

4. Could there be a legal system without sanctions?

I want to argue for three, separate, claims—each of which answers the prompt’s question in a significant way. First, I argue that it is logically possible to conceive of a legal system as one that does not provide for sanction. Second, I argue that insofar as a legal system is a system that concerns the conduct of humans, a legal system must have sanctions. (As an aside, I also argue that practical, human requirement is not because of some failing of humans to be good—I argue—but because of intrinsic human goodness itself, discussed below.) Third, and finally, I consider the meaning of the word ‘sanction’; and I argue that—while it is impossible (per my second argument) to conceive of a humanly possible legal system without coercion, it is possible to conceive of one without sanction but with coercion.

Before I begin, I want to make one note about the prompt. In particular, the prompt, *prima facie*, invites a ‘yes’ or a ‘no’. If I wanted to answer it with a yes, all I would need to do is provide one, single example of a legal system without sanctions: the question is an existential one—the answer to which depends on the existence of even one legal system without sanction. However, arguing that the answer is ‘yes’ simply because of the existence of a logically possible though humanly infeasible system seems unfulfilling. Therefore, I begin by answering the prompt with a simple ‘yes’ due to that logical (not practical) possibility. I then answer the question practically construed with a ‘no’—a no related to sanctions defined in one way. Finally, my answer switches back to a ‘yes’ in the third argument, because of a reinterpretation of the word ‘sanction’. These changes in answer—from yes to no to yes again—do not represent uncertainty about the outcome of the enquiry. Instead, they represent three clear answers to distinct interpretations of what it is for a legal system to exist; and what a sanction is.

One final preliminary: I begin without fully defining the term ‘sanction’. I will take up, in detail, work related to the definition of a sanction; but that work fits best nearer the end of the essay. For now, I use ‘sanction’ to mean an intuitively plausible definition: ‘coercive treatment imposed after the commission of some act, in response to that act or to something about the actor exhibited by the commission of the act (e.g. some bad character)’. A more complete definitional discussion must wait.

Now, I consider whether it is logically possible to conceive of a legal system without coercive sanctions. First, I shall consider a legal system that does not itself stipulate sanctions, but which (explicitly or implicitly) stipulates conduct that, if done, a third, non-legal party separately sanctions. A case can be made for such a system: consider a primitive legal system of rules all passed by a king, including rules such as ‘a man must remove his hat in church’ (primary rule) along with other rules, such as ‘the king determines whether a rule breach occurred’ and ‘the king’s new rules can overrule previously-made rules’. When a breach occurs, the legal system itself stipulates no specific sanction; however, a separate, non-legal body may step in to sanction the wrongdoer. Here, sanctions evolve naturally—if a man does not remove his hat in church, he may be scolded by his fellow churchgoers or shunned until he complies. These pseudo-sanctions

are not stipulated by the system, but they are inextricably linked to it: the hard treatment would not occur but for the rule. It is thus, in a sense, possible to consider such legal systems to lack sanctions or coercive measures. That consideration flows solely from the condition that sanctions are imposed by an external body rather than by the legal apparatus itself.

But, if the hard treatment would otherwise be prohibited by the legal system; or even if the hard treatment is in any way caused by the legal system, then the coercive measures or sanctions are closely tied to the law itself. Also, contracting out to third-parties to punish lawbreaking is already done (private prisons; or charitable workers replacing probation officers). In both the primitive case and the modern privatized case, the hard treatment is allowed or caused by—if not given or necessarily stipulated by—the legal system. Thus, I consider this kind of possible counterexample to the logical necessity of sanction to be unsuccessful: even if in the technical sense sanctions are outside the legal system, they are so closely tied as to be rightly considered part of it.

Let us consider a more promising avenue for logically eliminating sanctions from a legal system. I want to consider Raz's position: there might be some impractical but logically possible society where a legal system could be devoid of coercion and sanctions. By this I mean a legal system devoid both of its own coercive or punitive mechanisms and of externally-applied sanctions (as discussed above). To illustrate such a non-coercive and non-punitive system, consider a calm and well-off community with five policemen. In the community's first year of existence, the policemen patrol, but there are no complaints or arrests. The community then cuts the police budget, so there are only two police. In the following year, they cut the budget to only one part-time officer. The next year, they cut the police budget entirely.

What does this lack of law-enforcement entail about the community? Note that it does not entail a lack of law—merely a lack of needed enforcement. Law could still be necessary to solve coordination problems: which side of the road to drive on, etc. The lack of enforcement also does not entail a lack of 'gaps in the law': community members could disagree about what the law is and take matters to court. The court acts as an arbitrator not backed up by threats, much like certain religious courts often work today. So, the legal system can still deal with disputes between members with both parties willingly complying with a verdict. Drawing these implications makes such a non-coercive system seem tenable—both logically and possibly (prima facie, wrongly) practically so. This is the example that demonstrates that insofar as the prompt's question is asking about whether a legal system could *logically* exist without sanction, the answer is: yes.

