

## Sanctioning

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That legal authorities impose sanctions on subjects that contravene the law is one of the reasons most often invoked to argue that legal systems are coercive. The sanctioning<sup>1</sup> of subjects is widely accepted as ubiquitous in the practice of legal authorities. At times, even stronger claims are made. It is not uncommon to hear philosophers claiming that sanctioning is central to the efficacy of legal systems, or – even though much less common nowadays – that it is conceptually necessary for the very existence of legal systems. Despite expressing different ideas about sanctioning and legal systems, these claims presuppose something in common: that we know what sanctioning actually is. It is undoubtedly the case that we can sometimes identify examples: an authority is certainly sanctioning when it sentences a murderer to life-imprisonment. But some cases are a bit more puzzling. Is an authority sanctioning when it orders someone to pay compensation for spitting in someone else's face in public? How about when an authority orders the recall of a number of cars that have been sold with a hidden defect, the presence of which is known by the automotive manufacturer? And what if an authority orders a musician to stop playing loudly at night given recurrent complaints in the neighbourhood? This lack of clarity

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<sup>1</sup> 'Sanctioning' also has a positive meaning. It can mean 'giving approval or effect'. In the paper, however, I only use the word with its negative connotation; it refers to the action of imposing a sanction.

about cases may prevent us to fully assess the extent in which legal systems rely on sanctioning and the role sanctioning plays in legal practice.

Legal philosophers have proposed various accounts to determine when an action is a token of sanctioning.<sup>2</sup> Traditionally, an action has been considered a token of sanctioning if, and only if, three conditions obtain: (i) its performance imposes unwelcome consequences on the targets<sup>3</sup> (ii) it is performed as a response to a breach of a duty, and (iii) it aims to discourage behaviour.<sup>4</sup> Some philosophers have – correctly, in my view – criticised this account in relatively recent works.<sup>5</sup> Condition (iii), they submit, is not a necessary condition: many actions that plausibly count as sanctioning are not aimed at discouraging behaviour. As an alternative, they have proposed that we'd be better off sticking to (i) and (ii): sanctioning is an action the performance of which is unwelcome to the target and is performed as a response to the target's breach of a duty.

It is my claim that, despite capturing important elements of the nature of sanctioning, this latter account is over-inclusive; ultimately, it classifies certain actions as sanctioning despite there being overriding reasons why such actions should not be classified as such. My goal in this paper is to propose an alternative account of sanctioning that avoids this problem.<sup>6</sup> The structure of the paper is as follows: In section 1, I qualify the account that characterises sanctioning as a combination of (i) and (ii) in order to present it in its most plausible form. I call the qualified account '(S1)'. In this same section, I highlight some virtues of (S1)

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<sup>2</sup> In the paper I take *sanctioning* to be a type of action. That is why I will often use the phrase 'token of sanctioning' to refer to those actions that belong to that type of action. Sometimes, depending upon the context and the point being made I also use phrases such as 'an action is an example of sanctioning', 'an action counts as sanctioning' or 'an action is sanctioning'. I intend all of them to effectively mean the same thing: that a particular action is a token of sanctioning.

<sup>3</sup> Some people refer to it as an 'evil', which sounds stronger than 'unwelcome'.

<sup>4</sup> This view is influenced by Jeremy Bentham who held that sanctions are those measures imposed to motivate compliance. See, Jeremy Bentham, *Of Laws in General* (HL. Hart and Frederick Rosen eds, Athlone Press 1970) 134–136 (where he even regards rewarding as sanctioning). Perhaps the most explicit defence of this account can be found in Hans Oberdiek, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 *Am. J. Juris.* 71, 75–79. Joseph Raz seems also to hold this account. See, Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 160.

<sup>5</sup> See, Grant Lamond, 'The Coerciveness of Law' (2000) 20 *Oxford Journal of Legal Studies* 39, 58–59. See also, Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2007) 42 *U. Rich. L. Rev.* 1195, n 80.

<sup>6</sup> Despite the examples of sanctioning discussed in the paper being all from the legal domain, the account of sanctioning I propose can be easily extended to sanctioning outside the legal domain.

and present hypothetical cases to raise some doubts about its plausibility. In section 2, I propose a new account of sanctioning that retains (S1)'s plausibility and is immune to the concerns raised against (S1). Towards the end, I briefly highlight some advantages of adopting this new account.

### **1. Sanctioning: Unwelcome and Performed as a Response to Wrongdoing**

As already noted above, some philosophers have proposed that an action counts as sanctioning if, and only if, (i) its performance brings about unwelcome consequences to the targets, and (ii) it is performed as a response to the breach of a duty.<sup>7</sup>

One may already ask in regard to (i): what is the relevant baseline against which to assess whether the consequences are unwelcome? At first glance, two candidate baselines stand out: (1) the state of affairs prior to the breach; and (2) the state of affairs prior to the application of the consequence. According to (1), a consequence is unwelcome if, and only if, it makes the target worse off than she was prior to the breach. According to (2), the consequence is unwelcome if, and only if, it makes the target worse off than she was before suffering the consequence. On further reflection, however, neither of these baselines are satisfactory. Here is one example that illustrates why (1) is problematic: Imagine two salespersons are competing to close a multi-million-pound deal with a company. Whoever gets to the company's office first will close the deal and receive a sales bonus. In order to arrive first, one of the salespersons drives significantly above the speed limit. As a result, she arrives first, closes the deal, and receives a hundred thousand pounds as a bonus. However, in response to her reckless driving, a substantial fine (of a thousand pounds) is applied. If (1) comprises our baseline, we must conclude that authorities are not sanctioning the salesperson when they impose this fine because this consequence doesn't

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<sup>7</sup> Grant Lamond, for instance, claims that 'sanctions are disadvantages which are prescribed for the breach of a duty', which suggests that he defends the view on sanctioning currently under consideration. See Lamond (n 6) 58. A similar view is endorsed by John Austin: 'The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*'. John Austin, *The Province of Jurisprudence Determined* (Wilfrid Rumble ed, Cambridge University Press 1995) 22.

make her worse off than she was prior to the breach of the law (were it not for the breach, the deal wouldn't be closed and she wouldn't receive the bonus). More than that, according to (1), the application of a fine would be regarded a case of sanctioning in this scenario only if above a hundred thousand pounds. That is too demanding.

