BOOK REVIEWS

In Defense of Public Order: The Emerging Field of Sanction Law. By RICHARD ARENS and HAROLD D. LASSWELL. New York: Columbia University Press, 1961. Pp. x, 314. $7.50.

The study of sanctions—the spectrum of means available for the enforcement of legal norms—is rapidly becoming a central preoccupation of students of the legal order. It has not so far progressed much beyond the recognition that the problems are important, intricate, and almost entirely unexplored. I have no doubt that legal scholarship will be given over in increasingly large measure to the development of a jurisprudence of sanctions. It is equally clear to me that insights and techniques drawn from the behavioral sciences will play an important role in this development. Consequently, I approached this call by a lawyer and an eminent behavioral scientist for the systematic study of "sanction law" with interest and sympathy. Both interest and sympathy rapidly waned. The book is not successful. The reasons are not altogether easy to articulate but an effort to articulate them is due authors who, whatever the shortcomings of their work, cannot be accused of triviality.

The book is divided into two parts. The first and by far the longer part, entitled "The Challenge of Present Failures," undertakes to present the concept of "sanction law" and to demonstrate that, at present, sanctioning policies are "confused, inconsistent, and fraught with dangerous consequences for the basic values and institutions of the United States."[1] This part of the book is organized in a rather peculiar fashion. After an introductory chapter which defines "sanction law" in terms that we will presently examine, there appears a cursory introduction to "value-institution study"—a series of constructs familiar enough to students of Lasswell's work[2]— but here presented in a fashion that can hardly satisfy any but the most passive and acquiescent reader. It is stated, with little elaboration, that the values of a body politic include power, wealth, rectitude, skill, enlightenment, well-being and affection, that in a democratic society these values are expected to be widely distributed, and that the "sanctioning process" as it presently operates tends adversely to affect the desired wide distribution of these values.[3] The demonstration then proceeds in a series of chapters each of which is devoted to, or at least captioned with, one of the "values": *e.g.*, "Sanctioning Measures and the Sharing of Respect"; "Sanctioning Measures and the Sharing of Skill", etc., etc.

[1] P. 12.

[2] See, *e.g.*, LASSWELL, POWER AND PERSONALITY (1948).

[3] Pp. 13–14.

Each of these chapters is an enumeration of instances in which the shortcomings of the "sanctioning system" are thought to bear adversely on the particular "value" involved.

Two comments are in order about this framework. In the first place, the value categories are stated at such a high level of abstraction that it is very difficult for the authors to give them content. As a result, the relationship between the values and the specific examples of their supposed erosion through the sanctioning process is highly adventitious. The connecting thread among the various examples is even more so. The analytic framework, in short, is not a help to the authors but rather a positive embarrassment. A second and related consequence is that, lacking any coherent pattern for developing their subject, the authors are reduced to multiplying examples in what appears to be an effort to overwhelm by sheer weight of numbers. For example, the longest chapter, on the Respect value, contains in thirty-seven pages upwards of sixty examples of asserted malfunctions in sanctioning. The result, leaving aside the dubious character of some of the examples, is an absence of anything approximating sustained analysis.

There are more basic troubles, however. One inheres in the authors' strange ambivalence about the meaning of the term "sanction." We are told at the outset that a sanction is different from a "primary norm." The point is made more than once in the early pages of the book.[4] Yet much of the demonstration of the shortcomings in the sanctioning process is based on examples of what I suppose everyone, including the authors, would view as "primary norms." For example, the authors attack fault as a basis for divorce;[5] they deplore the vagueness of antitrust standards;[6] they question the wisdom of restrictive laws dealing with sexual conduct.[7] All of these may be points at which the law is open to criticism—and I doubt that our lack of progress in these matters can be attributed to a shortage of criticism—but it is obvious that these failures, if failures they be, are failures of substance rather than of sanctions.

