

SANCTIONS, LAW AND PUBLIC ORDER

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A more creative conception of criminal law, and a more scientific and policy-minded approach to the organization of research, instruction and consultation concerning the use of criminal and other negative sanctions, have long been in making in the minds of many working in the field, in many widely separated places. My purpose in this paper is briefly to describe the kind of program currently conceived to these ends in the Yale School of Law.

Stemming from a series of exploratory studies and seminars conducted over the past few years in collaboration with members of the Departments of Anthropology, Psychiatry and Public Health in the University, our program † is concerned with the technique of public order—that is to say, the “know-how” of the use of negative sanctions to preserve desired aspects of a culture or, as the case may be, to promote desired culture change. All penal and regulatory laws prescribing negative sanctions are, of course, addressed to one of these ends.

By public order I mean that measure of peace and observance of basic value patterns of a culture upon which the fruitful pursuit of legitimate interests in the given society depends. Our prime concern in this project is to re-appraise the use—and misuse—of the methods of criminal law, since through the centuries these have been relied upon as the ultimate sanctions for the achievement and preservation of public order. Criminal sanctions are conceived as a distinctively motivated sub-class of negative sanctions or collectively enforced deprivations of value; and crime as a distinctively experienced sub-class of deviational or value depriving behavior. The policy objective in the use of criminal or other negative sanctions may therefore be described as the economical use of value deprivation to achieve a net value gain. The economy principle is, of course, implicit in any cultural rank order of values which assigns primacy to the dignity and well-being of the individual. It suggests that non-depriving sanction equivalents (or preventive measures), and less as against more depriving sanctions, to the extent that they may be available and adequate, will be preferred.

As societies have grown more complex we have witnessed an increasing resort to these sanctions, but it is also observable that despite this trend of increasing resort, negative sanctioning methods as we know them are by no means well adapted to many of the situations in which they are employed and not infrequently fail to serve the desired ends. Typically, indeed, we

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invoke criminal sanctions not so much because we are skilled in their use as because alternative procedures appear ineffective or are lacking completely.

The urgency today to maintain and expand the domain of public order in the interest of a maximum preservation of our basic values in the face of internal and external culture conflicts, is apparent. Two phases are involved: first, the forecasting and elimination of major sources of friction; and second, the deterrence, rehabilitation or incapacitation of those who, having proved unamenable to non-penal preventive controls, threaten the public peace and order. Effective policy requires a systematic re-evaluation of this latter group of procedures, with full consciousness that the result may be to minimize rather than aggrandize the tendency to rely upon some or all of them.

Areas of friction which we have in mind include contemporary conflicts of political ideologies, of labor and management, of big and little business, race-culture and international power conflicts. The control problems posed in these areas differ from those posed by the ordinary common crimes in that the behavior one seeks to discourage is likely to be of very frequent occurrence, being representative of the culture, of the counter-culture, or mixed, rather than alien to the culture. Problems in the strategy of mass enforcement come to the fore, and penal measures tend to be employed as secondary or ultimate sanctions, selectively, and in conjunction with other modes of control. In such situations it is apparent that a control program, to be effective, must be scientifically engineered.

The inquiry into technique must nevertheless draw heavily upon the experience with criminal law in the older fields which shaped its development. For that aggregate of shared ideas, attitudes and patterns of behavior which we call criminal law represents all that men have so far learned about "keeping the peace" in situations where other social controls are lacking or fail. When the law fails, resort on the local level is to martial rule—or revolution; and on the international level, to war.

To speak of the technique of criminal law and public order may suggest a contradiction in terms. The shapes which penal measures and enforcement programs may assume are many and varied; and information concerning the effects of contemporary experiments in this field is for the most part subjective. One should neither hope nor desire to produce a simple formula, suited to all enforcement situations, and susceptible of satisfactory application by anyone. But the fact remains that critical discussion of particular legislative proposals, administrative enforcement programs or the strategy of handling a particular case, invariably takes its point of departure from some supposedly established proposition of policy and technique, usually without reference to the authority or basis for the proposition. Yet nowhere do we find a systematic

exposition of these underlying propositions. To fill this gap is one of the goals of the current project.

