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LEGAL SANCTIONS*

Modern legal systems employ a vast array of sanctions, and many precise distinctions regarding them are elucidated in the literature of jurisprudence which may be profitably employed in the analysis of the problems of organized coercion in the contemporary world. It is commonly assumed, however, that legal sanctions are technical, and this results not only in the neglect of the abundant data of legal institutions but also in the unsound bifurcation of social and legal research. Accordingly, the directions taken in this paper will be (1) to show that legal sanctions do not differ substantively from the sanctions of subgroups, (2) to mark out a unified field of sanctions-data in the more precise and significant terms that become available when relevant legal distinctions and the perspective of integrative jurisprudence are employed, and (3) to indicate some pertinent ethical problems.

Certain theories about legal sanctions must first be examined in order to clear the field of misleading conceptions, especially the widely held view that legal sanctions are "negative." This is a phase of the eighteenth century utilitarian theory that the function of law is to maintain the peace, that law only prohibits and restrains action. This theory is also supported on the supposition that it is the function of law to provide only the minimal conditions necessary for the maintenance of civilization, the development of individual potentialities and the like and that the "positive" influences are nonlegal ones. In the twentieth century, however, there are vast fields of law which impose many duties that require positive action. There are other reasons to doubt the above restrictive theory of the function of law. For example, there is persuasive psychological evidence that law enforcement contributes to the maintenance of each person's "sense of justice" and to the mental equilibrium which accompanies that. Thus, as a substantive, cultural agency, law influences thought and feeling and channels energy in worthwhile directions. A modern "corporation lawyer," for example, would emphasize the invention of methods, devices, and agencies to create new enterprises and to distribute functions and resources in ways that achieve worthwhile purposes. This suggests that the principal factual limitation on the use of legal sanctions is their feasibility, not the provision of minimal conditions; and, if this be granted, the ethical significance of legal sanctions becomes a phase of the larger problem of discovering the soundest values, i.e., the best answers to social problems. In sum, the legal institution does not direct conduct into right channels merely by blocking action in wrong directions. To determine what are the right goals, with coercion and feasibility held in view, and the construction of the channels to reach them are legal tasks; and the concomitant influence of legal institutions on action is "positive" in any jurisprudential sense except that of dogmatic conceptualism.

The study of sanctions has also been retarded by the fact that they are

* This paper was presented at the 16th Conference on Science, Philosophy, and Religion held in New York on September 1, 1960.

often treated as isolated phenomena. For example, in the literature of penology, "punishment" is defined as nothing more than the infliction of suffering. But sanctions are intelligible only when they are related to the prior harms, and these, in turn, must be related to the conduct which caused them. Not until all of these variables are cogently interrelated can the significance of any one of them be understood.

Viewed in the context of the indicated interrelationships, conduct, harm, and sanction have ethical connotations. The relevant ethic depends largely upon the nature of the causal connection between the conduct and the harm. Thus, in the "really" criminal law, the cause is a human actor. It is, more specifically, the voluntary, i.e., intentional or reckless, infliction of harm on human beings.¹ This is the traditional sphere of responsibility and blame, the moral connotations of punishment. Both intrinsic and instrumental values are relied upon to justify the deprivations imposed by authorized persons acting for the community.

At the opposite extreme are types of damage caused by behavior which may be negligent, but not by the voluntary commission of harm. The relevant policy concerns the just distribution of economic losses. Since the person who caused the damage was not at fault in the traditional sense of moral culpability, the ethics of these sanctions rest upon other bases than those which support punitive ones. Frequently the legal judgment only selects the particular person who must initiate measures leading to the equitable distribution of the economic losses; and insurance is increasingly relied upon to distribute those losses. The relevant ethics are the ethics of the situation.

In the context of nonpenal sanctions it is important also to distinguish judgments for breach of promises from tort judgments. A tort is usually an unequivocal damage; and if the tort-feasor carries no insurance, the loss falls upon him. On the other hand, a person may violate a contract because he prefers payment of the damages to performance of his agreement. He has a rational choice, and by like token the usual assumption that sanctions are coercive and privative in the ordinary sense of these terms, needs to be qualified. A deliberate breach of promise resembles criminal conduct in some ways, but the mores take a different direction. Other factors would also need to be considered in dealing with these difficult aspects of the sanctions problem.²

There are other relations which sanctions bear to criminal harm and economic damage and other purposes served than those associated with "punishment" and "compensation." The most important of these are corrective sanctions and measures of safety. In theory, at least, instances of the former are the education of juvenile delinquents and the treatment of alcoholics and drug addicts. Measures of safety, on the other hand, do not presuppose the educability of the persons segregated, e.g., the detention of dangerous psychotics. Other

1. Detailed discussion of this and other problems raised in this paper are included in JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960).