Setting the baseline as (2) also has problems. In some cases, sanctioning frees someone from a heavier burden. Imagine that a company is violating their employees' rights by not paying all legally required benefits. As a result, the company suffers heavy pressure from labour unions, and their own employees – in protest – reduce their productivity (which decreases the company's revenues). By being ordered to both pay the benefits to its employees and a fine, the pressure ceases and the workers resume their normal activity, which makes the company better off than it was prior to the application of this consequence.

Even though it might be possible to work out these baselines to circumvent these problems, it is better and simpler to adopt a different view: a consequence is unwelcome when most people are disposed to believe that it is unpleasant, undesirable or detrimental to those who bear it. Regardless of the fine not being sufficient to render the salesperson worse off than she was prior to the breach, many would usually assume that she would rather not pay the fine if she had the chance. The same can be said about the company. The proposed baseline has the advantage of avoiding the problems raised against previous baseline approaches without the loss of explanatory power. On top of that, according to this proposed view, sanctioning involves bringing about a consequence *a given community* takes to be unwelcome, which helps vindicating the common intuition that one can be sanctioned despite having idiosyncratic preferences: the masochist who regards corporal punishment as welcome is still being sanctioned in the event authorities order the infliction of corporal punishment upon him.<sup>8</sup>

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<sup>8</sup> It is important to point out, however, that when the consequence turns out to be considered as welcome by the target, some people may claim that it won't be the sort of sanction capable of coercing. See, Lamond (n 6) 60; Yankah (n 6) 1216–1217; Oberdiek (n 5) 88–89.

Some further qualifications are called for. There is reason not to characterise sanctioning as an action performed as a response to the *breach of a duty*. For starters, we need to qualify ‘duty’. Are we talking about moral duties? If yes, then the view is implausible, for there certainly are actions most people would consider as sanctioning even if not being performed in response to the breach of a moral duty (e.g. applying a fine in response to jaywalking). So, probably ‘duty’ must also encompass ‘institutional duties’ (which would include legal duties). However, articulating the content of ‘duty’ in this manner is not devoid of problems. Sanctioning, arguably, occurs most prominently in the domain of criminal law. And characterising sanctioning as a response to a breach of a moral or an institutional duty is at odds with what some philosophers of criminal law defend. Some of them reject that individual criminal laws prescribe duties, prohibit conduct or command subjects; instead, so they maintain, individual criminal laws merely communicate the wrongfulness of certain types of conduct or define what constitutes a criminal offense; they merely give *reasons* for action.<sup>9</sup> From this view, it follows that when one breaches an individual criminal law, one does not breach an *institutional duty* (i.e. a legal duty).<sup>10</sup> Be this as it may, these philosophers wouldn’t resile from the claim that sanctioning occurs in the domain of criminal law. As a result, they would reject an account that requires sanctioning to be an action performed as a response to the breach of a duty.

An account of sanctioning need not, and therefore should not, adjudicate between competing theories of criminal laws. It is safer to be as ecumenical as possible, lest the plausibility of the account suffer. Accordingly, substituting the phrase ‘response to wrongdoing’ for ‘response to the breach of a legal duty’ is the most ecumenical option. ‘Response to wrongdoing’ is broad enough to include breaches of institutional duties, and is consistent with theories of criminal law that reject viewing individual criminal laws as imposing duties.

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<sup>9</sup> See, e.g., Anthony Honoré, ‘Real Laws’ in PM. Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A Hart* (Clarendon Press 1977) 117–118; RA Duff, ‘Rule-Violations and Wrongdoings’ in Stephen Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 53.

<sup>10</sup> And given that some of those breaches aren’t breaches of moral duties, it would follow that there are cases where neither a moral, nor an institutional duty are broken.

‘Response to wrongdoing’ also calls for some qualification. To say of an action that it is a response to wrongdoing is to say that the occurrence of wrongdoing is both a reason and a condition for performing the action. Additionally, to be a response to wrongdoing the action must be performed by someone – normally an authority – who has a duty or is at liberty to perform the action in case the wrongful state of affairs obtains.<sup>11</sup> In the legal context, an action is a *response to wrongdoing* when the occurrence of a legally specified state of affairs is, according to the law, a reason and a condition for someone – normally a legal authority – to be at liberty or duty to perform a legally specified action.<sup>12</sup>

As for the meaning of ‘wrongdoing’, this term refers here to an action that is, according to a normative point of view, wrongfully performed. In the legal domain, for example, the action must be wrongfully performed according to *the legal point of view*.<sup>13</sup> Performing the action, therefore, may or may not be morally wrongful.<sup>14</sup> This latter qualification is particularly important if we want – as I think advocates of this view do – to consider as examples of sanctioning those cases in which authorities impose an unwelcome measure upon those who perform the so-called *mala prohibita* conduct (e.g. jaywalking).

Given the qualifications above, we can restate this account of sanctioning as follows:

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<sup>11</sup> For simplicity’s sake, I am not considering cases where an action *will be performed* in case wrongdoing occurs. Although this expresses something slightly different from cases where the action shall or may be performed in case wrongdoing occurs and arguably satisfies at least one sense of ‘response’, cases where an action *will be performed* if wrongdoing occurs are only relevant to our discussion when the person who performs the action is either at liberty to perform it or has a duty to perform it.