Central to serious investigation along the lines proposed is a consistent body of workable ideas concerning criminal law and public order. Useful thinking here calls for a conception of criminal law that transcends the peculiarities of any one system, and enables the scholar to benefit by the comparative investigation of other systems. Prevalent hypotheses need to be subjected to the discipline of data gathered from many countries, many periods in history and many forms of human culture.

We know that many societies (at various times and places) do the following:

- (a) Recognize that deviations from certain standards of conduct threaten the community (the system of public order as a whole);
- (b) Invoke collective methods of dealing with such non-conformers;
- (c) Inflict measures of incapacitation upon the non-conformers, and to this end rely eventually upon deprivation of status and privilege either permanently or pending transformation of the individual into a conforming personality.

Conceived in this way, criminal law presents certain important aspects: first, it is not universal; some societies have no *collective* proceedings for coping with non-conformers, much as humanity as a whole still lacks established ways of defining and dealing with offenses. A searching question for investigation is: What factors *favor* (or work against) the delegation of authority to define standards in the name of the whole and to apply them on behalf of the community?

A second important aspect of the criminal law consists in the two-edged character of its sanctions, resting as they do on the use of force to preserve peace. Obviously, the use of these sanctions in such a way as to preserve any given aspects of a culture which may be threatened presupposes a broad understanding of the dynamics of culture change. Another searching question for investigation is therefore: What factors determine why behavior at one time regarded as criminal comes to be considered tolerable or even respectable, and vice versa?

In a period of world crisis, with advances in technology forcing an accelerated social change, the public order problem may be posed in terms of a maximum preservation of basic values in the process of such change. In our culture the values of individualism, of freedom in the senses in which we use the term, may be taken as basic; and the value-preservation problem expressed as one of the insuring wide rather than narrow participation in the making of key decisions which affect large numbers of individuals. But effective participation depends not merely on formal opportunity. It depends on information and intelligence as well. To the basic friction-preventing prob-

lems suggested above an underlying problem in the preservation of public order in the interest of progressive ends may now be added: This problem is to insure an adequate flow of objective information and intelligence through the major channels of communication to all who participate in the making of key decisions affecting the course of adjustment or change in the society.

The program involves a review of the essential attributes of the sanctions and procedures of criminal law, in relation to other modes of social control, in the light of their evolution, and with regard to the variations they assume in different contemporary cultures. Neutral conceptions must be formulated, uncolored by the values of a particular culture, to provide a framework for the comparison of data from different nations and different periods in time, and to facilitate communication on an international level. The end-product visualized is a synthesis of experience in the development and use of criminal sanctions, systematically formulated in operational terms.

In general aspect, the program of research may be divided into the following distinct lines of inquiry:

1) *Primitive Experience*.—Explanation of the earlier known forms of criminal sanctions and tendencies in their use must be sought in the data of comparative ethnology. It will be necessary to retrace and examine the why and how of the steps whereby delegation of authority to settle disputes came about.

2) *Development of the Modern Criminal Law*.—Explanation of the forms of criminal sanctions and of particular tendencies in their use in the major legal systems of today must similarly be sought in the earlier institutions and practices through which they developed. For this purpose we shall review the literature of comparative legal history, having in mind that this history has been one of expanding application of penal sanctions. Some of the new applications have been more successful than others. Some have been failures, and some have been discarded. Through study of these successes and failures we shall seek to ascertain the factors which determine whether behavior, once declared criminal, will continue to be tolerated, or even become respectable.

3) *Comparative Law and Policy*.—Ideas concerning policy and technique in the use of criminal sanctions are, of course, part of the content of every major culture. Some are expressed and some are implicit in constitutions, legislation, high court decisions and authoritative legal writings. We shall review these, to ascertain the areas of agreement and disagreement. But we shall be equally concerned in each instance with corresponding patterns of actual behavior in the administration of law, and with the relationship between these and the ideas. Some of these actual patterns, such as the allocation of money and manpower for enforcement purposes, and the relative frequency with

which various laws are invoked, are reflected in police and judicial statistics, bureau reports and appropriation measures.