2. For example, a normal prospective offender may deliberately commit a crime although he knows he will be convicted and punished. Again, one who violates a contract is compelled to pay damages which, presumably, he would like to avoid. These considerations and others that might be suggested indicate that the notion of "coercion" might be divided into classes or subclasses beyond those discussed in this paper.

classifications of sanctions have been suggested by various writers, but most of them can be reduced to the types noted above; and it is problematical whether advantages accrue from the construction of highly refined taxonomies at this rudimentary stage of sanctions-research.

Even when the classification of legal sanctions is limited to the types suggested above, the elucidation of the relevant terms is not easy, as is evident, for example, in the many, diverse meanings of "punishment." Some of the principal lines of analysis are the following: Punitive sanctions, in contrast to compensatory or restitutive ones, are very personal. This is the connotation of the "suffering" of punishment and the reason why no other person than the convicted one can be substituted to undergo that sanction. On the other hand, since the ethics of economic sanctions are "situational," not personal, the source of the repairs is of no concern. Nor are measures of social security personal in the way that punishment is, and if there were any way short of compulsory segregation to assure protection from dangerous psychotics and carriers of communicable diseases, the use of that method would be obligatory. Similarly, corrective sanctions do not carry any connotation of moral fault; and the coerciveness of the education is unavoidable, not desired. Finally, these and other distinctions among sanctions should not obscure the fact that sanctions also share certain common characteristics. For example, compulsory hospitalization involves the loss of freedom. Indeed, some hospitals for mental patients are more punitive than are progressive jails, and many institutions of juvenile correction are far from approximating the conditions of good schools.

The substantive distinction of civil and punitive sanctions has been rejected in utilitarian and positivist jurisprudence, which holds, e.g., that "the same act" may be both a crime and a tort; and the corollary is that a judgment for \$10,000 is more punitive than a five-day jail sentence. This, however, is an oversimplification of the relevant problems; e.g., it stresses accidental differences among harms and also implies that facts are intelligible apart from relevant ideas. The relevant ideas are the respective norms, i.e., a valid appraisal depends upon whether "the act" is viewed in relation to tort law or in relation to criminal law. For example, A strikes B, and certain other persons later injure A in certain ways. Only by viewing these actions in relation to certain norms is it possible to attach significance to them. Thus, the relation of the harms to the legally defined criminal conduct or tortious behavior which caused them is one determinant of important differences between torts and crimes; and that leads to the attribution of different meanings to what is only superficially a "single act." The respective functions of the two branches of law, noted above, i.e., the distinctive, formal, public condemnation signified by punishment and the distribution of economic loss, provide another ground for distinguishing the meanings of "the act." A third difference in meaning is conferred by the nature of the sanctions, i.e., the significance of the so-called "same act" is greatly altered when it is viewed in relation to the different types of sanction. Thus, a tortious battery is the kind of behavior for which compensation should be made, while a criminal battery is the kind of action which ought to be met by punishment of the offender. This illustrates the point pre-

vously made, namely, that the significance of conduct or behavior, resultant harm, and sanction cannot be understood until all of them are interrelated.

The discussion thus far has been confined to norms which are recognized as legal rules, i.e., as the State's norms. Quite different problems arise when the inquiry is enlarged to include all sanctions. In the discussion of this problem, it is often assumed or argued that the State's norms, i.e., laws, are different from all other norms. Legal sanctions, i.e., those employed by the State, have been distinguished from all other sanctions on the hypothesis that they are measures of physical force, or that they are organized or definite, or that they are imposed by a specialized corps of officials. This view, which sharply separates the State's sanctions from the others, is sometimes associated with a historical hypothesis regarding the origin and development of legal institutions, i.e., it opposes the maxim *ubi societas, ibi jus*. It assumes that "originally" there were very diffusely organized "societies" and that harm-doing did not stimulate any reaction except that spontaneously expressed by the injured person or his family.

