

Towards a Modest Legal Moralism

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Abstract After distinguishing different species of Legal Moralism (positive vs. negative; modest vs. ambitious) I outline and defend a modest, positive Legal Moralism, according to which we have good reason to criminalize some type of conduct if (and only if) it constitutes a public wrong. Some of the central elements of the argument will be: the need to remember that the criminal law is a political, not a (merely) moral practice, and therefore that in asking what kinds of conduct we have good reason to criminalize, we must begin not with the entire realm of wrongdoing, but with conduct falling within the public realm of our civic life; the need to look at the different processes of criminalization (of which legislation is only one), and to ask what kinds of consideration can properly figure in those processes; the need to attend to the relationship, and the essential differences, between criminal law and other modes of legal regulation.

Keywords Criminalization · Legal moralism · Criminal process · Moral wrongdoing

My aim in this paper is to explain, and begin to defend, a particular version of so-called Legal Moralism. ‘Legal Moralism’ picks out a family of views about the proper aims and scope of the criminal law according to which the justification for criminalizing a given type of conduct depends on the moral wrongfulness of that type of conduct. In order to explain the kind of Legal Moralism that I espouse, I must first distinguish some of the different versions in the literature, and explain why some other familiar versions of Legal Moralism are either less ambitious than I think we should be or, when suitably ambitious, not (as their critics have pointed out) plausible.

Varieties of Legal Moralism

Two distinctions between different species of Legal Moralism matter for our present purposes.

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