

Democratic Failures: Moral Panic in Law and Policy

‘Moral panic’ is a form of collective action in which the public, the media and political actors mutually escalate a pattern of exaggerated, intense worry in response to a perceived social threat. Some instances create a long trail of hastily patched together legislative and institutional reforms. Examples include: drug and alcohol use, human trafficking, HIV/AIDS, and the post 9/11 terrorist attack legislative effort. This essay argues that moral panics – through their adverse effect on the quality of decision making by elected officials – represent a serious malfunction in democratic institutions. In particular it is seen to oppose the idea that all policy decision should be made through a process of careful deliberation and reflection and on the basis of relevant knowledge. The ramifications of this challenge for legal theory and institutions have not yet been expounded.

The essay will start by analyzing the impact of moral panics on decision making in democratic societies. Relying on the understanding that officials are more responsive to public opinion on salient issues. We will define a state of moral panic as a state in which an issue becomes incredibly salient – i.e. it urgently captures the attention of the public and media – a fact which leads to swift, sometimes ill considered, actions by the legislature and executive.

Following this analysis, the essay will suggest reforms meant to alleviate the potential hazards of moral panics – arguing that the judiciary is the most appropriate institution for handling the malfunction of moral panic. It will show that although steps such as life tenure and budgetary autonomy are usually taken to ensure the independence of the judiciary, evidence still suggests that courts regularly make decisions in line with public opinion. Yet, unlike the high-bandwidth feedback between public opinion and officials, the courts take their time in adjusting their views. This attribute effectively creates a situation where courts react to long-term changes in public opinion, but completely avoid extreme short-term shifts. The judiciary is an institution already inclined to avoid the pitfalls of moral panic. It is relatively immune to rapid swings in public opinion, and is able to involve relevant experts.

Under what conceivable power can courts intervene with government acts made during times of moral panic? Unlike the other branches, the judiciary requires cases to be brought before it. If the constitutionality of an act is questionable, then appellate and supreme courts can operate. But many cases of moral panic have nothing to do with constitutionality. Even if the policy falls within the purview of constitutional review, the willingness of the

court to examine primary legislation might be insufficient due to strategic behavior guided by its dependence on other branches of government. Also, where the review process is prolonged, any review of short-term moral panics is moot. There is therefore a need for a different judicial review power which can be brought into play quickly, and be less confrontational for the courts to implement in light of their strategic behavior.