<sup>12</sup> Sometimes, however, authorities are mistaken about whether the state of affairs have really obtained. All evidence available may be sufficient to warrant their judgment that the legally specified state of affairs have obtained, and yet it might not have. As a result, authorities may perform an action in response to the legally specified state of affairs they *believe* to have obtained. Those cases are still cases where authorities are performing an action as a *response*. Nevertheless, it is not plausible to consider as *responses* those actions authorities perform without relying upon any evidence of the occurrence of the legally specified state of affairs. In this latter case, it is simply arbitrary to perform these actions.

<sup>13</sup> I take the phrase to refer to the point of view of the legal institution in place, i.e. the legal system. The legal point of view, in other words, is an institutional point of view.

<sup>14</sup> Even natural law theorists can agree with this, as they allow for bad laws to be part of the legal system as well as for the possibility of authorities being mistaken as to the real moral status of some legal norm considered part of the institutional framework.

(S1) Sanctioning is an action<sup>15</sup> (i\*) the performance of which is commonly regarded as being unwelcome to the target, and (ii\*) is performed as a response to wrongdoing.<sup>16</sup>

Formulated in this manner, (S1) seems to do fairly well. Cases commonly viewed as sanctioning do satisfy (S1). Think of the example given in the introduction: authorities sentence a murderer to life-imprisonment. Life-imprisonment is certainly something unwelcome. On top of that, provided authorities have sentenced the murderer in virtue of murdering and that murdering is a wrong, the action is performed as a response to wrongdoing. Similar things can be said about other cases commonly seen as sanctioning.

So long as an action satisfies (i\*) and (ii\*), there is, according to (S1), no further restriction placed on it that must be met for it to constitute a sanction. Indeed, virtually any action could be seen as sanctioning provided that the conditions are met. The most common and telling examples of those actions are the ordering of incarceration or corporal punishment, and the imposition of fines. But nothing, according to this account, prevents considering an order for someone to carry out community service, the withholding of benefits, the imposition of a restraining order, or ‘the deprivation of legal rights and status’<sup>17</sup> as sanctioning when they satisfy the conditions of (S1). The actions, according to (S1), need not belong to a particular branch of law, nor do they need to have a particular aim; they can, for instance, have the aim of discouraging behaviour, preventing further harm from occurring (as is the case with restraining orders), or imposing punishment; indeed, the action may even possess several aims at once. That seems a good result.

Even though (S1) places no further restrictions upon the kind of action which can be considered a token of sanctioning, (S1) is able to separate tokens

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<sup>15</sup> Omissions can also be included.

<sup>16</sup> I think a charitable interpretation of what Grant Lamond has claimed would allow us to conclude that he actually endorses something very close to (S1). Despite his explicit characterisation of sanctioning involving the phrase ‘breach of a duty’, at times what he says seems to suggest that he means something very close to my ‘response to wrongdoing’. See, e.g., Lamond (n 6) 43, 59.

<sup>17</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford University Press 1980) 150.

of sanctioning from some actions that, despite resembling sanctioning to a certain extent, are not plausibly regarded as such. Take, for instance, actions generally considered as *the order to pay taxes* (henceforth ‘*taxing*’). Here is an example: authorities order a merchant to pay taxes for selling fish. The order is unwelcome to the merchant: it makes him give some of his money away. The order, moreover, is made in response to a legally specified state of affairs, namely fish being sold. Still, it would be odd to classify this order to pay taxes as an example of sanctioning. (S1) vindicates this intuition. It is odd to classify this action-token as sanctioning, for the authorities’ order was not made in response to wrongdoing. Assuming most paradigmatic cases of taxing are significantly similar to the fish case, it seems that (S1) is capable of isolating sanctioning from them. In fact, judges usually distinguish tokens of *sanctioning* from most tokens of *taxing* based on the same criteria – and this reinforces the claim that (S1) has an intuitive appeal.<sup>18</sup>

Most philosophers would accept that *sanctioning* and *nullifying* are different action-types.<sup>19</sup> (S1) supports this view. Declaring a contract null for its lack of consideration is an example of a case where authorities are merely nullifying. Even though the nullification may be unwelcome to someone who has her contract nullified – she may, for example, lose a good bargain as a result – advocates of (S1) wouldn’t consider it as sanctioning. Two differences stand out: first, it is not made in response to wrongdoing. Second, sometimes the nullification doesn’t bring about any *change* in people’s normative positions; an authority who nullifies a contract is sometimes just *announcing* that, according to the law, the contract has never existed and, thus, has never created any rights and duties. This is not to say, of course, that some case of nullifying cannot be a

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<sup>18</sup> See, for instance, *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566, for the contrast between taxes and penalties – the latter seems to be used as something semantically close to ‘sanctions’. Citing a previous decision, the Supreme Court said: “In distinguishing penalties from taxes, this Court has explained that ‘if the concept of penalty means anything, it means punishment for an *unlawful act or omission*.’” (Ibid 37, Emphasis mine). Some philosophers also rely on this aspect to distinguish sanctioning from taxing. See, H.L. Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012) 39.

<sup>19</sup> Frederick Schauer is a recent exception. He considers some nullities as sanctions. See, Frederick Schauer, *The Force of Law* (Harvard University Press 2015) 28–30. However, he does so by characterising sanctions as whatever ‘law imposes in the event of noncompliance with legal mandates’ (ibid 129.), which is a quite broad, and unhelpful, characterization.



case of sanctioning: the general types are different, but some tokens may coincide.