4) *Case Studies of Particular Ventures*.—Recent experiences with more or less novel enforcement problems may be expected to afford a testing ground for some of the tentative hypotheses which will emerge from this study, and to raise new questions as well. Projects for intensive investigation under this heading lend themselves to the research seminar type of inquiry jointly conducted by representatives of the several relevant social disciplines.

Major fields for such special emphasis may be summarized as follows:

(a) *Criminal Law and the Market*: The function and appropriate use of criminal sanctions to promote the orderly adjustment of conflicting interests as between those engaged in trade and commerce and the public, as between labor and management, and as between competitors.

(b) *Criminal Law and Internal Security*: The function and appropriate use of criminal sanctions to promote the orderly adjustment of political, ideological and race-culture conflicts.

(c) *Criminal Law and Freedom of Information*: The function and appropriate use of criminal sanctions to promote a free flow of intelligence and objective information to all who participate in the making of policy decisions which affect the public interest.

(d) *Criminal Law and International Order*: The function and appropriate use of criminal sanctions to promote the peaceable adjustment of conflicting interests between nations.

(e) *Criminal Law and Character Formation*: The function and appropriate use of criminal sanctions and penal treatment procedures to promote the adjustment of individuals to the community standards of local order embodied in legislation dealing with common crime, vice, traffic regulation, and the like.

(f) *Criminal Law and Fact-finding*: The function and appropriate use of familiar and new techniques of criminal investigation and legal forms of procedure to promote the objective ascertainment of facts with a minimum of infringement of the interests of the individual.

The program as a whole is still in its early stages, but it may be useful at this point to give some indication of the perspective which has begun to emerge. We began with the premise that the prime function of the administration of criminal sanctions, as of other institutional arrangements in any given society, is to maximize the values of the culture. The sanctions are, in themselves, negative. Deliberate and calculated deprivation of the value position of the individual against whom they may be invoked is their essence. But they are typically conceived and invoked as means to positive ends. All contemporary societies so conceive and invoke them in an organized way. No society has been found in which negative sanctions were not similarly conceived and invoked in an unorganized if not an organized way. This recurrence of belief, motivation and response is suggestive. Our problem is to devise ways of appraising effects.

Comparative study confined to a descriptive level would not greatly advance this problem. The forms of the sanctions and the patterns of their use differ with time and place. So does social structure; and the sanctions both condition and are conditioned by social structure. But comparative study which differentiates between formal or ideal statement and manifest institutional arrangements and practices, takes variations of expectation and identification into account, and is alert to the existence or non-existence of sanction-equivalents, can yield positive results.

Through this latter type of study we are seeking to determine ranges of variation, areas of difference and of congruence, and to turn up situations and collections of data useful for the testing of our hypotheses. Some of the conceptual requirements of meaningful comparison—and in particular an inclusive system of neutral operational definitions of terms—are being elaborated and refined. Our next concern will be to devise operational indices of the relevant values, to permit evaluation of the effects of different patterns of sanction use.

That negative sanctions have a positive social role—which is to say that there are recurring types of situations in which a net value gain (measured in terms of the shaping and distribution of the values of the culture) can most economically be achieved by a discriminating application of value-depriving sanctions—is a basic hypothesis. We do not assume its validity, but observe that in all contemporary societies recourse to negative sanctions is the ultimate response of power and authority to deviation deemed dangerously destructive of the values sought by power and authority to be maximized or at least maintained.

A corollary hypothesis is that the net result of each such sanctioning transaction is a gain or loss in the value position of those on behalf of whom the sanction is invoked, depending on the effectiveness of the sanction in the situation. This too we take from our culture, observing that in policy controversies involving issues of civil liberty in our own and other known societies the hypothesis is typically adopted as a premise by both sides, disagreement being expressed in the form of conflicting evaluations of the effects of negative sanctioning in the particular situation.