If the authors seem at times to expand the concept of "sanction law" to include everything that the term "law" includes, at other times they constrict the concept in a way that is highly damaging to their call for a jurisprudence of sanctions. They start, sensibly if not as originally as they seem to think, with the observation that sanctions are not limited to the punishments inflicted under the law of crimes but rather include all measures taken to encourage compliance with legal norms. It is important to take that expansive a view, they assert, because "failure to consider the sanctioning process as a

[4] "Prescriptions can be roughly classified as primary and sanctioning propositions, the former articulating a norm of conduct preferred by the body politic, the latter specifying the actions to be taken especially when breaches of the norm occur." P. 9.

"Sanctions are deprivations or indulgences of individual and group values for the purpose of supporting the primary norms of a public order system." P. 14.

[5] P. 115. [6] Pp. 134–36. [7] P. 123.

whole has resulted, to a significant degree, in some of the most damaging faults of our legal order."[8] We are to expect, then, an attempt "to consider the sanctioning process as a whole": a large order—too large, it soon appears, for the authors. What they have given they quickly take away:

> Since we have the perspective of entire communities in view it is clear tlat economy of effort calls for selection, and that [*sic*—therefore?] we choose for legal study those prescriptions that are expected to be enforced with a high degree of severity against deviates and that involve specialized representatives of the community in the process of sanctioning.[9]

Put less obscurely, this is to be a book about the shortcomings of the criminal sanction and other publicly administered measures of social control. But I should have thought it precisely relevant to the authors' initial complaint for them to consider what criteria can be developed for deciding when "specialized representatives of the community" should be involved in the sanctioning process and when initiative is better left in private hands. The claims they make for the study of "sanction law" lose a good deal of their force when the subject is limited to highly afflictive publicly administered sanctions. And it only confuses thought to start with an expansive definition of sanctions, as the authors do, and then proceed to use the term in a much more restrictive way, adhering all the while to the claims they make for the more expansive reading. Throughout, the examples of "present failures" are drawn predominantly (about 75% by rough count) from the criminal law. Near the end of the book, the authors pretty much let the cat out of the bag by admitting that they do not regard "controversies over contracts and torts" as involving the application of sanctions: "The typical policy considerations that figure in problems presented to community decision makers under the supervisory code [their term for prescriptions whose enforcement is left to private initiative] are remedies rather than sanctions."[10] What this does to their original position is obvious.

Both of these ambiguities—the treatment of sanctions as equivalent to law in general and the countervailing restriction of sanctions to the criminal law and its penumbra—seem to me to reflect a basic shortcoming in the authors' approach. Although they denounce formalism in others, it can be justly asserted that their view is itself formalistic in the extreme. Their concern with the elaborate conceptual apparatus of "value-institution study" precludes any attempt to undertake what I should have supposed was the obvious line of inquiry: assuming a hypothetically desirable norm, what is the spectrum of sanctions—"public" or "private"—available to give it effect? What are the advantages, what are the disadvantages of a given sanction or combination of sanctions? Is the primary norm one that we will wish to support through sanctions once we understand what the sanctions are likely to cost? It is the inter-

[8] P. 5. [9] P. 10. [10] P. 231.

play between primary norm and sanctioning possibilities that gives rise to the distinctive problems of sanctioning in the legal order and it is through the close study of that interplay in different situations that we may eventually hope to develop a jurisprudence of sanctions.[11] All of this the authors ignore.

A possible explanation of this failure to view the problem of sanctions as an aspect of the legal process generally may lie in an orientation that seems to blind the authors to the importance of distinctively private, self-applying regimes of legal order. This indifference, in turn, appears to derive from the view that "community policy" is an ascertainable guide to the control of social behavior. There is a strange paradox for me in a system of thought that stresses the importance of the widest possible sharing of values, including power, yet that sees "community policy" as a White Goddess served by an elite priesthood of enlightened decision-makers.[12] However beneficent the Platonism that inspires it, I am uneasy about a cast of mind that produces observations like this one: "Defense counsel too often appears to act as the 'mouthpiece' of a dubious client rather than as an instrument of community policy."[13] That makes me bridle, and shudder a bit, too.