Furthermore, (S1) can also vindicate the intuition that holds that when authorities merely remove or suspend subjects' powers they are not thereby necessarily sanctioning subjects. Suspending a police investigator from investigating a case is an example where authorities are simply suspending a power. And regardless of this action being probably unwelcome to the investigator – she might have an interest in being the one who solves the case – because it is not made as a response to wrongdoing, (S1) wouldn't consider it as sanctioning.

What I've said above about (S1) being able to distinguish cases of sanctioning from cases where authorities are taxing, nullifying, and suspending or removing powers doesn't suggest that (S1) implies that if an action is a token of sanctioning, then it is necessarily not a token of, say, taxing. That view would be misguided: nothing prevents a single action from being simultaneously a token of sanctioning and taxing (or other action type).

### 1.1. Objection

Alas, (S1) cannot hold its intuitive appeal everywhere. Below I will advance a series of hypothetical cases to show that. Before doing so, I need to say something briefly about my use of hypotheticals in the discussion. To begin, the hypotheticals shouldn't be seen as an attempt to give knock-down arguments against (S1). I won't defend that we should *reject* (S1) solely in virtue of it failing to vindicate the intuitions pumped by the hypotheticals. Intuitions vary and are not always reliable. As some say, one person's *Modus Ponens* is another's *Modus Tollens*. In fact, despite not articulating the reasons why, advocates of (S1) as well as those of rival accounts have considered cases similar to the hypotheticals that I will present as sanctioning.<sup>20</sup> The purpose of the hypotheticals is to raise some doubts about (S1)'s plausibility. They will simply show that – at least to *some* people – (S1) occasionally lacks intuitive appeal. Be this as it may, by raising

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<sup>20</sup> See, e.g. Grant Lamond, 'The Coerciveness of Law' (2000) 20 *Oxford Journal of Legal Studies* 39, 60.

doubts about (S1)'s plausibility the hypotheticals can still be helpful. By causing – in some people – some discomfort regarding the plausibility of (S1), these hypotheticals may motivate these people to start looking for alternative views and compare them with (S1). That is what I will do. I will later propose a new account of sanctioning and offer some reasons to replace (S1) with this new account. But I won't argue that this new account should be adopted *simply because* it is consistent with the intuitions pumped by the hypotheticals presented here in this section.

Additionally, the hypotheticals may be of particular importance to those who defend (S1). If anything, by highlighting precisely what aspects of (S1) generate controversy, the hypotheticals can give reasons for advocates of (S1) to clarify these aspects. Faced with the hypotheticals, advocates of (S1) may have reasons to add some qualifications to their view and attempt to explain why the hypotheticals don't threaten their theory (in case they don't). Thus, even if advocates of (S1) don't accept the account I will propose later in this paper, the hypotheticals offered here will still serve to, as it were, impose a burden of clarification on advocates of (S1). All in all, the hypotheticals help the discussion moving forward.

Understood in this rather thin sense, the use of the hypotheticals doesn't raise the methodological concerns typically associated with the appeal to intuitions as evidence. Indeed, as mentioned in the introduction, some philosophers have come to defend a version of (S1) due to being unsatisfied with a previous account of sanctioning that required actions to be aimed at discouraging behaviour in order to be tokens of sanctioning. And philosophers have expressed their discontentment with this past account by *initially* presenting hypotheticals in which actions *looked* like sanctioning but weren't aimed at discouraging behaviour.<sup>21</sup> It would be inconsistent for them now to consider a similar move against their own account as illegitimate.<sup>22</sup>

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<sup>21</sup> See, *ibid* 58–59; Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2007) 42 U. Rich. L. Rev. 1195, n 80.

<sup>22</sup> The move is similar in respect to its reliance on hypotheticals to raise some doubts about a given theory.

Here is the first hypothetical, which I will name ‘(Car)’ to facilitate further reference:

Imagine that a thief has stolen a car in a jurisdiction where stealing a car is a wrong. Apart from having the car stolen, the car owner didn’t experience any further loss, inconvenience or nuisance as a result of the theft. Authorities find the thief who is responsible for the wrongdoing and *solely* order her to return the car to the owner.<sup>23</sup>

Ordering the return of the car to the owner would, according to (S1), be a token of sanctioning: the order is unwelcome to the target (the car thief), and it is made as a response to the thief’s wrongdoing. Yet, considering the action authorities performed in (Car) as an instance of sanctioning doesn’t look right.

To help see why, let me try a variation of this example that allows for a better comparison between the action performed by authorities in (Car) and a clearer case of sanctioning. Being creative, I’ll call the variation ‘(Car 2)’. (Car 2) is a case that is identical to (Car) in every respect except for what the authorities do. The authorities in (Car 2) perform two separate actions: They order the thief to return the car to the victim, and they order her to spend some time in jail.<sup>24</sup> Despite both actions meeting (S1)’s requirements, the second action is no doubt a token of sanctioning, whereas the first is not clearly so.

In (Car 2) the two actions are performed by authorities in response to the same wrongdoing: stealing the car. So, the implausibility of considering one of the orders as sanctioning cannot be explained by any sort of qualitative difference in the wrongs to which the actions figure as responses.<sup>25</sup> Maybe, then, it is the fact that there is a difference in the degree to which the actions are

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<sup>23</sup> The example does presuppose that it is at least *possible* to have a legal system in place where ordering someone to returning a stolen good is the sole response to stealing (which is a wrongdoing). I’m aware that, in most jurisdictions, legal authorities wouldn’t probably *solely* order the thief to return the car if it was proven that the thief had *stolen* it.

<sup>24</sup> I have omitted the steps that would lead from the wrongdoing to being sentenced to prison purely for the sake of convenience, as nothing relevant to the discussion turns on them.

