

PRESENTATIONS

Refereed Paper

- Jonathan Crowe, 'Some Important Distinctions in Liberal Theory', *Centre for Independent Studies Advanced Liberty and Society Conference*, Sydney, 3-5 October 2003

Non-Refereed Papers

- Jonathan Crowe, 'The Unashamed Natural Lawyer', *T. C. Beirne School of Law Staff Seminar Series*, The University of Queensland, 12 August 2005
- Jonathan Crowe, 'Levinasian Ethics and the Force of Law', *Australian Society of Legal Philosophy Annual Conference*, The University of New South Wales, 29 April - 1 May 2005
- Jonathan Crowe, 'Existentialism and Natural Law', *New Researchers, New Research: A Conference for Early Career Researchers in Law*, The University of Adelaide, 30 September - 2 October 2004
- Jonathan Crowe, 'Law and Ethics', *Australian Legal Philosophy Students Association Seminar Series*, The University of Queensland, 13 May 2004

- Jonathan Crowe, 'Law, Ethics and Community', *T. C. Beirne School of Law Research Higher Degree Colloquium*, The University of Queensland, 23 April 2004
- Jonathan Crowe, 'Existentialism and Natural Law', *Australasian Society for Continental Philosophy Conference*, The University of Queensland, 20-22 November 2003
- Jonathan Crowe, 'Reinterpreting Government Neutrality', *Julius Stone Institute of Jurisprudence and Australian Society of Legal Philosophy Annual Conference*, The University of Sydney, 18-20 July 2003
- Jonathan Crowe, 'Existentialism, Liberty and the Ethical Foundations of Law', *T. C. Beirne School of Law Research Higher Degree Colloquium*, The University of Queensland, 11 April 2003

ABSTRACT

The thesis examines the theoretical relationship between law and ethics. Its methodology is informed by both the existentialist tradition of ethical phenomenology and the natural law tradition in legal theory.

The main claim of the thesis is that a phenomenological analysis of ethical experience, as suggested by the writings of existentialist authors such as Jean-Paul Sartre and Emmanuel Levinas, provides important support for the natural law tradition. This claim is developed and defended through detailed engagement with the natural law theory of John Finnis.

Specifically, I contend that Finnis' account of moral reasoning as applying the principles of practical reasonableness to a context of self-evident, basic values gains significant support from a phenomenological theory of ethical experience. Finnis' emphasis on the irreducible role of choice in moral deliberation also finds support in the existentialist tradition. However, I criticise some key aspects of Finnis' theory, including his emphasis on the transcendental character of the basic values and his account of legal obligation.

I begin by outlining some central features of the existentialist approach to philosophy. I advance an interpretation of existentialism as *ethical phenomenology*. I then discuss some possible methodological connections between the existentialist and natural law traditions. This discussion provides the methodological framework for the remainder of the thesis.

The thesis develops and defends a substantially original theory of the relationships between law, ethics and politics. The exposition begins with an account of the relationship between law and community that draws upon the work of Finnis and G. W. F. Hegel. I then outline a phenomenological theory of ethical experience, drawing in particular on the writings of Sartre and Levinas.

I employ this phenomenological account of ethics to develop a conception of moral reasoning as reflective, good faith engagement with pre-reflective social judgements

of ethical significance. This view of ethical experience and moral reasoning is then used as the basis for an examination of the concept of law and its relationship to political discourse.

I turn next to the notions of legal authority and obligation. I argue that law, in the focal sense of the term, presents a generic, peremptory obligation that is necessarily moral in character. In the course of the argument, I critically discuss the conceptions of legal authority proposed by Joseph Raz, Adolf Reinach, H. L. A. Hart, John Rawls, Finnis, Jacques Derrida and Hans Kelsen.

This view of legal obligation entails there are fundamental moral conditions that positive rules must satisfy to qualify as law, in the focal sense. I explore the nature of the moral framework created by these conditions through a detailed analysis of the ethical foundations of political discourse.

I argue that political discourse is founded upon an ontological apprehension of the nature of humans as free, ethical beings, which finds expression in a developed notion of political freedom. I suggest that the distinction between positive and negative forms of freedom advanced by Isaiah Berlin is best understood in terms of the different types of political claims invoked by those conceptions. I develop this theory by reference to the work of Charles Taylor, Gerald C. MacCallum, Wesley Newcomb Hohfeld, W. D. Ross, Robert Nozick and F. A. Hayek.

I conclude by discussing the role of ethical experience in the interpretation of legal materials. I argue that ethical judgements play an irreducible role in constructing the natural interpretive context for judicial reasoning. I engage with the work of Hart, Lon L. Fuller, Martin Heidegger, Hans-Georg Gadamer, Ferdinand de Saussure and Ronald Dworkin, among others.

In the final substantive chapter of the thesis, the potential for ethical judgements to play a constructive role in judicial action is illustrated through a detailed discussion of the doctrine of government neutrality.

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