CONFLICTING DUTIES IN CRIMINAL LAW

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Despite the great interest aroused among Anglo-American criminal law scholars by the justification of necessity, the conflict of duties as a separate defense sui generis *has gone largely unnoticed until now. The aim of this paper is to fill the gap by providing a critical review of the concept and foundation for a conflict of duties as defense in the continental criminal law. Regarding the former, this legal institution is defined as a conflict between grounds of obligation that cannot be cumulatively fulfilled. Their deontic nature (prohibited or required) is thus irrelevant. With regard to the second issue, the argument is made that the solution of the collision involves a judgment set out to hierarchically arrange the colliding reasons from a formal point of view that is respectful with the principles of autonomy and solidarity. Therefore, the obligor must only fulfill the strongest ground of obligation—the only duty that can be legitimized in the particular situation—or, when before a conflict between equivalent grounds of obligation, they must comply with the disjunctive or alternative duty—aid one or the other—which the legal system imposes on them.*

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INTRODUCTION

Imagine that you were peacefully sailing with your two children. The boat sinks, and you find that, although you can save them from drowning by rescuing them separately, there is only time to save one. Fulfillment of the duty to rescue one necessarily excludes the duty to rescue the other. Or imagine that you are the lifeguard, and the only way to carry out your duty to rescue is by stealing a jet ski from a stranger. In both cases, you are obliged by two criminal law duties, but you can only obey one, with the inevitable consequence that you will be violating the other. Despite being a classical and central topic in political and moral philosophical literature,[1] the collision of duties has been a subject of little interest in contemporary Anglo-American criminal law writings. Beyond a few isolated mentions of the problem in papers discussing the necessity or choice-of-evils defense,[2] as well as the problem of mandatory rescue killings,[3] there is no real debate at present on the scope and foundation of collision of duties as defense to criminal law responsibility.

As an exception, like in so many other aspects of the general theory of the criminal offense, *Rethinking Criminal Law* must be mentioned, in

1. However, these are too strongly centered on theoretical problems—basically, the mere possibility of practical dilemmas, leaving aside practical problems (more interesting to the legal scholar) and their resolution, occasion, or cause. Herman (1990, p. 312) rightly warns of this. An overview of the discussion on moral dilemmas can be found in the works edited by Mason (1996) and Gowans (1987).

2. See Dennis (2009, pp. 41–43); Hörnle (2009, pp. 126–128); Alexander (2005, p. 618). I feel that this lack of interest is due partly to the fact that a collision of duties is closely related to the defense of necessity, and partly to the lesser weight given to the duty to act in Anglo-American criminal law systems. For a critical look at the marginalization of the topic among Anglo-American scholars, see Stacy (2002).

3. Fabre (2009, 2007); Øverland (2009); Fletcher (1990); Miller (2016). It is a question of whether the duty to rescue (general or based on a special relationship) leads to a specific duty to kill when it is the sole option to save the person in need. The actor is facing a conflict of duties: either the bodyguard fulfills his duty to rescue the threatened politician, or he violates his negative duty not to shoot the aggressor wishing to kill the politician.

which George P. Fletcher, taking the current German literature as a reference, focuses on the problem of what he calls "inconsistent duties":

> In one situation the choice is between affirmatively killing innocent persons and doing nothing, which would effectively result in the death of more innocent persons . . . If we see a conflict between these duties, it is because we cannot decide whether to follow Kant or Bentham. If whatever the actor does in these situations is free from culpability, it is because the moral conviction of the legal system is an equipoise. With the culture torn by conflicting moral premises, we cannot decide whether to demand that people adhere to one or to the other.[4]

Fletcher seems to be more sure of himself when responding to situations in which two duties to act collide, for example, when a father can only save one of his two children in danger of drowning. "In these cases of failing to render aid, the problem arises from the peculiarity of affirmative duties, namely, that it is possible to be duty-bound to perform logically incompatible acts." The solution here comes from a disjunctive or alternative duty: "One could escape this dilemma by formulating the duty in this special case as the duty to aid one or the other." Fletcher ends the passage by stating that both types of conflict are radically different from the rest of excusing conditions. "The first type of case is the consequence of the moral uncertainty of the legal system . . . The second is a logical peculiarity of duties to render aid. Thus it might be preferable to treat the category of inconsistent duties as a special category of exemption, rather than as a case of excused wrongdoing."