<sup>25</sup> I am trying here to prevent those arguments that appeal to the distinction between *public* wrongs and *private wrongs*. If the account of sanctioning I will propose is correct, sanctioning occurs regardless of a wrongdoing being private or public. That, I think, is a desirable outcome; it allows us to defend that sanctioning occurs in both tort and criminal law and avoids complications associated with the public-private distinction (if, in fact, this distinction makes sense).

unwelcome to the thief that makes it implausible to consider them both as tokens of sanctioning? It is true that being sent to jail and being ordered to return a car are unwelcome to a different extent. Usually, the former is generally considered to be far more unwelcome to the thief than the latter.

This explanation, however, doesn't take us very far. The difference in the degree to which the actions are unwelcome is irrelevant as to why it may seem implausible to regard both actions as sanctioning. To see why, let's again slightly alter the example in such a way that authorities perform actions equally unwelcome to the thief. Call it '(Car 3)': (Car 3) is also identical to (Car) in every respect except that authorities perform two separate actions: they order the thief to pay what the car is worth (in money) to the victim, and authorities order the thief to pay exactly the same amount of money to the state. Since the sum of money required by the two orders is the same, there is no margin for a difference in the degree the actions are unwelcome here. If giving away a sum of money is unwelcome, it is equally unwelcome in both cases.<sup>26</sup> Yet, the second order still looks like sanctioning, whereas the first doesn't. Why is that?

## 2. Sanctioning: A New Account

As we have seen, despite satisfying the conditions set forth by (S1), it is not entirely clear that we should consider the following actions as tokens of sanctioning: ordering the thief to return the car to the victim (as in (Car) and (Car 2)) and ordering the thief to pay to the victim what the car was worth (as in (Car 3)). I have already dismissed two potential explanations as to why some may think it is implausible to consider such actions as sanctioning: there is no qualitative difference in the wrongs these actions figure as a response to, and the difference in the degree the actions are unwelcome to the thief doesn't matter. There is, however, one possible explanation the reader might have already thought of and I haven't presented: actions typically viewed as sanctioning have

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<sup>26</sup> Of course given the second order is performed *in addition* to the first, someone might think the second is more unwelcome: the thief will have to pay more money. If it helps, I ask the reader to consider these orders in separate contexts. Even in separate contexts (a context in which an authority performs only one of the orders) the second order, and not the first, seems to be sanctioning.

a *punitive aim*,<sup>27</sup> whereas those actions present in the (Car) examples which are not plausibly seen as sanctioning lack such aim. Instead, the latter have a purely reparatory aim.

Think of the second order made by authorities in (Car 2) and (Car 3), respectively the order for the thief to be jailed and the order for the thief to pay a sum of money to the state. We can ask the following question about their aims: what did the legal system intend to achieve by permitting or requiring authorities to perform these actions as a response to stealing?<sup>28</sup> Surely the answer can be ‘many things’. Still, at least one of the things that comes to mind as an answer is ‘*punishing wrongdoers* for their wrong’. This seems to be at least one of the numerous aims these actions have. And if we were to rank the aims according to their salience, certainly punishing the wrongdoer would be high up in the rank.

Knowing exactly what amounts to ‘punishing’ a wrongdoer is a complicated and controversial issue – one that I neither intend to, nor have space to pursue here. But that doesn’t prevent me from offering, for the sake of the current inquiry, at least a stipulative characterisation of what amounts to punishing a wrongdoer. Needless to say, this is not an attempt to settle the issue of what amounts to punishment.

Punishment is a censorious practice; it ‘involves an essential element of condemnation’.<sup>29</sup> To be more systematic, we could say that: X punishes Y if, and only if, Y has committed a wrong and X, in response to Y’s wrongdoing,

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<sup>27</sup> In the paper I assume that ‘aim’, ‘purpose’ and ‘intention’ are all synonymous.

<sup>28</sup> I’m talking figuratively here. I’m not assuming that legal systems are agents and have desires or intentions. I ask the reader to interpret any reference to legal systems’ intentions as referring to the intentions of the authorities who act on behalf of legal systems. The relevant authorities here are those who have first authorised or required the performance of these actions as responses to cases similar to (Car 2) and (Car 3) – e.g., legislators. And by doing so, they might have had some aim in mind. They might have had a conception of what performing these actions was *supposed to achieve*. What the action is *supposed to achieve* can be contrasted with what the response is actually used to achieve (say, by law appliers). Both reveal something about an action’s aims. The first about the supposed aim of performing an action, and the second about the aim that one actually intends to achieve by performing the action. For our discussion, we should focus on the aims of those who chosen these actions as responses to wrongdoing wanted to achieve by placing them as responses. That is because this is the sort of aim that figures in the explanation of the fact that a particular action was chosen as a response to a given wrong.

<sup>29</sup> David Garland and RA Duff, ‘Introduction: Thinking About Punishment’ in David Garland and RA Duff (eds), *A Reader on Punishment* (Oxford University Press 1994) 13. The idea that punishment involves condemnation was first advanced by Joel Feinberg. See, Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 *The Monist* 397.

intentionally subjects Y to harmful treatment<sup>30</sup> that conveys disapproval towards Y.<sup>31</sup>

From this we can say that an action is performed with the *aim of punishing* if, and only if:

(Aim of punishing): those who have chosen the action as a response to a particular wrong have done so to subject wrongdoers to harmful treatment that conveys disapproval.

The thief, in the (Car) cases, has committed a wrong by stealing the victim's car. It seems that both the order for the thief to be jailed and the order for the thief to pay a sum of money were chosen as responses to stealing by authorities who had the aim of punishing. Authorities intended to, as it were, teach those who steal a lesson.<sup>32</sup> That sounds like a plausible explanation of what authorities intended to achieve by choosing these actions as responses to stealing.

