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Published in:
SATS - Northern European Journal of Philosophy

DOI:
10.1515/sats.2011006

Publication date:
2011

Document Version
Early version, also known as pre-print

Citation for published version (APA):
Petersen, T. S. (2011). What Is Legal Moralism? *SATS - Northern European Journal of Philosophy*, *12*(1), 80-88. https://doi.org/10.1515/sats.2011006

What is Legal Moralism?

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Abstract

The aim of this critical commentary is to distinguish and analytically discuss some important variations in which legal moralism is defined in the literature. As such, the aim is not to evaluate the most plausible version of legal moralism, but to find the most plausible definition of legal moralism. As a theory of criminalization, i.e. a theory that aims to justify the criminal law we should retain, legal moralism can be, and has been, defined as follows: the immorality of an act of type A is a sufficient reason for the criminalization of A, even if A does *not* cause someone to be harmed. In what follows, I critically examine some of the key definitions and proposals that have, unfortunately, not always been carefully distinguished. Finally, I propose a definition that seems to capture the essence of what many philosophers refer to when they talk about legal moralism, while also providing more clarity.

Keywords: Arthur Kuflik, criminal justice ethics; criminalization, Patrick Devlin, legal moralism, Michael Moore, theories of criminalization, the Harm Principle

1. Introduction

That murder, rape and child abuse are forms of conduct that ought to be (and usually are) criminal is trivial. It is also trivial that one of the justifications for criminalizing these acts is that they seriously *harm* the victims in wrongful ways. But it is in no way a trivial matter to answer the more general question: should wrongful harm be all that matters in an account of the kind of acts that ought to be made (or remain) criminal? Based on the concept of legal moralism, the answer to this normative question is negative.[1] Legal moralism *can* be defined as follows: the immorality of an

[1] Hart (1963) (p. 6) was the first to use the term "legal moralism". Explicit defenders of legal moralism in modern literature on philosophy of law include Stephen (1874), Devlin (1963), Finnis (1980), George (1993), Moore (1997), Dworkin (1999) and Kekes (2000).

SATS, vol. 12, pp. 80–88

DOI 10.1515/sats.2011.006

act of type A is a sufficient reason for the criminalization of A, even if A does *not* cause someone to be harmed.[2]

The aim of this critical commentary is to distinguish and analytically discuss some important variations of the ways in which legal moralism is defined in the literature. As such, the aim of this paper is not to advocate for a certain theory of criminalization or to evaluate the most plausible version of legal moralism. But, if progress is to be made in the normative discussion of the limits of criminalization, a vital preliminary task is to identify clearly which principle and which specific version of a given principle for criminalization is under discussion. However, as already indicated, there is far from a consensus on how to define the term "legal moralism" as seen in the literature under the subjects of "Philosophy of Law" or "Criminals Justice Ethics". In what follows, I critically examine some of the key definitions that have, unfortunately, not always been carefully distinguished. Finally, I propose a definition that seems to capture the essence of what many philosophers refer to when they talk about legal moralism and that, at the same time, provides more clarity. However, before this investigation commences, it is important to set the stage with a rough description of a principle in relation to which legal moralism has evolved as an alternative.

Unsurprisingly, most versions of legal moralism are motivated by dissatisfaction with a principle like the following:

> The only plausible reason for the state criminalizing conduct of type A is that A *harms* (or risks harming) individuals.[3]

This is a preliminary statement of a complex view that may conveniently be labelled *the Harm Principle*. The Harm Principle is, in other words, the view that *only* harm matters in deciding what forms of conduct ought to be made (or remain) criminal. Let me add a few comments to this principle and its complexity. First, it should be noted that it is important to talk about *types of acts* instead of *single acts*. It is easy to imagine single acts that do not, all things considered, harm people but which nevertheless are (or should be) considered criminal because such acts usually harm others or risk harming others. These acts might be termed "criminal right-doing". For example, if Peter's reckless driving results in Paul breaking his leg on

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2 Feinberg (1988) (pp. 4 and 8), Moore (1997) (p. 68) and Alexander (2003) (p. 33) provide definitions similar to this.