This article aims to reignite the discussion on the concept and foundation for resolving the conflict of (criminal law) duties in the Anglo-American criminal law. To this end, in Section I of this paper, I present a critical review of the treatment of the problem in continental criminal law influenced by German doctrine. Since neither the classic definition of the defense, nor the aim of prioritizing duties based on the principle of the preponderant interest (or lesser evil), nor the foundation generally attributed to the exemption should constitute the ideal starting points in the resolution of these conflicts, I have devoted Section II to redefining the conceptual notion of conflict of duties in criminal law. Following this, Section III tests a review of the guiding principles in the system of

4. Fletcher (1978, pp. 852–855).

prioritizing duties or, even better, the conflict between grounds of obligation. All the above should, in Section IV, make it possible to explain, even to the victim of the conflict, why the collision of duties applies as a cause for excluding criminal wrongdoing, and not only as an excuse, but even in situations of equipoise.

I. THE COLLISION OF DUTIES IN CONTINENTAL CRIMINAL LAW

A. The Common Approach

There are three basic cornerstones upholding the treatment of the conflict of duties by continental criminal law scholars: (1) this defense is defined by the conflict between two or more duties to act; (2) prioritizing duties, as a first step to resolving the conflict, is governed by the principle of preponderant interest (lesser evil); and (3) complying with the equivalent or higher-ranking duty excludes the wrongdoing inherent in not facing up to the other duty.[5] Let us look at each of these in more detail.

1. The Collision of Duties as Justificatory Defense for Offenses by Omission

At present, the most prevailing opinion is that only conflicts between duties to act (commands) would constitute a collision of duties as criminal defense.[6] On one hand, the conflict between duties to omit (prohibitions) would be logically impossible, since prohibitions would never completely exhaust the complete sphere of action by the obligor, *conditio sine qua non* when talking about a conflict of duties. On the other hand, conflicts of duties to act and omit must be excluded from the defense scope for functional reasons. Given the equality of legal interests at stake, it would always be preferable to respect the prohibition over the command, and such conflicts would find a materially suitable solution by applying standards of necessity: the obligor would only be obliged to comply with the prohibition, unless fulfillment of the command guaranteed an interest that substantially outweighs that protected by the prohibition.[7] In short, the

5. For a general overview, see Bohlander (2009, pp. 95–96).

6. Zimmermann (2014, pp. 263–269); Lenckner (1986, pp. 657–658).

7. The (*substantially*) greater significance of the endangered interest is a necessary condition to be able to legitimize, in a non-utilitarian way, a foray into the legal sphere of

scope of a duty to act is always limited to what can lawfully be done, which is constricted by the set of prohibitions in force.

- The father obliged to save the life of his drowning child should steal a small boat, since violating this prohibition is justified by the defense of necessity. The safeguarded interest substantially outweighs the lesser one. This does not apply if the father has to remove an organ from a third party, as the interest of his child does not substantially outweigh that of the harmed party by violating the prohibition.

2. Prioritizing Duties Based on the Theory of Balance of Interests

The ranking of the duties in conflict must be decided by a comparative judgement of all legal interests underlying the conflicting duties. Assuming that it is not possible to safeguard all the threatened interests, the actor must fulfill the duty that protects the highest. Therefore, basically, the prioritizing of duties will be judged to coincide with that proposed by the most traditional doctrine in the necessity defense,[8] although with an important proviso: the kind of duty is also significant. This means the greater normative weight of special legal duties against the general duties to rescue,[9] embodied basically in the different degrees of sacrifice that can

who is not responsible for the danger. For the exceptional character of the rights of solidarity in a liberal criminal law system, see Neumann (2014, pp. 598–599).

8. Broadly speaking, the balancing operation depends on five essential factors: the legal interest (life, physical integrity, property, etc.); the extent of the threatened harm; the probability of the occurrence of the harm; the provocation of the conflict; and the special legal relationship between the parties involved. See Neumann (2014, pp. 598–603); Coca-Vila (2018, pp. 69–70).

9. Continental criminal law doctrine usually distinguishes two kinds of duties to act: the duties of guarantee, based on a special relationship between actor and victim (voluntary undertaking, parental/family, creation of the victim's peril, etc.), and the general duties of solidarity. Whereas the former demand the obligor to face significant risks and, if violated, might charge the obligor with the ensuing result, as though he had actively caused it ("commission by omission"), the latter, as well as not demanding special sacrifices, are penalized much more lightly. For more on this, see Silva Sánchez (2008); Bohlander (2009, pp. 40–45). Although self-defense is allowed against an immediate threat based on an infraction of a duty of guarantee, only a justificatory necessity would be recognized against

be required of the actor, and the different punishment foreseen by violating this, must be taken into consideration when prioritizing conflicting duties.

- Thus, for example, it is common although controversial to state that the answerable father is obliged to save his child before a stranger, when both are in danger of drowning. However much both those in need are threatened by an identical evil, the different kind of duties involved will prevent confirming their equivalence.

