

In Defense of “Pure” Legal Moralism

Danny Scoccia

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Abstract In this paper I argue that Joel Feinberg was wrong to suppose that liberals must oppose any criminalization of “harmless immorality”. The problem with a theory that permits criminalization only on the basis of his harm and offense principles is that it is underinclusive, ruling out laws that most liberals believe are justified. One objection (Arthur Ripstein’s) is that Feinberg’s theory is unable to account for the criminalization of harmless personal grievances. Another (Larry Alexander’s and Robert George’s) is that it cannot account for public decency laws. I shall reject both of these underinclusiveness objections in favor of one that focuses on the “free floating evil” of corpse desecration. Liberals need “pure” legal moralism (PLM) to explain their support for a criminal ban on mistreatment of the dead. I also argue that while deterrence is plausibly regarded as the primary rationale for criminalizing and punishing wrongs like murder or rape, it is not plausibly regarded as any part of the rationale for criminalizing free floating evils. The point of punishing corpse desecrators has to be either retribution or the promotion of virtue/discouraging of vice. Finally, I consider Feinberg’s reason for rejecting all PLM, namely, that competent adults have a right to personal sovereignty or autonomy, and the state’s duty to respect that right trumps the desirability of punishing or reducing the vice associated with harmless immorality. I argue that Feinberg’s argument here fails because it exaggerates the right’s strength and scope.

Keywords Legal moralism · The harm principle · Joel Feinberg · Corpse desecration

Most commentators on the Hart-Devlin debate agree that Hart was devastatingly effective in his critique of Devlin’s defense of the legal enforcement of a society’s positive morality. The claim that social disintegration looms if we fail to enforce social norms forbidding homosexuality is, as Hart noted in his oft quoted jibe, about as plausible as the Emperor

D. Scoccia (✉)

Department of Philosophy, New Mexico State University, Las Cruces, NM 88003, USA
e-mail: dscoccia@nmsu.edu