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SANCTIONS SYMPOSIUM

Foreword: Sanctions in Context

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In contemporary legal theory, what is called the problem of "sanctions" is much too often narrowly and inadequately, rather than comprehensively and effectively, conceived. In international law and national law alike, attention is commonly focused upon isolated practices or anecdotal gadgets, without appropriate regard for the broader community context which both affects and is affected by particular practices. Thus, in international law the recommendation of sanctions is characteristically illustrated by the projection of elaborate blueprints for new structures of formal authority, sometimes refined and specified in most minute detail, with little or no attention being given to the environmental and predispositional factors which must condition the degree of acceptance and implementation of any sanctioning practices; on occasion, in exaggerated response to particular features of the environment, such as the development of a new weapon or an arms race, attention is brought exclusively to bear upon a single, specific security goal, such as disarmament, in disastrous neglect of the whole range of relevant particular goals and of their interdependences.[1] Similarly, even in the more mature systems of national law the specific sanctioning practices which are employed or recommended for securing conformity to basic constitutional and private law prescriptions are seldom clearly and explicitly related to a coherent set of sanctioning goals formulated in terms of general com-

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[1] This theme is documented in detail in McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION ch. 4 (1961).

munity policies. The assumption appears endemic that the advantages and disadvantages, the benefits and costs, of alternative sanctions for a single "desirable norm" can be fruitfully considered without the clarification of more comprehensive public order goals.[2]

The Editors of the Iowa Law Review in fashioning this Symposium have, happily, been inspired by a broader conception of sanctioning process and by an appropriate sense of the relevance of context. In their initial call to authors they stressed that their subject was "somewhat unusual" in cleaving out "an area which is not traditionally defined or treated as an integral topic in the legal literature." Within the area of their concern, they included not merely the "theory of criminal liability and punishment," but also general consideration of "sanction and the operation of the law," the "theory of civil liability and remedy," the "effects of administration of the law," indirect sanctions as illustrated in tax practices, and the "coordination of sanctions" in "treatment of noncriminals." They questioned whether "legal rules" could be "meaningful when not referable to an eventual unequivocal 'sanctioning.'" In their outlines of particular topics they called for the specification of detailed sanctioning goals in terms of "fulfillment of expectations," "compensation," "prevention," "deterrence," "rehabilitation," and so on. They called also for inquiry about the factors affecting the adoption and operation of sanctions and about the social process consequences of particular types of sanctions. The range of practices which they indicated as being within the ambit of "sanctions" embraced practically the whole arsenal of conformity-inducing modalities exhibited by contemporary authoritative decision.

Even a modest application in inquiry of this broad conception of sanctions would be, as the Editors themselves explicitly recognized, a task of formidable proportions. The detailed relation of particular sanctioning practices to the comprehensive public order goals of any community must require guiding theory and intellectual procedures which we are only beginning to develop and perfect. The first urgent need is for a guiding theory which will facilitate a more adequate and realistic description of the interactions in community social processes

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[2] For an eloquent, if unpersuasive, statement of this assumption, see Packer, Book Review, 29 U. CHI. L. REV. 586, 588 (1962). As important as it is to postulate and clarify a comprehensive set of public order goals for a community, it could lead to complete defeat of such goals to postulate only a single policy principle and to consider only the efficiency of alternative sanctioning practices in promoting conformity to this principle. One who is shocked by the notion that it is possible to clarify "community policy" surely mistakes the purposes for which people maintain legal systems.

which give rise to claims to authoritative decision, of the specific types of claims to authority which are in fact made, of the different processes of authoritative decision (comprehensive, regional, local) which the community maintains for response to such claims, and of the varying roles of particular sanctioning practices within such processes of decision. Within the more adequate and realistic orientation which an appropriate guiding theory might permit, it must still remain necessary for an observer, who would appraise particular sanctioning practices invoked in particular contexts for their conformity to the comprehensive public order goals of a community, continuously and systematically to employ a variety of interrelated intellectual procedures. These indispensable procedures include, in one formulation recommended in this Symposium,[3] no less than the detailed clarification of basic community policies in relation to the particular context in which sanctions are invoked, the description of past trends in success or failure in the application of sanctions in comparable contexts, accounting for the factors which have affected past degrees of achievement, anticipating the conditions which may affect possible future achievement, and inventing or evaluating new practices better designed to secure community policies in probable future contexts. In the successful employment of these procedures, an observer must of course relate the processes of authoritative decision he studies to the effective power processes of the community by which they are maintained and consider alternatives for the management of environmental and predispositional factors in ways best designed to support preferred sanctioning practices.

The clarification of our largest community's basic policy of minimum order which, as expressed in the United Nations Charter and other authoritative pronouncements, seeks to minimize the deliberate use of coercion across state lines as an instrument of change must, thus, require a careful orientation in the comprehensive processes of coercion which transcend state lines, in the specific types of claims to authority which are made about such coercion, and in the processes of authoritative decision maintained by the general community for response to such claims. The responsible appraisal of recommended alternative sanctioning practices for their compatibility with the whole range of basic community goals demands, further, that the highly general policy of "minimizing" coercion be made more specific in terms of sub-goals, such as prevention, deterrence, restoration, rehabilitation, and reconstruction, and that specific sanctioning practices in the employment of diplomatic, ideological, economic, and military

[3] See Lasswell & Arens, *Toward a General Theory of Sanctions*, 49 IOWA L. REV. 233 (1964) (this Symposium).

instrumentalities be related to these various sub-goals and be assessed in terms not only of their effectiveness for immediate purposes but also of their net consequences for public order values.[4] Similarly, the policy commonly prescribed in mature national communities which seeks to promote the shaping and sharing of values more by persuasion than coercion and to minimize the deprivations caused by the breach of agreements and other coercive practices or events could be made more specific in terms of comparable or equivalent sub-goals and specific measures in sanction—such as the authorization of self-help, injunction, award of damages, or imprisonment—be assessed not only for their immediate efficiency but also for their longer term consequences.

It would be too much to expect that the generous vision of the Editors of this Review about relevant inquiry into sanctions could be fulfilled in a single symposium. The several articles here presented may, however, be appropriately regarded as important preliminary contributions toward the fulfillment of their vision. The issue as a whole is a worthy successor to the early pioneering symposium upon the *"Juristic Bases for International Law,"*[5] with its very useful discussion of sanctions in the international arena.

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[4] Some effort to illustrate the potentialities of this mode of inquiry about sanctions in the international arena is made in McDOUGAL & FELICIANO, *op. cit. supra* note 1 and in McDOUGAL, LASSWELL, & VLASIC, LAW AND PUBLIC ORDER IN SPACE ch. 4 (1963).

[5] 31 IOWA L. REV. 493 (1946).