3. Collision of Duties as Justificatory Defense: *Ultra posse nemo obligatur*

Lastly, the analysis of the collision defense concludes by stating its justifying nature of *prima facie* criminal wrongdoing. According to the principle of preponderant interest (lesser evil) as a general principle of justification,[10] the resolution of conflicts among unequal duties should not cause larger problems. However, faced with conflicts between duties of equal rank (parity cases), the necessity standard collapses and it would be essential to develop a special rule, with a correspondingly distinct underpinning.[11] The reason is because although the collision of duties appears to be a special case of the necessity defense, continental doctrine tends to treat it as a separate defense *sui generis* in the field of offenses by omission.[12] Since a legal system cannot legitimately demand a citizen to comply with two duties impossible to fulfill together ("ought implies can"), the obligor's actions would be justified, not merely excused, when he fulfills either of the two equivalent duties.[13] This also means that nobody could act in self-defense against the obligor who leaves one of those to their fate.[14]

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the violation of a general duty of solidarity. Exploring the intricacies of the self-defense against omissions: Coca Vila (2016b).

10. Molina Fernández (2000).

11. Zimmermann (2014, pp. 269–272).

12. Bohlander (2009, p. 95).

13. A detailed discussion on the distinction between justification and excuse valid for most continental penal systems is provided by Eser (1987) and, succinctly, Husak (1989, pp. 495–504).

14. The parity between interests involved would enable justification of the wrongdoing of the omission, since, unlike what happens when violating a prohibition, the breach of a command does not constitute a violation of the right of the victim, nor misappropriation

- Consequently, when there is a collision of duties, the mother of the child who the lifeguard will not save cannot in the "defense of others" violently force the lifeguard to save her son to the detriment of the other child in danger. In this case the lifeguard's action is justified when he saves the child, and the mother of the other one must tolerate the death of her child.

B. On the Fragility of the Collision of Duties Defense

Nevertheless, in my opinion, the three cornerstones underpinning the treatment of the defense in continental doctrine rest on objectionable premises. Firstly, reducing the scope of the defense to conflicts between duties to act assumes that there is a rule in force preferring *ceteris paribus* the duties of omission against those of action. This is incompatible with most continental penal codes, which recognize full equivalence among certain actions and omissions. Secondly, it turns out that the apparently irreproachable process of ranking duties rests, on one hand, on a justificatory ground—i.e., the principle of the lesser evil, strongly contested recently due to its essentially collectivist nature. On the other hand, the theory of the balance of interests, while being the method for prioritizing duties, relegates conflict resolution to extreme arbitrariness, as it is incapable of providing clear guidelines for objective comparison. Thirdly and lastly, standard reasoning on the systematic placement of the defense in the structure of offenses is, likewise, not exempt from problems.[15] The mere mention of the impossibility of the legal system to oblige a person with two duties, both impossible to obey, does not sufficiently explain why victims, especially when their life is in danger, have to tolerate not being rescued.

This being the case, the following section aims to compile the basic lines of what is, from my point of view, an essential review of the concept of, and the basis for resolving, the collision of duties as a defense. This stems from the firm conviction that neither the definition of the defense upheld by contemporary criminal law theories, nor the aim of resolving conflicts based on the principle of the lesser evil, nor the arguments usually

of the role of fate or God, but simply not safeguarding the interests at peril. See Lenckner (1986, p. 658).

15. For a brief overview of the tripartite structure of offenses of German criminal law, see Bohlander (2009, pp. 16–17).

expounded to justify the infringement of one of the duties, are appropriate points of departure for resolving the conflicts of duties in criminal law.

II. COLLISION OF DUTIES AS A CONFLICT BETWEEN GROUNDS OF OBLIGATION

The conceptual (re)definition of the collision defense that is sought here requires an answer to two previous questions. The first relates to the material significance of the axiom *ultra posse nemo obligatur*, and the second to the functional convenience of excluding conflicts between commands and prohibitions from the conceptual scope of the collision defense.

A. Conflicting Grounds of Obligation as a Particular Problem in the Process of Instituting Duties

A collision of duties is generally defined as one situation in which a single person is faced with two (or more) obligations that can be fulfilled separately, but in the specific case, for empirical reasons, it is impossible to fulfill both. Based on this, there seems to be agreement on not punishing the obligor in such situations for not fulfilling the lesser ranking duty or, faced with conflict between equal duties, for not carrying out one of the two. If the obligator has no choice but to infringe one duty, it seems unfair to expose her to criminal sanctions. The reasoning repeatedly given to support this line of argument is summarized in the Latin maxim *ultra posse nemo obligatur*.[16]

The maxim "ought implies can" constitutes indeed an essential principle in the process of instituting duties in a functional criminal law system. Conceding that the duties operate as reasons for the obligor's action, and that the intrinsically reduced freedom that their imposition involves has to be legitimized functionally, it should be stated that it is only possible to impose on a citizen that duty that *ex ante* is proper to influence their decision making between two or more possible forms of behavior.[17]

16. This adage is a version of Celsus' *Impossibilium nulla obligatio est!*: There can be no obligation to do the impossible! (Digest 50.17.185). See Byrd and Hruschka (2010, pp. 294–297).