3 For modern adherents of this roughly sketched view, see Mill (1859) (chapters 1 and 4), Hart (1963) (pp. 31–33) and Raz (1986) (p. 413). However, it should be noted that while Mill would say, "That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physically or moral is not a sufficient warrant", Hart and Raz would not rule out paternalism as Mill does is his famous quotation.

the way to the airport to catch a plane, causing him to miss a plane that he would have otherwise died on as a result of a fatal crash, then Peter's reckless driving did not, all things considered, harm Paul; in fact, he benefited from Peter's reckless driving.[4]

Second, if a state wants to criminalize certain conduct it is, following the principle, only a *necessary condition* that the conduct be harmful to (or risk harming) individuals. Adherents of the Harm Principle do not believe that harm, per se, is a sufficient reason for criminalization, as for example most types of acts run the risk of harming people or because some kinds of harms are not harms that ought to be criminalized. Finally, the Harm Principle represents a wide range of views that differ in several aspects. For instance, the way in which harm is *defined*. However, in order to distinguish the Harm Principle from legal moralism, I confine the Harm Principle to harm defined in prudential terms. That is, an act is harmful if, and only if, it negatively affects the *wellbeing* of an individual life or, what I use as a synonym, the "*welfare*" of that individual.[5] If we do not insist upon this restriction, the Harm Principle and legal moralism can easily be conflated. Adherents to the Harm Principle, who recognize what we might call "moral harms" (harms experienced in the course of conduct, such as participating in pornography that is said to be morally degrading), would accept that a person could be morally harmed, even if the conduct in question is entirely beneficial to that person's welfare. Consequently, I adhere to a version of the Harm Principle in which the relevant kinds of harms are those exclusively defined in terms of individual welfare. Let us call this version of the Harm Principle *legal welfarism*. And, again, in order not to conflate legal welfarism with *legal moralism*, individual welfare is to be taken as something subjective in the sense that for a state of affairs to make a person better off (or worse off), it has to enter into the person's experiences. If welfare were defined as something purely objective, in the sense that the welfare of an individual is dependent on whether certain objective values are fulfilled in his or her life (e.g. having an education, a good job, close relationships, children, health etc.), then the concept of welfare could end up being so broad that in terms of wrongful harms, it could very well encompass every single immorality typically listed by legal moralists. Apart from all of these comments, these issues are not further touched upon here, but they were important to set a background for this discussion.

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4 For an example like this see Parfit (1984) (p. 372).

5 The nature of well-being can of course be defined in many different ways. But in what follows I will stay with a mental state theory of welfare according to which the welfare of a person depends on mental states like pleasure or pain (i.e. hedonism). A justification for this move is explicated in what follows.

2. Definitions of legal moralism

Returning to the definition of legal moralism, the sheer number of possible definitions of legal moralism makes it impossible to deal with all of the logical possibilities. Instead, I focus on three definitions frequently mentioned in the literature that have, unfortunately, not always been carefully distinguished and criticized. Hereafter, I propose a fourth definition that I believe captures the essence of legal moralism, while also providing more clarity. First of all, and according to Arthur Kuflik, "... legal moralism (at least in its purest or most extreme form) is the view that what is morally required ought to be legally required: law's proper function is to enforce 'morality as such.'"[6] In other words:

(a) If the conduct of type A is regarded as (or is) immoral, then the state *ought* to criminalize *A*.

It is obvious that this definition of legal moralism makes it too easy to reject legal moralism from a moral point of view. Undoubtedly, it would be immoral to let the state transcribe into the legal code all aspects of what morality requires us to do. For instance, it would be prohibitively costly to enforce the punishment of every immoral type of conduct, no matter how insignificant the immorality is. It might be so costly that the state could not afford to live up to the responsibility of providing higher-priority goods such as public healthcare, social security, military defence etc. Second, it would obviously be too costly when it comes to personal autonomy if the state should enforce the illegality of every immorality, no matter how small. Third, if what is immoral is identified with what is harmful, then there is no difference between this definition and the Harm Principle. Furthermore, adherents of legal moralism who accept this definition appear non-existent. For example, one of the leading proponents of legal moralism, Sir Patrick Devlin, makes the explicit claim that not all types of acts that are regarded (or is) as immoral ought to be criminalized.[7]

Another more relevant definition, in the sense that some adherents of legal moralism actually apply it, is given by Carl Cranor, who writes, "... the immorality of a particular form of conduct provides a reason, but not a sufficient [or necessary] reason for making it illegal."[8] This view can be stated as follows:

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6 Kuflik 2005, 185.