In fact, however, none of the criteria selected to support the view that the State's sanctions are substantively unique can be validated, and the reasons for this may be briefly indicated. The origin of law in the command of the sovereign is either a formal criterion or, if it is viewed descriptively with reference to the maximum power center in a society, it is not distinctive. The leaders of criminal gangs, labor unions, and churches are also power centers. The rules of criminal gangs are often enforced by a designated specialized personnel, after a formal hearing, e.g., by the council of the Mafia, and they include very definite predetermined measures of physical force which are sometimes imposed upon persons who are not members of the gang. On the other hand, some state laws are sanctioned by reprimands and adverse publicity — e.g., the reprimand given a lawyer who has violated a law — and the adverse publicity given a company which has violated rules regarding the listing and sale of securities.³ Moreover, emphasis upon the physicality of some legal sanctions is an exaggeration which ignores the paramount role of relevant ideas, e.g., the transfer of incorporeal property from debtor to creditor. Thus, too, the organization of sanctions by reference to a system of norms, the formality of procedure, and a specialized official personnel concern matters of degree, e.g., canon law and the rules and procedures used in intra-union adjudication.

In recent writing on the subject, the most persuasive case for distinguishing the State's sanctions from those of subgroup norms has emphasized the "inexorable imposition" of the former.⁴ It is unclear, however, whether "inexorable imposition" implies anything more than the "coercion" traditionally attributed to sanctions. Presumably, "inexorable imposition" is descriptive of a factual quality. But whether the designated fact concerns the helplessness of the person subjected to a sanction vis-à-vis the State or whether it concerns the probability of its imposition, it is not distinctive. Debtors and convicts avoid sanctions by flight, they conceal their assets, and they sometimes commit suicide. On the other hand, the probability of the imposition of the sanctions of a church or

3. For references to cases and statutes see HALL, *op. cit. supra* note 1, at 611-612.

4. Luis Recaséns-Siches, *Les usages sociaux et leur différenciation d'avec les normes juridiques*, in DROIT, MORALE, MŒURS 145 (Paris: Recueil Sirey, 1936).

of a criminal gang may be very great; and the notion that one may resign from these associations seems hardly apt when tested by the relevant facts.

It must be concluded that none of the above criteria distinguishes the sanctions of the State from all other sanctions. While the exigencies of current research may suggest the use of a combination of the above criteria, it seems clear that they indicate only differences in degree, not in kind. For example, the modern court is a highly developed institution, but there are councils and chieftains among primitive peoples; and the same holds for the specialization of officials who enforce sanctions. The conclusion that the laws of the State are not substantively distinguishable from those of subgroups has the advantage of requiring the admission of a wide range of data within the field of sanctions-research. It also extends the problem of the ethics of sanctions to world-wide proportions.

In this perspective, the pertinent distinction is between norms whose sanctions are coercively imposed and conform to an established method or pattern and norms lacking these characteristics. This is, in large measure, the theory developed by Max Weber, and when he speaks of legal sanctions he means not only those of the State but also those of all other associations that are coercively imposed by a specialized official personnel whose particular role is to discharge that function.⁵

The writer's position may be stated most briefly in terms of its divergence from Weber's theory. Weber placed great emphasis upon the specialization of an official personnel; hence it affects both Weber's theory and that previously discussed — that the State's rules are distinctive. But, for reasons stated above, this is a difference in degree, not in kind. Second, Weber speaks of the orientation of conduct to norms, implying that the two are separate. Current social psychology, however, recognizes the "internalization" of norms, and this comes closer to an accurate description of the relevant data. This implies that norms are expressed in conduct, they are part of conduct.

The difference in the above views is very important. First, with reference to the verbal requirements of the social science of law, including a science of sanctions, Weber's formulation reflects the traditional view of law as an idea or concept. This account has been utilized by Kelsen, who allocates the study of factual data "paralleling" what he calls law to "legal" sociologists. What is wanted, however, is a social science of law, not of parallel facts. That is one reason why it is submitted that certain conduct, expressing legal ideas (in the above wide sense applicable to many associations), is the paramount datum in the study of law and that, in short, there is ample warrant, indeed it is necessary, to define "law" accordingly.⁶ This is also validated by reference to the perennial problem of the Is and the Ought of law. While it is formally

5. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 127-129, trans. Henderson and Parsons (New York: Oxford U. Press, 1947).