17. The legitimacy of a duty implies assuming the person who is obligated is free to undertake the act that he is required to perform. For more on this, see Stacy (2002, p. 494); Husak (1989, p. 518).

However, it would be a mistake to restrict the validity of this principle to the moment in which a single duty is determined. In fact, this axiom also governs the metaplane in which several duties that are possible to fulfill separately are purported to be imposed on a single actor. This means that a legal system composed of multiple duties, and aiming to be constituted as a true system, must be equally certain that they are possible to obey together. Obliging the father who cannot swim to save his drowning child is as dysfunctional as obliging him to save both children when he can only save one.

Thus, the collision of duties constitutes a special problem in the process of instituting criminal law duties. In agreement with Kant's view of the concept of the problematic,[18] it can be stated that, in a legal system, under no circumstance must duties collide (*obligationes non colliduntur*), but, at most, only the grounds of obligation (*rationes obligandi non obligantes*) can collide.[19] In this paper, I refer to grounds of obligation as a duty that, contemplated in isolation, appears as legitimate because it can be fulfilled, but since its compatibility with the other grounds of obligation purported to pertain to a single actor in a specific case has not yet been judged, it still lacks a binding force.[20] Only after the conflict between the various concurrent grounds of obligation have been untangled, can a legitimate duty proper be assessed, and it is only then that it can be fulfilled and is, therefore, binding. The weaker ground of obligation does not constitute a proper duty, and its infringement thus lacks criminal law relevance.[21]

B. Against the Primacy of Duties to Omit

The mainly continental doctrine restricts the criminal defense to conflicts between commands (duties to act), since only these are governed by a special rule of necessity defence. There are basically two arguments in favor of recognizing a rule of this type. On one hand, it is commonly stated that a breach of duty to act does not constitute a real violation of the victim's

18. On this, see O'Neill (2013, pp. 258–266); Timmermann (2013, pp. 38–50); McCarty (1991, pp. 67–73); Herman (1990, pp. 316–337).

19. Kant (1797, p. 224).

20. Ross (1930, p. 19) and Raz (1975, pp. 25, 45) refer to something similar when addressing the notion of "prima facie duty" and "ordinary reason," respectively.

21. Montague (1988, pp. 359–366) recognizes that conflicting *prima facie* duties exist, but denies the possibility of all-things-considered conflicts.

rights, but merely does not safeguard an interest in peril. What the legal system can guarantee is the defense of negative rights from active external interference, but not indemnity of all assets against any imaginable danger.[22] On the other hand, linked to the former, recourse to a second argument of a quasi-metaphysical nature is frequent: criminal law has a special interest in protecting the *statu quo* given, and assuming that this protection is gained through respecting prohibitions—i.e., omission—the conclusion is that, *ceteris paribus*, the legal system always prefers duties of omission over those of action. This means that, if there is no good reason to act—a reason cannot exist when there is a conflict between equivalent interests—it is always desirable to omit action and leave things as they are, or let things take their natural course of action, rather than arrogantly taking on the power to "play God" or to "alter fate."[23] From this principle, which is conservative in nature, but absolutely compulsory in any modern legal system,[24] a prohibition is derived: the agent threatened with a non-attributable harm, even if it not deserved, is not allowed to divert the threat to a person who is not responsible for it (*casum sentit dominus*).[25]

- This would explain why a surgeon cannot kill a person on the street to save a patient in hospital awaiting a kidney donor; or why the switchman should not (actively) change the tracks to minimize the number of deaths in the basic version of the trolley problem.

The certainty with which continental doctrine accepts a general primacy of the duties of omission over those of action in conflict resolution contrasts with the legal, jurisprudential, and doctrinal recognition of the possibility of attributing a harmful result to the omitting party under the same

22. Neumann (2017, pp. 174–175); Michalowski (2002, pp. 393–394).

23. On the prohibition of actively playing the part of fate or God in situations of necessity, see Coninx (2013, pp. 179–181). In the Anglo-American philosophical argument, Sartorio (2008, p. 121) notes: "If you have no good reason to change who lives and who dies, then, presumably, you also have no good reason to change the *chance* that the people in the situation will die."

24. Joerden (2017, pp. 81, 94).

25. This principle was imported into criminal law from civil law, which, in turn, took the axiom from Roman private law: the *casus*, meaning the events that cannot be attributed to any act of human will, must generally be borne by the owner of the damaged object, the *dominus*. For more on this, see Coca Vila (2016a, pp. 387–392).

conditions as though he had actively caused the harm. The supporters of this theory still have not provided a convincing explanation of how to make this supposed primacy of the duties of omission compatible with attribution of full criminal liability in "commission by omission."[26] The fact is that a general primacy of the duties of omission cannot be confirmed over those of action, even when resolving conflicts among grounds of obligation. In addition, it is not certain that rights can only be infringed actively. Real subjective rights can be infringed through omission, which is exactly what happens when a special obligor fails to fulfill his duty.[27]

- The bodyguard who, in exchange for a large sum of money, does not prevent the death of the politician he has to protect is not just failing to save a mere interest, he infringes the right to life in the same conditions as the professional assassin who kills for money.