7 Devlin 1963, 16–17.

8 See for example Dixon (2001) (p. 325) and Cranor (1978) (p. 147) for versions which are similar to definition (b). It is clear from Cranor's paper that the version of

(b) If the conduct of type A is regarded as (or is) immoral, then the state has *a reason* to criminalize A.

However, the problems with this definition are obvious. In what follows, I will focus on its lack of distinctiveness from other theories. First, theoretical or practical justifications for making certain acts criminal are usually based on the belief that these actions are immoral – either in themselves (*mala in se*) or indirectly (*mala prohibita*). And if this is true, it becomes very difficult to distinguish legal moralism from other theories of criminalization. For instance, (b) is not necessarily distinguishable from the Harm Principle if we accept that the wording "a reason" may be interpreted in a narrow sense rather than in a wide sense. According to a narrow interpretation of "a reason", harm to others (or the agent himself), is literally "a reason" to criminalize an act although it could be the only reason. And if harm, and only harm, is considered as the essence of an immoral act, then the difference between legal moralism and the Harm Principle evaporates. According to a wide interpretation of "a reason", we only have *a reason* to criminalize conduct in the sense that there could be *other reasons,* than the immorality of the conduct for criminalization. However, if this is the case, adherents of legal moralism need to spell out these details.

In sum, definition (b) is not necessarily different from the Harm Principle.

In the literature, however, the label "legal moralism" is also used in a way that makes the difference between it and legal welfarism more explicit. For instance Michael Moore writes, "the legal moralist theorist will think that ... to prevent behavior that harms no one but that is nonetheless morally wrong ... is proper together with whatever ... [kind of harm] that morality speaks to prohibit."[9] And elsewhere he states, "... the immorality of behaviour, on this theory [legal moralism], will be a sufficient condition with which to justify criminal legislation."[10] Jeff Murphy relates these descriptions to one another when he writes, "... the legal moralist maintains that criminal sanctions are demanded even when no obvious harm to others occurs. The intrinsic heinousness of sexual deviation, for example, is sufficient to justify its prohibition by statute."[11] The meaning of these statements can be reflected in the following definition:

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legal moralism he has in mind does entail that the immorality of a conduct is a necessary reason for making it criminal – see p. 148. One reason for this is the fact that most (or all) legal moralists are pluralists in the sense that other moral considerations could outweigh the presumption that the immorality of a conduct should be followed by a criminalization of that act.

9 Moore 1997, 68–69.

10 Ibid. p. 645.

11 Murphy 1966, 51.

(c) If the conduct of type A is regarded as (or is) immoral, then the state has a sufficient reason to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed.[12]

However, to claim that harmless immoralities are a sufficient reason to place legal restrictions on conduct seems morally wrong. In other words, if this were right, it would mean that if an act may be described as an instance of a harmless immorality, then it would have to be illegal.[13] However, if one accepts the existence of harmless immoralities, one should also accept that some of them need not be made illegal or even criminal. Consider the following example. An American tourist asks me the way to the airport and I reply in Danish with a smile, and say "Hold kæft og skrid" which means "Shut up and get lost." in Danish. Assume, furthermore, that I was not harmed by the action and that the tourist, who does not understand Danish, was not harmed by my action either. Nevertheless, many would consider this an immoral act, or at least a blameworthy act – assuming, of course, that I was not mentally disturbed or otherwise out of control. But even though my answer to the tourist may be considered immoral, and in this instance harmless, few would claim that such an act should be made illegal or criminal.[14] A more plausible version of legal moralism, then, seems to be:

(d) If the conduct of type A is regarded as (or is) immoral, this *can* provide a sufficient reason for the state to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed.

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12 See for example Feinberg (1988) (p. 5), Tebbit (2000) (p. 122), Smith (2002) (p. 237). Feinberg (1988) (pp. 4–8) also calls this version *pure legal moralism* in contrast to *impure* versions. The former version implies that the immoralities in question are wrong in themselves (without any reference to harm) and therefore can be criminalized by law. The latter version relies in the end on legal welfarism; the so-called "immoralities" should be made (or remain) illegal because this reduces the amount of harm people in society will experience. When for example impure legal moralists argue that the preservation of a certain lifestyle is immoral, this becomes a reason to make it illegal; so according to this interpretation legal moralism functions as an *instrument* to reduce harm in society.