6. The relevant philosophy of law is presented in the writer's *Reason and Reality in Jurisprudence*, 7 *BUFFALO LAW REVIEW* 351, esp. beginning p. 392 (1958) and in his *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* ch. 2 (New York: Oceana Pub., 1958). Later elaboration of this philosophy is found in Pedro R. David, *Bosquejo de la Jus-Filosofía Integrativa de Jerome Hall* in *JURISPRUDENCIA ARGENTINA*, ano 23, No. 747, Jan. 16, 1961 (Buenos Aires).

erroneous to derive an "ought" proposition from "is" premises, neither the sociological positivist philosophies which reduce the oughtness of law to factual data nor the formalist effort to exclude factual data from the field of law solves the problem. But in the perspective suggested above, the Is and the Ought of law coalesce as distinctive human conduct which, in a social science perspective, is positive law. The logical difficulty is thus resolved in the spheres of human psychology and ontology; and the resulting construct allows the demarcation of a unified field of data, including sanctions, that is congruent with, and significant for, the requirements of a social science of law.

This is pertinent, also, with regard to the writer's third divergence from Weber's position — his theory of values. Weber seems to have held that it is possible to understand social action, including the actors' valuations, by empathic participation without making any appraisal or even trying to do that. This is also the theory of psychoanalysts who state that they confront a patient with his scheme of values without themselves appraising those values in the slightest degree. Without considering this claim in any detail, it may be suggested that if one wishes "really" to understand problem-solvers, he must participate in their efforts as if he believed that at least some of his own values have objective validity; and if he acts that way, the Rubicon has been crossed. It seems likely therefore that a critique of ethics is necessarily employed not only in actual practical problem-solving, where its assumption is evident, but also in social science, including the study of sanctions-processes. It serves as a body of assumed knowledge or valid opinion which provides an essential vantage point, an anchor, from which the valuations of problem-solvers can be understood, and then cogently described and communicated.

The conclusions suggested above can be assembled in a wider framework within which, it is hoped, their significance will be further clarified. What should be emphasized, first, is that the problem of sanctions is bound to the meaning of "positive law." This has been confused by the failure to take account of the context and purposes of theories and discussions of "law." Three perspectives have been dominant in the definition of "positive law": that of natural law, i.e., the justice of the sovereign's command; that of legal positivism, which is also the perspective of lawyers' law; and that of a social science of law, in which perspective the term must refer to data that are observable, whatever other qualities they may have. The meaning of "legal sanction" varies with that of the perspective determining the meaning of "positive law." With reference to the social science perspective, it should also be noted that a descriptive theory of legal sanctions is valid only in certain conditions, e.g., the spontaneity or "naturalness" of the discovery or adoption of laws, including their sanctions, must be assumed or stipulated. The notion of "customary law," enlarged to include the norms of subgroups, suggests the criterion for selection of the data. In sum, from a practical viewpoint, rules of law are considered apart from "relevant" conduct — conduct either conforms to or it violates a rule. But from a scientific viewpoint, conduct which "conforms" to rules is more accurately described as expressing the meaning of those rules. Thus, "conformity to law" can be defined more significantly than in the negative way that is apt and relevant only to the lawyer's conception of law. In this

perspective, the legal ideas expressed in conformity are the affirmative meanings of legal norms. They are, e.g., the norms that require keeping promises, paying taxes, respecting persons, and so on; and the relevant law is the conduct which expresses those norms. As stated, this law differs in important respects from that of the lawyer and legal positivist, e.g., in having affirmative significance, implied by "conformity to law," whereas in the practical, positivist sense, law is restricted to description of harms (deviation) to which sanctions are directly attached. For the reasons indicated above, in the social science perspective conformity to law is as important as the violation of (deviation from) law. Indeed, deviation implies conformity and, in fact, the latter is the dominant datum in societies which survive. Both types of conduct must be included in the field of relevant data and taken account of in social scientific theory.