On the other hand, neither should the duties of omission be associated, without further thought, with the maintenance and respect of a given *statu quo*, nor should duties to act be associated with the perturbing alteration of the *statu quo*. The *statu quo* whose indemnity preoccupies criminal law doctrine, meaning the fair distribution of spheres of freedom based on notions of rights and duties, can be altered by omission, which is precisely what happens when guarantors do not fulfill their duty. The violation of a special duty involves an interference in another's legal sphere, and alteration of the given *statu quo*, equivalent to actively harming that right. Similarly, the *statu quo* can be upheld through active behavior that alters the natural course of events. Not all active interposition of a cause for a harmful result automatically constitutes the violation of a subjective right. Consider the following examples:

26. In continental literature, see Silva Sánchez (2008, pp. 455–462); Dopico Gómez-Aller (2008, pp. 445–446); Bohlander (2009, pp. 40–45); in Anglo-American literature, see Ormerod and Laird (2015, pp. 74–83); Ashworth (2013, pp. 38–66).

27. The situation is different in relation to the general duties of solidarity (e.g., the duty of easy rescue). The claim of the person in need is of lesser importance here, and the failure to fulfill this duty does not constitute the violation of a subjective right. Therefore, the result not prevented is not attributed to the person who failed to act, who is also not required to take large risks or to bear significant costs in order to rescue others. For more on this, see Silva Sánchez (2008, pp. 466–469).

- (A) and (B) are walking through a city during a very strong windstorm. Suddenly, (A) notices that a large billboard has come loose from the roof of a building and is heading toward them. Before the billboard can hit (A), which would have killed her, she ducks, and it hits (B), who dies immediately.
- A security officer (A) in a private office block has to lock the doors at 8 o'clock in the evening. A few seconds before eight, when he goes to lock the door, he sees (B) running toward the door hoping to enter the building to avoid being bitten by a wild animal. Despite that, (A) closes the door, and the person in need, (B), is devoured by the animal.

In these two cases—the first answering a structure of "ducking harm,"[28] and the second, an interruption of a rescue process within the actor's own legal sphere[29]—it seems clear that neither the person ducking nor the security officer are committing typical homicide in this case; in short, they are not altering the given *statu quo* by acting in a normatively significant way. Therefore, their actions do not require any special justification, but are covered by the general principle of freedom to act.[30] In the first case, the person ducking is simply taking evasive action and putting into effect a life-saving choice guaranteed by law and which is her right, so that shifting—through active behavior—the harm onto a third party could not be seen as arrogating another's claim to be saved. In the second case, the security officer locking the door is acting according to a pre-established schedule and is simply exercizing a right for his own good, and therefore, is not really violating the person in need's right to life. At most, the officer is a bad Samaritan and would be infringing his general duty of solidarity. Disrupting the system or altering the *statu quo*, does not depend on whether the behavior is to act or omit, but on its specific normative meaning with respect to the performances involved.[31]

28. About a nonconsequentialist approach to the distinction between merely "ducking harm" and "sacrificing others," see Boorse and Sorensen (1988); Uniacke (1994, p. 147); Haslett (2011); Ferzan (2017, pp. 223–227). For criticism of the distinction, see Fischer and Ravizza (1994).

29. See further McMahan (1993, pp. 258–259); Alexander (2005, p. 621); Lerman (2013).

30. See further Alexander (2005, p. 621).

31. More than a few people, in order to safeguard the link between action and alteration of the *statu quo*, try to re-interpret the action of the one taking active evasion as a mere omission. See Alexander (2005, p. 621). However, this obscures the true reason for why

If it turns out that it is not possible to confirm a general prevalence of omission over action, neither should legal practical consequences be extracted to solve conflicts based on the active or passive nature of the due conduct. Therefore, if conflict resolution does not depend on the deontic operator of the acts (prohibited or required), there is no sense in establishing the scope of the defense based on this difference.

III. THE SYSTEM FOR PRIORITIZING CONFLICTING GROUNDS OF OBLIGATION

A. Short Critique of the Standard Method and Rationale

The issue of how to prioritize conflicting duties seems to raise no doubts among continental criminal law scholars. If only an interest is hiding behind the duty, with its maximum protection being the end purpose of the criminal system, it is obvious that safeguarding the preponderant interest in a situation of conflict must always be preferred. This means that, if there is no explicit legal solution or regulated decision-making process,[32] the obligor must always safeguard the preponderant interest, after defining and comparing all those involved.