From the premise that the function of administering negative sanctions is to contribute in a productive way to the shaping and distribution of values in the society—well-being, wealth, power, respect, enlightenment, etc.—significant implications for social science research as well as for administrative technique may be drawn. To evaluate policies and administration we must have ways of testing effects. Administration must utilize procedures for the recurrent appraisal of relevant shifts in value expectations and structures of identification in society, and other reporting procedures to permit a continuing

audit of administrative operations. For these techniques administration must turn to applied social science. Procedures for the sampling of public opinion and for the forecasting of tension levels have already been developed to the point of usefulness in other contexts, and operational indices of the wealth value are already utilized in the economic realm. For our purposes, comparable indices of well-being, power, respect and enlightenment will have to be devised.

Exploration of the positive potential of negative sanctions must also take into account a certain ambivalence of attitude with respect to them which is prevalent in our culture. A depriving sanction, like the disturbing deviation which provokes the sanctioning response, tends at once to fascinate and repel. The ambivalence generates a whole set of negative attitudes toward sanction administration. Law and criminology have, indeed, come to speak of social protection (through deterrence and rehabilitation, when possible, and otherwise through incapacitation) rather than exclusively in the older symbols of vengeance, retribution and expiation. This involves recognition that deprivation should bear a rationally demonstrable relation to a desired end. But the cast of the formulation is still negative, the end being expressed in defensive terms.

To dispel this negativism is one of the conditions of a more productive administration of sanctions. One of the sources of this negativism appears to consist in our continued adherence to use of the term "criminal" to categorize sanctioned behavior, sanctions and sanctioned individuals. The term is freighted with connotations of ignorance, fear and brutality, and reminiscent of sanctions rooted in primitive superstitions and mystical beliefs. There is reason to believe that its symbolic effect is to defeat the deterrence of others by breaking identification with the offender against whom the sanctions are invoked, and, conversely, to restrict the application of sanctions to individuals with whom persons representative of the culture feel little or no identification. Rehabilitation of a sanctioned subject likewise appears to be impeded, since the symbol tends to overload his sense of guilt or appear to him as hypocrisy.

A comparison of sanctions legally classified as "civil" fortifies the above hypothesis. The conventional assumption that "criminal" and "civil" sanctions differ in nature as well as in purpose does not square with the facts. Value deprivations of great severity are common to both. In some situations the applicable "civil" sanctions (denaturalization, deportation, or indefinite commitment of individuals, decrees of divestiture, divorcement or dissolution addressed to industrial or commercial organizations) are far more depriving than any applicable "criminal" sanctions. Classification of the sanction as "civil," moreover, automatically deprives the person against whom it is invoked of the special constitutional and procedural safeguards accorded one

against whom a "criminal" sanction is invoked. A more functional classification of sanctions involving deprivation might distinguish between those utilizing deprivation as an instrument, and those to which deprivation was incidental. But despite the artificiality of the distinction currently employed, little of the negative atmosphere of the "criminal sanction" appears to carry over to the most depriving of civil proceedings.

Our program may now be resolved into immediate and longer-range goals. To assemble in an integrated form those propositions concerning the use of negative sanctions which are accepted on a "reason to believe" basis in different cultures, and to present them in the form of operational hypotheses susceptible of empirical test, is the first objective. Ways of bringing such knowledge more directly into play in legal thinking and administration, and—since the use of sanctions is conditioned by social structure and expectation—of disseminating it more generally, are also matters of immediate concern.

The areas of difference revealed by our comparative law cross culture study also serve to suggest the most fruitful problems in this field for social science research. Through empirical investigation and demonstration we may hope to reduce such areas of difference—which are among the sources of international tension and conflict—and to advance our techniques of public order as well. To this end we are attempting to pose problems for investigation raising questions which are susceptible of being answered, and to which answers will advance our knowledge of sanction technique. We are also formulating investigative procedures for such problems, devised to turn up as many as possible of the factors relevant to be taken into account in arriving at a judgment. Arrangements for the conduct of such empirical problem investigation on a continuing and significant scale we envisage as our longer-range goal.

We have been speaking of the creative potentialities of our developing social science and technology, and of the fuller realization of those potentialities which is within our grasp. But social like physical science can of course be turned to destructive ends. The bald fact is that social science has enormously enhanced the power of those who can use it to manipulate the attitudes and behavior of individuals in society. To glimpse the potentialities for social control of a more scientific use of negative sanctions is to sense a new urgency that such use be turned and confined to creative ends.