The same explanation doesn't hold much water when it comes to expounding the aims of those actions not plausibly seen as sanctioning in the (Car) examples, namely ordering the thief to return the car to the victim, and ordering the thief to give the equivalent in money to the victim. We know the thief has caused the victim a loss; she has deprived the victim of his car. Now that the thief has stolen the victim's car, she owes a car, or the equivalent in money, to the victim.<sup>33</sup> In response to the theft, authorities ordered the thief to give back to the victim – as far as possible – what she owes to him, namely the

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<sup>30</sup> 'Harm' here should be interpreted broadly. It encompasses both the infliction of physical pain as well as the violation of interests, preferences or rights. I also assume that one may be harmed without feeling or believing to be harmed. Naturally, subjecting someone to harmful treatment that conveys disapproval is something unwelcome (in the way previously specified).

<sup>31</sup> There are, of course, a number of well-developed accounts of punishment. For an account of *legal* punishment, see, for instance, Michael J Zimmerman, *The Immorality of Punishment* (Broadview Press 2011) 20. For a competing account – although also encompassing *non-legal* forms of punishment – see, Leo Zaibert, *Punishment and Retribution* (Ashgate 2006) 28–37.

<sup>32</sup> With this phrase I don't presuppose that authorities are indeed aiming at re-educating those who steal. It may well be that they were attempting to do so. But I use the phrase just to convey in different terms the fact that authorities have aimed at censuring those who steal.

<sup>33</sup> There are competing explanations as to why this duty arises. For a helpful discussion, see John Gardner, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1; John Gardner, 'Punishment and Compensation: A Comment' in L Christopher Russell (ed), *Fletcher Essays on Criminal Law* (Oxford University Press 2013) 72–74.

car, or the equivalent amount in money. Apparently, the aim of ordering the thief to return the car or its equivalent in money is solely to make the thief give back what she owes to the victim; i.e. to make the thief provide reparation for the losses that she has caused.<sup>34</sup> The orders, after all, are directing the thief to do or to pay something *to* the victim and the thief is not being ordered to do or to pay anything more than she owes to the victim. No disapproval seems to be conveyed, and hence no punishment, seems to be intended.

That might lead us to conclude that the reason why it may be implausible to consider all actions in the (Car) examples as sanctioning is that some of these actions lack the aim of punishing, which is a necessary condition for sanctioning. This move, however, would be too hasty. What to say about cases that look like sanctioning but which involve orders that are made solely to prevent further harm or further criminal activities from occurring? Ordering the apprehension of both the drugs and the materials used to produce drugs from someone charged with drug trafficking, or the denial of child custody in virtue of mistreatment would be examples.<sup>35</sup> The relevant authorities might have solely aimed to protect society from drug trafficking, or the child from parental mistreatment when they've chosen these orders as responses to drug trafficking and child mistreatment respectively; the authorities could have been indifferent as to whether these orders subjected the targets to harmful treatment or conveyed disapproval. No aim of punishing *needs* to be present here.

What I've just said above suggests that the implausibility of considering the orders to return a car or an equivalent to the victim as sanctioning may not

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<sup>34</sup> In the sense of giving to the victim, as far as possible, what the wrongdoer owes to the victim in virtue of causing the loss. Or, as it is usually said by many: putting the victim back in the position that she would have been weren't the wrongdoing. In this paper, any phrase such as 'providing reparation for the victim's losses' or related expressions should be interpreted according to the sense specified in this footnote.

<sup>35</sup> These examples are adapted from Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 16 and passim. Ashworth and Zedner call this – and other similar examples – 'punitive-preventive' orders. According to them, despite recognizing the lack of a punitive aim in such examples, courts have considered this kind of orders as having basically the same effects as punishment and, for that reason, have subjected these actions to the same constraints applicable to instances of punishment. This shows that it might be useful to legal practice to group together actions that, despite not being strictly speaking instances of punishment, generate the same effects as punishment. As we will see, that is one consequence of the account of sanctioning I will propose.

arise from the notion that sanctioning must have the aim of punishing. There is, though, an alternative explanation: for an action to be a token of sanctioning the action must be *apt* for punishing the wrongdoer. The relevant actions in the hypotheticals aren't. So that is why it is implausible to consider them as sanctioning.

By saying that an action is *apt* for punishing the wrongdoer I mean this:

(Aptness-test): In the appropriate context, if the action had the *aim of punishing* the wrongdoer, performing it would punish the wrongdoer.

(Appropriate context): a context where the action figures as a response to wrongdoing.

The aptness-test implies that an action may be apt for punishing even if it doesn't actually have the aim of punishing (i.e. even if not chosen as a response to wrongdoing in order to subject the wrongdoer to harmful treatment that conveys disapproval towards her). To see whether an action satisfies the aptness-test we should ask counterfactually: In the appropriate context, if the action were elected as a response to wrongdoing in order to punish wrongdoers, would its performance amount to punishment? If the answer is 'Yes', then the action is apt for punishing. Determining whether an action is apt for punishing, thus, involves looking at the effects the performance of an action would produce in a circumstance where it has the aim of punishing: the action must subject the target to harmful treatment that conveys disapproval. Having the aim of punishing plus the effects the action would produce if performed in the appropriate context should be jointly sufficient to conclude that those who are performing the action are *punishing* the wrongdoer.<sup>36</sup>

Notice that the fact that the action would amount to punishment if the action had the aim of punishing the wrongdoer doesn't imply that its performance would amount to the punishment the wrongdoer deserves. It could

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<sup>36</sup> All actions that satisfy the aptness test are actions that *actually* subject their targets to harmful treatment that conveys disapproval (regardless of their aims). Actions that fail to satisfy the aptness test are those that, for whatever reason, turn out not to subject the relevant targets to harmful treatment that conveys disapproval when so intended.



amount to a fair or unfair, mild or harsh, useful or pointless form of punishment. What matters is that it would be a form of punishment nonetheless.