Nevertheless, behind the simplicity and apparent plausibility of this reasoning lies a problematic method and rationale for resolving conflicts. First, the theory of balance of interests, as a method, plunges conflict resolution into pure arbitrariness. Behind the praise for the open, all-encompassing character of judgement by weighting, there is, in fact, a worrying impossibility of clearly defining the object of comparison, meaning the notion of interest, as well as the criteria (regulatory) through which to attribute a value to each interest at stake, and on the other hand, redirect them to a common denominator that will then enable comparison. Instead, supporters of the theory of balance of interests are content to list a string of—always controversial and supposedly relevant—factors in comparative judgement (legal interest, the probability and extent of the threatened harm, the provocation of the conflict, etc.). This makes it impossible to control of the subjectively defended solution rationally. Added to this

active behavior causing death should not be considered as homicide. Critical of this proceeding is Husak (1985, pp. 86–91).

32. Although concerning the necessity defense, see Thorburn (2011, pp. 32–35); Molina Fernández (2000, pp. 232–254).

problem, already accurately observed in the modern discussion on defense of necessity,[33] is a second one in the collision of duties, namely the role that would correspond to the kind of duty—duty of guarantee vs. general duty to rescue—in the prioritization of duties. Whoever is happy to state that the weighting must take all relevant factors into consideration, lacks a criterion to state whether the father's duty of guarantee to his child in danger of drowning is greater than the general duty to rescue a stranger threatened with the same fate.

The principle of the preponderant interest, as an axiological driving criterion when prioritizing duties, is not convincing either. The theory of the preponderant interest entails a mainly collectivist principle of resolving on conflicting duties.[34] A person has to tolerate the loss or non-rescue of his interest and the violation of his claim simply because this enables another person's greater interest to be saved. However, this way of reasoning finds no place in a liberal system, where it is recognized that all citizens are owners of their own sphere of freedom, managed solely by themselves and guaranteed by true rights of exclusion to be free from interference by third parties.[35] Neither does a holistic being exist, interested in maximizing the cumulative interests of a particular community, even in situations of emergency; nor can anyone be forced to tolerate interference in their legal sphere for the sole reason that it maximizes the interests of others.

The legal system is not directed toward the highest possible protection of legal interests, but toward ensuring formally predefined legal positions based on notions of right and duty.[36] This being so, it is the end victim in the conflict, in as far as he is the owner of the infringed rights, to whom the resolution of the conflict must be justified. As will be made clear in the next section, this is only possible through a deontological reasoning arising from the two basic guiding principles of the system for founding rights and duties in a liberal criminal system, i.e., the principles of autonomy and solidarity.

33. Alexander (2005, pp. 613–617); Coca-Vila (2018, pp. 64–66).

34. See Husak (1989, pp. 505–506). The utilitarian or collectivist foundation for necessity continues to enjoy some support in continental criminal law (see Joerden [1993, pp. 247–253]), and is generally accepted among Anglo-American criminal law theorists (see Brudner [1987, p. 341]).

35. For more detail on this, see Pawlik (2012, pp. 29–124); Neumann (2014, pp. 588–589).

36. Coca-Vila (2018, pp. 65–66).

B. Toward a Deontological Foundation of the Prioritization System

1. Autonomy and Solidarity as Keystones of the Prioritization System

In this section, I am assuming that the legal system finds legitimacy as a coercive instrument due to its suitability as a guarantor of the minimum conditions required for citizens to be able to choose the course of their lives with effective independence.[37] Fair reconciliation of spheres of freedom in permanent conflict goes through a harmonious confluence of the two partial moments of freedom from which criminal law duties arise: the principles of autonomy and solidarity.[38]

As its primary mission, the legal system guarantees every person a space in which they can organize themselves freely, establishing a clear and unbreakable separation of legal spheres based on the principle of autonomy. The fundamental condition needed to ensure a separation of spheres of freedom of this type is for each person to be responsible for their sphere so that it does not violate the legally guaranteed interests of the other citizens *(neminem laede).* From the principle of autonomy both the duties to omit as well as to act are derived. The basis of the duty infringed by someone who actively strangles their victim is the same as that of a person who, after endangering a stranger, does not rescue him; or someone who freely takes on a position of control that results in the victim being unprotected, and then does not rescue the victim from a perilous situation. In addition to all the prohibitions and commands aimed at ensuring a stable separation of spheres of freedom, the principle of autonomy also gives rise to defense faculties authorizing harm to be transferred back to whomever was personally responsible for causing it (self-defense).