13 This kind of critique has also been presented in the discussion of definition (b). For stylistic reasons I will sometimes use "illegal" as synonymous with "criminal", although it is obvious that not all illegal acts are covered by the criminal law.

14 If we had laws for every immoral act, it would, from an economic and moral perspective, be problematic to enforce them. It would be too expensive; the money could probably be better spent elsewhere; almost everybody in a society would be criminalized, and enforcement of the law would usually violate people's privacy and autonomy and thus decrease their welfare.

With this change of the definition, it does not follow from legal moralism that my answer (or a type of act like this) to the tourist should be criminalized. Whether or not an act should be criminalized depends on several details within the machinery of this version of legal moralism. For instance, the weight of this specific reason, compared with the harm it would cause to criminalize such types of acts (remember that no legal moralist would claim that harm should not matter in the justification of which acts should be criminalized).

So we should be aware that definition (d) (as is the case with the other three definitions) only indicates something about the *structure* of legal moralism. When it comes to the *content* of the theory, it is obvious that legal moralism differs, dependent on *what kinds of harmless acts* are regarded as immoral. Furthermore, the legal moralist can point to any of *several reasons*, besides those referring to harm, when explaining which acts are immoral and ought to be considered criminal. One reason seems to be that of preserving a traditional way of life. Others are to perfect human nature[15] or to conform to a moral principle like respect for life.[16] But, again, these reasons may be used to argue in favor of the prohibition of many different acts. The legal moralist usually believes, for example, that regardless of the consent of those involved, some things (e.g. homosexuality, oral sex, pornography or euthanasia) should be criminalized. In short, then, legal moralism may differ according to (i) what *reasons* are appealed to in explaining which harmless acts ought to be criminalized, and (ii) what *kinds of acts* are claimed to warrant criminalization. However, these more detailed descriptions are outside of the scope of this paper.[17]

Finally, although this is not stated explicitly in (c) or (d), advocates of (c), such as Michael Moore, accept that the function of law is *broader* in the sense that considerations of harm are relevant. The claim is merely that harm is not the only relevant factor in deciding what kinds of acts ought to be made (or should remain) criminal. From a logical point of view, it is possible for legal moralists to accept that harm is not a relevant factor in explaining which acts ought to be criminal; but I here presuppose that the harm, or the risk of harm, that an action of type A visits on individuals cannot be neglected and must provide a plausible reason in favor of making A-conduct criminal. I therefore take it for granted that any plausible version of legal moralism will necessarily entail that harm matters in deciding which acts should be made criminal. In fact, I have not seen any work by a legal moralist (or any other normative theorist) that includes a denial of this statement.

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15 George 1992.

16 Devlin 1963.

17 For a critical discussion of legal moralism represented by more modern thinkers (than Devlin), like Robert P. George, Michael Moore and John Kekes, see Petersen 2010.

Any plausible version of legal moralism will then be *pluralistic*, in the sense of allowing that harm to individuals (i.e. making individuals worse off in terms of welfare), *and/or* some other kind of immorality, can justify the criminalization of an act.[18] Adherents of legal welfarism, on the other hand, are *monists*. According to them, it is harm alone that ought to justify the criminalization of an act.

3. Conclusion

I hope to have shown the importance of holding an analytical discussion about how to define or understand the more precise structure of "legal moralism", allowing that only definition (d) of the four versions discussed stands out as a plausible version. In order for dialogue between politicians, the public and academics to be constructive, the reasons behind different proposals regarding which acts the state should criminalize should be as clear and as plausible as possible.[19]

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[18] Without mentioning the word "pluralism" Moore makes the pluralistic nature of legal moralism clear (Moore 1997, 69–70).

[19] Thanks to Jesper Ryberg, Kasper Lippert-Rasmussen, Jakob v. H. Holtermann, Nils Holtug, Frey Klem Thomsen and two anonymous referees from *SATS: Northern European Journal for Philosophy* for valuable comments.

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