

WORKSHOP

COLLECTIVE
DECISION-MAKING
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INSTITUTIONS

7-8 JULY 2023



Legal Moralism, Mala Prohibita, and Norm Change

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Abstract

According to Antony Duff's strong negative legal moralism, only conduct that is wrongful independently of its criminalisation may be criminalised. In this talk, I explore how this view is undermined by cases in which criminalisation is needed to change suboptimal or harmful norms in society. In particular, I show that Duff's response to such counterexamples fails: legal moralism can allow for criminalising the harmful conduct only when it is no longer the norm, as this conduct is not wrongful before the social context has changed. This means that legal moralism cannot accommodate criminalisation as a tool for important positive norm change.