However, self-determination—that is, free exercise of a specific life plan—in addition to the negative guarantee of stable external relationships, of a freedom that is in some sense abstract or negative, also demands a basic material foundation; in short, it requires the real means necessary to be able to be effectively self-determining in keeping with their own aims. The guarantee that this material foundation to bring our abstract freedom into effect is mainly achieved nowadays through social institutions. Within

37. Pawlik (2017, pp. 39–45).

38. For more detail on this, see Wilenmann (2014); Coca Vila (2016a, pp. 248–274). On the philosophical discussion, see Rodin (2011), who develops a general explanatory model of justifications based on the principles of liability and lesser evil.

these institutions, certain people are not only obliged not to interfere in the spheres of others, but also to be positively bound to improve the status of the legal position associated with the role they hold. What matters now is that the principle of solidarity gives rise to positive duties to guarantee basic social institutions, especially the family and the state. Thus, for example, mothers are not only obliged not to harm their children, but also to feed them, in the same way as a police officer is obliged not only not to steal, but also to prevent the public from stealing. Following on from the same reasoning is the general duty to actively rescue that is endorsed by most continental penal codes, in addition to the duty of tolerance toward the person who has to suffer justified interference from the endangered person through the application of the standards of necessity.

Taking into consideration that conflicts between grounds of obligation constitute a particular problem in the complex process of legitimizing duties, it can be stated that the guiding principle in the prioritization system for grounds of obligation is also the duo consisting of the principles of autonomy and solidarity. The reasoning based on one of these two principles makes it possible to justify the victim bearing the final decision resulting from the conflict. In short, prioritizing is not to look for the preponderant interest from a collectivistic point of view, but to indicate which of the people involved in the conflict deserves to take on the costs of resolving it[39]—whether because it can be traced to a previous act of freedom (autonomy), or because it must be tolerated due to positive bonds (solidarity).

2. The Double Dimension of the Conflict Between Grounds of Obligation

Similar to the theory of the preponderant interest finding its related method in the theory of balance of interests, recourse to the autonomy/solidarity duo as a *ratio* for the prioritization system likewise requires a rather different train of thought on the methodology of the problem. The characteristic structural feature of a collision of grounds of obligation lies in the dual plane on which the conflict appears. This means that, unlike events in the classic situations of justification, where the solution to the

39. About the normative significance of responsibility to resolve a conflict and the consequentialist limits of this rationale, see Segev (2014, pp. 101–106); Rodin (2011, pp. 75–77).

conflict arises solely from an analysis of the legal positions of those defending themselves and of their victims,[40] settling the conflict of duties becomes especially complex, as there are two significant normative planes relating to the legal spheres, and at least three agents involved (triangular structure). On one hand, the conflict appears on the horizontal plane relating the two potential beneficiaries, due to the grounds of obligation. On the other, the conflict emerges on the plane defined by the vertical relationship between each beneficiary and the obligor. Here is an example:

- A father finds himself with the dilemma of saving his child's life or saving a stranger from suffering physical harm. On the horizontal plane, the right of the child not to die collides with that of the stranger not to be physically harmed. On the vertical plane, the father's duty of guarantor toward his child collides with the general duty to rescue the stranger.

The difference between these two planes establishes the bases for the prioritization system, which will be developed in the next section. The aim is to establish a provisional ranking for each of the biased planes separately, and then to apply a meta-rule to decide on the final order of precedence from the grounds of obligation involved.

C. Prioritizing Conflicting Grounds of Obligation

1. Ranking Opposing Claims in the Horizontal Plane

The first provisional judgement on prioritization examines the horizontal relationship according to the logic of the justificatory defenses. To this end, it must first be decided—based on the degree of responsibility for the conflict held by each person, or any special duties—whether any of the parties deserves to bear the cost of the conflict, either because he responsibly caused it (legitimate defense; defensive state of necessity), or because his interest is significantly less than that of the interfering party (aggressive

40. The three-party relationship of "defense of others" remains derivative of the two-party relationship of self-defense or necessity and is, therefore, one-dimensional. The agent then simply puts himself in the position of the person in need, exercizing exactly the same right to defense that is due to him. On this, see Westen and Mangiafico (2004, pp. 843–847); Christopher (1998, pp. 133–139). However, the third party cannot defend the attacked person against his will. About this constraint, see Thomson (1991, pp. 305–306).

state of necessity).[41] As a result of this first analysis, it is possible that one of the parties holds a higher ranking, meaning that he has a right of necessity over his opponent in the conflict situation.

- Person (A), not heeding the requirements of her companion (B), breaks the speed limit while driving along a road. Just when (B) wants (A) to stop the vehicle to let him out, (A) loses control and both are badly injured in the ensuing accident. The doctor (C) can only save one of the two in time. In this case, (B) has a stronger claim over (A), as determined by the defensive state of necessity.
- The father (A), out sailing with his children, sees both of them run about the deck and end by colliding. As a result of this, his child (B), who does not know how to swim, falls in the water, at the same time as his other child (C) see his very expensive watch fly into the sea. In this case, (B)'s interest substantially outweighs that of (C), as determined by the aggressive state of necessity defense.