It must also be said that the authors' attacks on shortcomings in contemporary sanctioning arrangements are frequently polarized to the point of distortion and, too often, uninformed. To what extent this tendency derives from the rapid-transit survey method they adopt and to what extent it results from their view that problems some consider hard are really very easy I am unable to say. A few examples, drawn from the chapter entitled "Sanctioning Measures and the Sharing of Respect," may illustrate what I mean by these strictures.

The authors attack the disparity in criminal penalty provisions from one state to another.[14] The point seems to be that it is invidiously discriminatory for a robber to be subject to a maximum of five years' imprisonment in one state and ten years' in another. Why this is bad the authors do not say. Would they also look with disfavor upon indeterminate sentencing, under which each robber may be treated somewhat differently from his fellow-robbers? Would they prefer a situation in which all states have uniformly severe penalties to one in which some are severe and others light? If not, "discrimina-

[11] Questions of this order are posed with much discernment in HART & SACKS, THE LEGAL PROCESS (Tent. Ed. 1958), a work that the authors might profitably have consulted. See, in particular, pp. 770–88, 905–13.

[12] For an account of the development of Lasswell's political ideas, see BIRNBACH, NEO-FREUDIAN SOCIAL PHILOSOPHY ch. 7 (1961). The following passage is particularly apposite: "By the 1950's Lasswell had boxed the compass of political science. From the cool reporting of hard and often unpleasant facts he had turned political science into an almost sentimental defense of a preferred set of values. A study of influence and the influential that had unmistakable anti-democratic implications had become a study of power that paradoxically rationalized an egalitarian society replete with individual rights." *Id.* at 175.

[13] P. 91.

[14] P. 28.

tion," however defined, hardly seems the gravamen of their complaint. This and similar examples of "discrimination" in legislative prescriptions are capped by the observation that "Moreover, thus far at least, none of these forms of discriminatory legislation has met with serious challenge on constitutional grounds."[15] I should like to believe that this sentence is a superb demonstration of deadpan humor, but the context suggests that it is serious.

Throughout, the authors display a penchant for the easy generalization, aggravated by an almost obsessive preoccupation with what they discern as sinister official motives. Thus, the felony-murder rule (sanction or primary norm?) is characterized as resulting from "the concern of men of property for property."[16] I doubt that many will agree. The well-known deficiencies of the felony-murder rule probably result not from any such conscious aim but rather from premature over-generalization by common-law judges, compounded by legislative inertia. As for the authors' next example of "the concern of men of property for property," the disparity of penalties in a given jurisdiction for assault and robbery, it is enough to observe that the chaos in sentencing provisions in American penal codes is not the result of bad thoughts; it is the result of no thought.

Other difficult problems receive equally jejune treatment as the authors rush from example to example. The scope and timing of judicial review of the exercise of summary powers to condemn or quarantine is not an easy problem, but one would never guess that there is a problem at all from the authors' denunciation of a decision[17] denying habeas corpus to one summarily quarantined. *Gregoire v. Biddle*[18] is roundly denounced, but the question of just what sanctions ought to be available against government officials who inflict or threaten to inflict malicious harms while purporting to act in their official capacity is not dealt with. Indeed, there is no suggestion that such a question exists.[19] *Costello v. United States*[20] is treated as having "furnished *carte blanche* to federal Grand Jury investigators to found their indictments on gossip, hearsay, and suspicion."[21] The authors' puzzlement at the "strange unanimity"[22] of a Supreme Court opinion written by that old enemy of the Bill of Rights, Hugo Black, might have been dispelled if they had stopped to think about the efficacy of the rule that *Costello* supplanted. Under that highly formalistic view, indictments founded on hearsay could stand if there was even a scintilla of competent evidence, however marginal, before the grand jury. Although there are overly-broad statements in the opinion, the

[15] Pp. 30–31.