In this perspective, sanctions are a type of conformity, distinguished by the fact that they express legal ideas, including the lawyer's practical sense of "law," as well as the representative action and values of the community. Thus, actual sanctions are distinguished from the ideas of sanction, i.e., the usual prescriptions in statute books. "Sanction" refers to the conduct of officials imposing privations upon violators. The officials are more numerous than the ministerial corps of law-enforcing agents, since reprimands and adverse publicity, e.g., are imposed by judicial and administrative officials and sometimes by designated laymen, such as a bar association committee. What is directly referred to above in terms of official conduct applies also to the enforcement of subgroup norms. The sanction-process in advanced societies is specialized official conformity that is not necessarily an index of the degree or type of conformity that characterizes the conduct of the society or subgroup. The various combinations and degrees of typicality can become quite complicated, e.g., in the modern State, as regards crimes like embezzlement, perjury, and certain sexual offenses which are very frequently committed but are rarely prosecuted and even less frequently punished. There are incompatibilities and anachronisms to be dealt with, not solely a uniform pattern of conformity opposed to deviation. Finally, sanctions link deviation and conformity psychologically and instrumentally, as threats and as conditioning, corrective influences.

It was suggested above that sanctions are significantly and in the first instance related to harms and to the conduct or behavior causing those harms. It is now clear that this conduct or behavior consists of the violation of rules, i.e., deviation. If we therefore reconstruct the previously suggested figure we terminate with a more inclusive one which takes account of the essential factors, namely, conformity, norms and values, deviation, harm and sanction (a socially justified "harm"). The study of sanctions explores their interrelations with all the other specified factors. If the study originates with sanctions, the trail leads first to harm and thence to the deviation. But, as stated, deviation implies conformity, and that expresses affirmative norms which implement values.

The legal theory which elucidates lawyers' law, i.e., the philosophy of legal positivism and, at the other extreme, natural law philosophy, are bodies of practical knowledge which "apply" the social scientific knowledge of sanctions. This does not imply "mere application" in the sense that engineering, e.g., is said to be the application of physics. The disciplines of lawyers' law and nat-

ural law philosophy, although oriented to practice, also contribute to the theoretical knowledge acquired by the social scientist. In a social science of law, the relevant ethics are both utilitarian and intrinsic, depending upon the sort of question that is asked and the perspective of the answerer, especially whether he is an observer or a "participant."

When one turns from the analysis and investigation of presently employed sanctions to world problems, the disparity between the accumulated ideas and instruments and the international needs is striking. In democratic states, rather comfortable theories are nourished regarding the dependence of sanctions upon the "consent of the people." The control of modern lethal weapons by an elite challenges this theory of the limits of effective control. It also indicates that a sufficiently clever and wholly ruthless elite can manufacture a suitable popular will. This suggests the need to re-examine the theory that norms are dependent upon, if they do not arise from, the fact of control, i.e., that the practices demanded by the elite are sometimes accepted as norms.

Social science has not thoroughly explored the relations between spontaneously developed law and the operation of power initially at odds with public opinion. Suggestive studies of recent European dictatorships contribute to the solution of this problem by revealing that the largest part of the traditional law remained unchanged. So, too, there is much to be learned from the Soviet experience, e.g., the trend to readopt a rigorous principle of legality in the field of crimes. The indicated problem is extremely important and merits sustained investigation.

A related problem which raises even more troublesome questions concerns the exclusion of minorities, sometimes very large minorities, from the protection against severe, officially imposed privations that is accorded persons to whom the "rule of law," in its prevailing sense, is applied. We are still far from having persuasive explanations of the systematic homicide of millions of helpless persons in European cultures which for centuries professed devotion to the highest religious and ethical ideals. If that is characteristic of "human nature" rather than of particular cultures, the inefficacy of present legal sanctions is an index of human impotence. The tensions between the traditionally avowed ethics and current political data are reflected in hesitant efforts to reconstruct international criminal law so that punitive sanctions may be imposed on political leaders. But these intentions are far from being actualized. Moreover, when a few hundred men kill millions of persons, the use of any known legal sanction may only aggravate a sense of futility.

Despite the wide gap between the current knowledge of sanctions and the needs of world problems, that rudimentary knowledge is the only base from which required inquiries can be projected. In these circumstances, one can only "hope for the best," and among the best is a social science of law.⁷ As we learn more about legal sanctions in normal conditions, we may discover how to restrict the extent and frequency of the barbaric eruptions.

JEROME HALL

7. The writer's view of this discipline is discussed in his *THEFT, LAW AND SOCIETY*, esp. the Introduction, 2nd ed. (Indianapolis: Bobbs-Merrill, 1952).