Having characterised when an action is *apt for punishing*, the question now is whether those actions in the (Car) examples which weren't plausibly seen as sanctioning are apt for punishing the thief. To be more specific, we need to know whether, in the appropriate context, authorities would be punishing the thief by performing the order for the thief to return the car to the victim and the order for the thief to pay the equivalent in money *had* the relevant authorities chosen both actions as responses to stealing in order to subject the wrongdoer to harmful treatment that conveys disapproval. The answer is 'No'. By performing these actions, authorities would be solely making the thief give back what she owed to the victim, i.e. repairing the losses she has caused. In other words, they would be just ordering the thief to perform a duty she already had. And she had the duty to return the car since the moment she stole the car.<sup>37</sup> With or without the aim of punishing, simply ordering someone to give what she already owed to the victim cannot be punishment.<sup>38</sup> For punishing the wrongdoer it is necessary that the action does subject the wrongdoer to harmful treatment that conveys disapproval. It is hard to see both the order for the thief to return a car and the order for her to give the equivalent amount in money this way.

That, however, doesn't mean that ordering someone to repair losses can *never* be apt for punishing the wrongdoer. Imagine a circumstance where the following action has the aim of punishing: ordering the thief to personally return the car to the victim in a public ceremony. This process is shameful (and hence the harm) and certainly conveys disapproval towards the wrongdoer. The same can be said about ordering someone to apologise in public for making a false statement which affected someone else's reputation. Even in those cases,

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<sup>37</sup> In this sentence, 'duty' refers to 'moral duty'.

<sup>38</sup> An argument to support this claim is offered by John Gardner in his discussion of the distinction between punishment and reparatory compensation '...there is no way to represent punishment as the fallback performance by the wrongdoer of the duty that he originally failed to perform. Unlike reparation, punishment is not something that the wrongdoer owes. For it is not something that he can give. It is something that is inflicted upon him by others, and the norms regulating it belong, in the final analysis, to their normative position and not to his.' See, Gardner, 'Punishment and Compensation: A Comment' (n 34) 74–75.

however, it is important to emphasise that the punishment-part lies not in the reparation of losses per se. Rather it lies in the *way* in which the losses are ordered to be repaired. The losses are, after all, ordered to be repaired in a way that shames the wrongdoer. Thus, had these actions the aim of punishing, they would be, given the effects produced, a form of punishment.

Aptness for punishing seems to lead us towards a new account of sanctioning. Adding *being apt for punishing* the wrongdoer to (S1) makes it resistant to the worries raised with the (Car) cases. Adding it to (S1), however, would render some of the elements of (S1) redundant. Remember that a specific context was required for an action to be apt for punishing the wrongdoer: a context where the action is performed as *a response to wrongdoing*. On top of this, it is plausible to think that all actions apt for punishing the wrongdoer are unwelcome. To eliminate redundancies, I offer the following formulation for this new account:

(S2) an action is a token of sanctioning if and only if, it is performed in the appropriate context and is apt for punishing wrongdoers.

As just mentioned, (S2) is immune to the worries we raised against (S1) with the hypotheticals. But more importantly, (S2) retains most, if not all, of (S1)'s intuitive appeal. We should bear in mind that (S2) doesn't imply that by being a token of sanctioning an action cannot be simultaneously a token of some other action type (e.g., compensating). That may initially sound like a *reductio* of (S2). After all, if there are actions that are tokens of sanctioning and tokens of, say, compensating, then it looks as if (S2) didn't fulfil its job. That would be too simplistic a view. As per (S2), an action is a token of sanctioning if, and only if, it is performed in the appropriate context and is apt for punishing. But a single action may be apt for punishing and apt for doing several other things. There is no reason to think that just because an action is a token of sanctioning it cannot be a token of some other action type. In fact, I've presented two examples earlier where this happens: the example in which the thief is ordered to return the car to the victim in a public ceremony, and the example in which someone is ordered

to apologise in public. And we can think of many others.<sup>39</sup> That (S2) allows for these cases to occur and yet be considered as sanctioning is, I think, a good sign. The legal domain is generally resistant to simplification.

## 2.1. Why Care?

Up until now I have only shown that (S1) fails to uphold intuitions shared by *some* people and that (S2) succeeds in doing so while preserving (S1)'s virtues. As far as methodology is concerned, I'm on safe grounds. Or, to be fair, I'm on the same methodological grounds as advocates of (S1) are – they too use intuitions and the method of cases to raise doubts about the plausibility of rival theories and to start making a case for their own. Yet, one can still ask: 'Why care about a new account of sanctioning?'; 'Apart from vindicating the intuitions of *some* people, are there any benefits in adopting an account which is more specific than (S1)?'.

It is tempting to offer the 'I'm doing theory for theory's sake' kind of reply. It is true that the plausibility of a theory does not depend upon whether people find the theory interesting or care about the issue the theory addresses. So, perhaps the burden of replying to such questions is a burden I don't have. However, at the same time I don't want to simply dismiss or disdain such questions. This attitude won't lead to any meaningful conversation with anyone who is willing to ask questions such as the ones above. And, for starters, there is no harm or loss in having such a conversation. More fundamentally, I think answering those questions is helpful; it helps us theorists avoid some common traps of our own calling. As theorists, we can quibble and propose minor adjustments to practically every theory or concept. But if what one is doing is *just* quibbling or doing pedantic exercises without any meaningful theoretical or practical benefit, then perhaps it is better to keep the exercise to oneself.

