THE LEGAL ENFORCEMENT OF MORALITY

• There are more, 4 we can list

(1) Historical and causal question: “Has development of law influenced by morals?” (and converse) Answer is yes, but just because answer yes doesn't mean other questions will be yes.

(2) Definitional: Must some reference to morality enter into an adequate definition of law or legal system? Took much ink spent on this issue.

(3) Is law open to moral Criticism? Or does admission that rule is a valid legal rule preclude moral criticism or condemnation of it by reference to moral standards or principles?

*(4): FOCUS OF THIS PAPER: Concerns the legal Enforcement of morality: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought morality as such to be a crime?

• JS Mill:
  • No, “The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others”...”His own good, either physical or moral is not a sufficient warrant”.
  • Critics: “No man is an island” This is illusionary
  • Critics: Good reason to punish deviations from morality we've when these do not harm others.

  • Hart: Not defend all of what Mill says, many grounds justifying legal coercion of individual other than prevention of harm, but on narrow issue relevant to enforcement of morality Mill seems to be right.

• I will show that justifications to enforce Morality are unwarranted.

CONSPIRACY TO CORRUPT PUBLIC MORALS

• In UK in last few years been revival of legal moralism, judges point out that enforcement of sexual morality is proper part of law' business. Maybe in response to crime.

  ° E.g: Shaw v DPP:
    • conspiracy to corrupt public morals is common law offence.
    • Facts : publication of ladies prostitute directory.
    • Held:
      • Lord Simonds
        ° “...there is power to superintend those offences which are prejudicial to public welfare.”
      • Importance attached to idea that courts are general censor and guardian of public manners may be gauged from two things:
**1. revival was deliberate act of policy**
**2. judges paid high price and were ready to pay and scarified principle of legality (something Bentham would have been pissed off by).**

**Wolfenden Committee 1954:** “Drive prostitution off streets”, interesting that main idea was to suppress the offensive public manifestation not make it illegal itself. (Reflected in US movement at that time too). In reading Wolfenden Committee idea of division between crime and sin. Lord Devlin wanted to continue and find more arguments down this line BUT then he realized that the “study destroyed instead of confirmed the simple faith in which I had begun my task” and he ended with conviction that these ideals were not only questionable, but wrong.

- So Mill's criticism still very much alive in law. But challenged by two masters of Common Law.
  - **James Fitzjames Stephen**
    
    Law should be “a persecution of the grosser forms of vice.”
  - **Lord Devlin:**
    
    “…the Suppression of vice is as much law's business as suppression of subversive activities.”
    
    “…looking at it calmly and dispassionately, we regard it as advice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.”

**POSITIVE AND CRITICAL MORALITY**

- Must Identify 3 different but connected features of question.

  1. The question is one ABOUT morality but it is also itself a question OF morality. Whether enforcement of morality is morally justified, so morality enters picture twice.
    - Why important? Would be insufficient to show that in some society morals are right to enforce.
    - Good way to understand,
      - “positive morality” = morality we accept and share in a group versus
      - “critical morality” = criticism of actual social institutions including positive morality.
  2. Our question is a question of justification and thus a prima facie evil. Makes sense to ask what precisely is objectionable in legal enforcement of morality.
    - a. Actual Punishment of offender (e.g. Prison)
    - b. Bearing on those who may never offend against law, but ar coerced into obedience by threat of legal punishment. (alias: Restrictions on liberty)
  3. positive v critical morality helps to dissipate misunderstanding of the question and clarify its central point, sometimes it is said that q is not whether it is morally justifiable to enforce morality but only WHICH morality may be enforced. **Not so.** It's not just a differing over content of morality to be enforced.