[16] P. 30.

[17] State *ex rel.* McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973 (1918).

[18] 177 F.2d 579 (2d Cir. 1949).

[19] Compare the discerning treatment of the subject in HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1215–24 (1953).

[20] 350 U.S. 359 (1956). [21] P. 33. [22] *Ibid.*

gist of *Costello* is its rejection of the view that rules of evidence designed to control the course of adversary proceedings should also control the grand jury process. In lieu of stopping to think about all this, the authors might merely have taken note of the thoughtful treatments in a number of leading law reviews supporting the *Costello* result.[23]

And so it goes, page after page, example after example.

The authors' cavalier way with hard problems is not limited to "legal" analysis. They assert that capital punishment bears unequally upon disadvantaged groups, particularly upon Negroes. I am quite prepared to believe that it does and to view that fact as one of the weightiest objections that can be levelled against capital punishment. But I can hardly accept the evidence they adduce as very probative, much less believe that it will convince those who need convincing. The evidence consists solely of a table showing the number of persons executed in the United States, by race and offense, for the years 1930–1959. It shows, simply, that almost as many Negroes as whites were executed for murder and that far more Negroes than whites were executed for rape. It does not show the distribution of Negroes and whites in the population. Nor does the table show anything about the number of capital offenses known to the police as distributed by race of the alleged offender, the number of alleged offenders as so distributed who were prosecuted, convicted, etc. I have little doubt what the relevant statistics would show. But surely the table in question does not show it. Yet the authors tell us solemnly that the table is "official" and that it "shows a shocking preponderance of Negroes over whites among persons executed."[24]

The evidence for assertions is not always thin. Sometimes it is non-existent. We are told, for example, that

> The situation [of indigent defendants in criminal cases] is aggravated by the fact that under the pressure of chronically congested dockets most of our state courts repeatedly tolerate a lapse of many months between indictment and trial. These are the operational facts as distinct from the doctrinal prescription of a 'speedy trial.'[25]

No supporting citation is given, which somewhat compounds the difficulty of interpreting words like "most," "repeatedly" and "many months."

Given the authors' shotgun approach, it was perhaps inevitable that little of substance could have been said about any of the examples. At most, as I have suggested, they add up to a catalogue of injustices, most of them quite familiar. So far as their relation to each other or to "the sharing of respect" goes, they might just as well have been put in alphabetical order or drawn one by one from a hat. And they do nothing to buttress the authors' previous-

[23] See, *e.g.*, Notes, 43 CALIF. L. REV. 859 (1955); 69 HARV. L. REV. 383 (1955); 104 U. PA. L. REV. 429 (1955); 65 YALE L. J. 390 (1956). Compare Note, 55 MICH. L. REV. 389 (1956), disapproving of *Costello* in a treatment almost as cursory as the authors'.

[24] P. 56. [25] *Ibid.*

ly quoted justification for the book: "the failure to consider the sanctioning process as a whole has resulted, to a significant degree, in some of the most damaging faults of our legal order." If the authors' assertion is only that American criminal law is in a bad way, their message is not earth-shaking, nor does it require "a five stage problem-solving model, seven functional categories of decision making, eight goal values, five objectives of sanctioning, five legal codes, and four characteristics fundamental to prescribing an adequate sanctioning system"[26] to elucidate the point.

The book's failure in the large makes all the more noticeable some venial sins of presentation. Quotations are wrenched from their context, often with misleading effect.[27] The use of authority is, to put it charitably, whimsical.[28] Large segments of the book appear to have been written with a pair of scissors. Even syntax suffers.[29] The stigmata of haste and carelessness abound.