I do think criticizing (S1) and proposing (S2) isn't just a quibble about sanctioning. As some philosophers have recently highlighted, sometimes it is important to discuss 'which concepts we *should* use in a given context'.<sup>40</sup> This is

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<sup>39</sup> Think of punitive damages, for instance.

<sup>40</sup> For an extensive and helpful treatment of the issue, see David Plunkett, 'Which Concepts Should We Use?: Metalinguistic Negotiations and The Methodology of Philosophy' (2015) 58

precisely how the dispute between (S1) and (S2) should be understood. The relevant dispute is about whether (S2)'s concept of sanctioning is better suited than (S1)'s *for legal practice and for the purposes of doing moral, political, and legal philosophy*. There are reasons to think that (S2) fares better in comparison to (S1) in relation to these aspects. For example, if as (S1) describes, sanctioning is too broad a phenomenon, then addressing certain questions in moral and political philosophy about the justification and the need for sanctioning may become quite difficult and frustrating. (S1) makes it hard – if not impossible – to find a common justification for all or most tokens of sanctioning. (S2) fares better in addressing these worries by virtue of better delimiting the phenomenon (without, of course, losing track of intuitions or losing explanatory power). The fact that all tokens of sanctioning are *apt for punishing* opens up some space for one to attempt providing a common justification of tokens of sanctioning.

Moral and political philosophers commonly argue that punishment – for criminal wrongs and otherwise – has a particular moral significance; it carries a justificatory burden. And this burden should be (and typically is) dealt by legal systems through the imposition of constraints for its exercise: punishment should be proportionate to the wrong, preceded by fair trial, applied only to those who deserve it, and so on. By connecting sanctioning with punishment, (S2) bundles together those actions that give rise to similar moral concerns as punishment – namely concerns relative to the subjection of individuals to harmful treatment and censure – and require similar justification as punishment.

That is not all. By grouping together actions that give rise to similar moral concerns, (S2) also seems to be more relevant to legal practice. For example, Andrew Ashworth and Lucia Zedner have pointed out that despite recognizing the lack of a punitive aim in *preventive orders*, courts have considered this kind of orders as having virtually the same effects as punishment and, for that reason, have subjected these actions to the same constraints as are applicable

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Inquiry: An Interdisciplinary Journal of Philosophy 828; Alexis Burgess and David Plunkett, 'Conceptual Ethics I' (2013) 8 Philosophy Compass 1091; Alexis Burgess and David Plunkett, 'Conceptual Ethics II' (2013) 8 Philosophy Compass 1102.

to instances of punishment.<sup>41</sup> This suggests that it might be useful to legal practice to have a well-defined concept that groups together actions that, despite not strictly being instances of punishment, generate the same effects as punishment and deserve similar legal treatment.<sup>42</sup> (S2) does precisely that.

Moreover, there are reasons to prefer (S2) when it comes to discussions about the relationship between sanctioning and legal systems' coerciveness. When, for example, legal and political philosophers discuss the possibility of the existence of a non-coercive legal system, they typically imagine a legal system free from *sanctioning*.<sup>43</sup> Be this as it may, they are, in general, not concerned with the possibility of there being a legal system where authorities wouldn't, for instance, order someone to repair a damage. Rather, most, if not all, philosophers who discuss the topic are concerned with the possibility of there being a legal system where legal authorities would, for instance, neither threaten nor carry out a threat to subject to harmful treatment those citizens who don't repair a damage (or comply with any legal mandate or direct order). Thus, if we want an account of sanctioning that is useful to discussions about the coerciveness of legal systems, (S2) seems the way to go.

Finally, an additional – even though weaker – reason to prefer (S2) is that it supports, and is supported by, linguistic usage.<sup>44</sup> Take, for instance, the dictionary definition of 'sanction' offered by the Cambridge Dictionary: 'a strong action taken in order to make people obey a law or rule, or a punishment given when they do not obey'.<sup>45</sup> (S2) is closer to this usage than (S1). Linguistically, it makes more sense to use words such as 'remedies', or phrases such as 'reparatory

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<sup>41</sup> Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) ch 1. esp. pp. 15-17.

<sup>42</sup> A number of legal scholars have defended that, given their similarity, some measures usually imposed by courts in *private law cases*, such as aggravated, punitive, and exemplary damages, should be subjected to the same constraints that are applicable to some measures imposed in *criminal law cases*. See, e.g., Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87. (S2) vindicates this claim: (S2) implies that both in (at least some) cases where authorities impose aggravated, punitive or exemplary damages, and in cases where authorities are punishing someone who has committed a criminal wrong, authorities are engaged in the same activity; namely, *sanctioning*.

<sup>43</sup> See Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 157–161.

<sup>44</sup> That should come as no surprise for those who accept that intuitions about cases are nothing more than linguistic intuitions.

<sup>45</sup> See, Cambridge Dictionary, <<http://dictionary.cambridge.org/dictionary/english/sanction>> accessed 2 April 2017.

measures’, to describe the consequences applied in cases such as (Car). Unsurprisingly, that is precisely what many courts and legal scholars usually do.

It is never too clear how much one should say in response to ‘why care?’ challenges. Regardless of whether I said enough or not, I have two hopes with the paper. The first is that even those who think they should not care about a *new* account of sanctioning and those who disagree with the proposed account may become aware of some counter-intuitive aspects of an account of sanctioning commonly defended and perhaps propose amendments or add new qualifications to it. My second hope is that I have made a plausible case for viewing sanctioning as an action which is performed in the appropriate context and is apt for punishing wrongdoers. This, however, is far from being the end of the discussion. A series of questions have just been touched upon and are still left open; questions about the precise relationship between sanctioning and the use of coercion by legal systems, questions about the justification of sanctioning, and questions about the implications of this account to legal practice. As pertinent as these questions seem to be, I must leave their exploration to another occasion.