I move next to the second argument I said in the introduction I would make: that such a legal system is humanly impossible (and that its impossibility flows from human goodness rather than human badness). To make that argument, I want to briefly set all the preceding work aside and consider something which may, for a few sentences, seem irrelevant. Kramer (and others) point out that certain liberties are binary. Kramer points out that my liberty to do X at T (what I shall call (X,T)) is a binary: I am either free to do it or I am not. A post-facto sanction operates by limiting the chains of acts which I am free to do. For example, if I do X at time T, then I may be

imprisoned and unfree to do Y at time U. So, it is not possible to engage in actions (X,T) and (Y,U). Without the sanction, I would be free to perform the act-chain (X,T), (Y,U). In this way, sanctions do not make me less free to do the single, punished action but rather limit the act-chains I am free to do.

Now, how does this relate to the non-punitive and non-coercive legal system discussed above? In our normal legal systems with sanctions, the sanctions operate on our choices by closing act-chains. These act-chains would remain open in the non-coercive legal system. The community members would simply choose not to engage in certain act-chains.

Consider Raz's term for the non-sanctioning society, often copied in the literature: a 'society of angels'. How would those angels behave? Each angel would understand the needs of the community and put those needs above her own and above those close to her despite never being forced to. Friends would voluntarily subordinate one another's interests to the community's. All of us subordinate our interests and the interests of those close to us in our day-to-day lives. For example, I do not assault my friend's competitor in a running race despite knowing my friend's life would be better if her competitor were slowed so she could win. It may feel wrong to abstain from tripping the other runner—say, if winning means a great deal to my friend (maybe the prize is money to be used for her sister's cancer treatment). But, I might rationalize: if I assault the runner I would be imprisoned and unable to help in other ways, say by sharing my wages.

The best option for my friend might be for me to engage in act-chain (assault, today) and (share wages, in future). But, the law stipulates that I can only do the first act or the second—not both. I am unable to perform—coerced out of performing—the act pair.

In the Society of Angels, there is no such coercion. Instead, it is up to me whether to engage in the assault, the wage-giving, or both. Each angel would have to subordinate her friends' interests to the community's—a choice which a coercive legal system typically allows us not to have to make.

So, our human desires to help those close to us instead of wider society make impossible the non-sanctioning legal system. As an aside, this means that I don't think Raz's 'Society of Angels' is populated by angels: I think angels would care about friends more than about society. The Society of Angels is necessarily populated with cold agents lacking in love for individuals. Sanctions are more than punishments: they allow us to make choices that our morality would otherwise stop us from making. A non-coercive legal system is not for a society higher than humanity but for one much lower. This moral evaluation of the society of angels is, however, only an aside. The essential point is that the non-sanctioning system is humanly impossible

One might respond that true dilemmas between helping friends and the wider society are rare. Most of us, says the interlocutor, do not have friends dependent on winning races to save siblings' lives. But, many have friends whose lives would be made immeasurably better if a competitor for a job got a lower mark in finals (say, from getting an unpleasant if not dangerous

virus during exams, one which I could give them). Many parents in the U.S. can cheat to get their children into particular universities. These are not uncommon situations. Still, though, you might reply, all that it takes is one compelling example of such a legal system where these dilemmas do not occur to show that such a system could be humanly possible. Some, e.g. Raponi, have emphasized international law as an example of a non-coercive legal system. It is worth noting that the same kind of moral dilemmas that occur between individuals might not occur in a non-coercive international law (state to state) context. The bond between a state and an individual is different from the bond between two individuals and gives rise to different kinds of moral conflicts. A state does not have the same kind of deep, unique interest in each of its citizens as one individual has for each friend. Again, my claim in this section of the essay is that such a system could not occur among humans—plausibly, and logically, it could occur among states (I dismiss penumbral, international-law, cases in this essay).

Thus far, I argued that due to Raz's example, a legal system sans sanction is logically possible. Then, I argued human morality—our care for those close to us—makes it humanly impossible. In this, final argument, I argue we could allow for a legal system sans sanction if that legal system still had coercion. It may be if I choose to assault the runner, I will be imprisoned—but imprisonment needn't carry the censoring sting we usually think inherent in 'sanction'. It might simply be a matter of choice architecture. Or, separately, much like we confiscate drivers' licenses from those with epilepsy, we might consider all misconduct some form of illness, much as some view pedophilia, and confine people after bad conduct for 'treatment'. There is no obvious reason a legal system could not both logically and humanly eliminate censoring sanctions so long as that system maintained coercion. (Note that it would be hard, in such a system, to argue for only ex post facto coercion and not ex-ante coercion, but whether that is a problem is a different question.)

In this essay, I began by offering two examples of possible legal systems that would demonstrate the logical possibility of a legal system without sanction. While the first possible example failed, the second succeeded, and thus I showed a legal system to be logically possible without sanction. I then argued that—because of the choice architecture instantiated by the ways sanction limit our possible act-chains, and because of humans inherent caring for those close to us, such a non-coercive legal system is humanly impossible. Finally, I argued that a legal system sans sanction is possible—both logically and humanly—if we dispose of sanctions (which include intrinsic censure) without disposing of coercion.