All of these particular shortcomings, damaging as they are, fade into insignificance when we return, as we must, to the authors' failure to establish any meaningful connection between the catalogue of injustices to which Part I of the book is devoted and their central proposition: that these injustices result from failure to "consider the sanctioning process as a whole." The problems of the legal order are too diverse and too intractable to yield to the solvent of Grand Theory.[30] The elaborate conceptual apparatus[31] that the authors propose bringing to bear on sanctioning problems is not likely to "inspire" —or even "provoke"—the work that they think needs to be done. [32] Their

[26] Robinson, Book Review, 30 GEO. WASH. L. REV. 155, 160 (1961).

[27] A single example will have to suffice. The authors' discussion of the discrimination latent in differing criminal penalties for the same offense in different states is climaxed with this observation: "Depending only on the *locus in quo* the law thus lays 'an unequal hand on those who have committed intrinsically the same quality of offense. . . .' " P. 56.

The reference is to Mr. Justice Douglas' opinion for the Court in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), invalidating a sterilization statute applicable to "habitual criminals" on the ground that the definition of that term was not based on a rational classification since, *inter alia*, "larceny" convictions qualified but "embezzlement" convictions did not.

[28] Again, a single example will have to do. After a reference to Griffin v. Illinois, 351 U.S. 12 (1956), the authors suggest that if its principle is extended to other means of legal assistance, "an improvement [in the plight of indigent criminal defendants] may at last be in sight." But they conclude dolefully, "at this stage, however, the possibility is highly speculative." P. 50.

One would at this point expect a reference to post-*Griffin* experience, but the citation turns out to be an article published six years before *Griffin*.

[29] See, *e.g.*, the sentences quoted *supra* notes 8 & 9. Sometimes the difficulty is more than syntactical. What, for example, does this sentence mean? "*When sanctions are examined as a whole the result is to strengthen the factors that tend to bring sanction law into more consistent and effective harmony with the goals of the American system of public order.*" P. 6. (All italicized in original.)

[30] The phrase, complete with derogatory implications, is borrowed from C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION (1959).

[31] Developed in great detail in Part II of the book, particularly in Chapter 11.

[32] P. 11.

prospectus is unconvincing. Perhaps a concrete demonstration of the utility of their approach would yield more persuasive results. I suspect that the demonstration will have to come from their hands. They are not likely to enlist others.

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The Legal Process: An Introduction to Decision-Making by Judicial, Legislative, Executive, and Administrative Agencies. By CARL A. AUERBACH, LLOYD K. GARRISON, WILLARD HURST, and SAMUEL MERMIN, San Francisco: Chandler Publishing Company, 1961. Pp. xxvii, 915. $10.00.

This superb book is designed, in the words of the authors, "to introduce the beginning law student and the college upper classman and graduate student to the operation of our legal system." While there is no reason to assume that course materials intended for one of these audiences would be less suitable for the others, this reviewer's perspective is primarily that of a teacher of undergraduates in a liberal arts program and of graduate students in political science who envisage careers as university teachers or as government servants.

In judging the value of this or any other work assigned for use as teaching materials, one necessarily must evaluate an author's performance against one's own criteria of the purposes to be served by a one-course treatment of the role of law in the governing of our society. It is obvious, too, that one's judgment must be influenced to some degree by the curricular resources available at a given institution. If such subjects as Roman law, constitutional law, international law, comparative law, and English constitutional history are available to students, then the selection of materials should avoid extensive duplication of the coverage of other courses. But with this qualification, it would seem that a judgment concerning the value of a text should be based on its ability to help the instructor achieve the following objectives. First, the course should make the student aware of the vital day-to-day role of law in making possible, or more effective, the functioning of a complex society. Stated differently, such a course should destroy the widely-held view of most liberal arts students that law is a technical body of material of only marginal relevance to the real workaday world. The importance of the ability of the legal system to furnish answers to problems of varying difficulty in an orderly sustained way should be a dominant note in such a course. Secondly, it should reveal to the student how the legal system operates. The form of reasoning used by judges and lawyers, and the roles played by legislators, administrators, judges, and lawyers should be treated in sufficient depth so that legal values and the results of legal reasoning can be compared with other forms of decison-making, and so that students will see how legal institutions are relat-