On the other hand, it is also possible that neither has a right as such, since neither could justifiably avoid the conflict at the expense of the other.

- The children (A) and (B) are in danger of drowning and expect their father (C), who is equidistant from both, to rescue them. Neither child can cite higher status than the other, meaning that neither could justifiably avoid the conflict at the expense of the other.
- The same occurs in the case in which, following shipwreck, (A) manages to cling on to a plank that keeps him afloat, while (B) can only save her child (C), who is in danger of drowning, by snatching

41. Continental criminal law systems usually recognize three different rights of defense: (1) *Self-defense* grants any defensive action that is necessary to avert an imminent unlawful attack on oneself or another. Those defending themselves can use as much force as necessary to avert the attack. (2) The *defensive state of necessity* grants any defensive action that is necessary to avert an unlawful and not fully responsible attack (negligent creation, mistake of law, diminished culpability, etc.). The defendant can use force up to a certain extent: he must not harm an interest that substantially outweighs the one safeguarded. (3) The *aggressive state of necessity* grants any transfer of a danger to another person who has nothing to do with its origin, when the person in need is safeguarding an interest that substantially outweighs the one harmed. Whereas the first two rights are based on the principle of autonomy, the third is based on that of solidarity. For more detail, see Hörnle (2007, pp. 586–589); Coca-Vila (2018, pp. 69–70).

> the plank from (A). Neither (A) nor (B) have a better right according to the strict logic of the theory of justificatory defenses.

In the first scenario, the analysis of the horizontal relationship ends by ruling in legal preference of a claim. However, in the second, it still cannot be ruled that the horizontal relationship between those in need comprises a situation of equipoise. This is not because, in conflict situations where neither of the beneficiaries holds a right of necessity over the other, it is still necessary to analyze the specific normative relation of each of the beneficiaries with the danger defining the conflict situation.

As the flipside to the principle of autonomy, a liberal legal system is governed by a principle of individualizing misfortune (*casum sentit dominus*) that generally prevents the person threatened by harm for which he is not responsible, from transferring it to a third party.[42] This means that, the dangers or harm not initially attributable to any party, are not socialized, but the law also charges them to a specific individual, even though it is completely undeserved. This is certainly fair within the framework of a legal system that also privatizes and recognizes that an individual can enjoy his good fortune privately. Looked at closely, the necessity defense is an exception to this general rule of individualizing misfortune: only when the interest of the person in need substantially outweighs that of the person finally affected, can diverting harm to a third party be justified.[43]

Criminal law scholars have historically focused on the second issue, leaving aside the question of who must, by default, suffer the misfortune (*dominus*). In general, it is assumed that this is always determined by the nature of the misfortune. The person suffering from renal disease is, by default, the one who has to tolerate the illness, with no other candidates possible. Thus, even when it may seem that diverting the harm has no normative significance, a driver whose brakes have failed, but has to decide which of two pedestrians to hit, would have to respect the natural distribution of the misfortune and let things run their course.[44] Anything to the contrary would mean breaching the dyke and opening the door to

42. Silva Sánchez (2008, p. 467); Øverland (2005, p. 705, n. 15). For the opposing argument, see Harris (1975); Unger (1996, p. 97).

43. Coca Vila (2017, pp. 67–68).

44. On the so-called "moral inertia," meaning the moral pressure to leave things "as is," see Sartorio (2008, p. 120): "the pre-existence of a threat—or, more generally, of a causal process of some sort—makes intervening impermissible, if other things are equal."

manipulating the misfortune, something that proves especially problematic when human life is involved.[45]

However, the fact that things stand in a certain way does not mean that they must be like that. Contrary to how the criminal law scholars present it, ascribing the position of *dominus* is based on a normative rationale. The *dominus* status is not given because of a prognosis about where evil will fall if no one intervenes, but rather because of a normative judgment that takes into account the foreseeable permitted acts of third parties who are able to deflect the harm. In other words, there is conduct by individuals that, normatively, is deemed to be a fact of nature, i.e., that contributes to determining the "default" state of the world.[46] Thus, the person called on to bear the loss is not necessarily the one first chosen by nature, but the one to whom the harm is directed after discounting any deflections of the harm supported by law. There are two basic regulatory criteria to decide which natural deflections of harm lack normative significance and, therefore, must be taken into account to determine the default position of competence due to the danger.

In the first place, it must be stated that neutral organizational acts within the legal sphere are generally guaranteed, even when this may expose—in naturalistic terms—a third party to harm that might not, at first, seem to belong to him.[47] Consider the following examples:

- (A) has lost control of her lorry and is going downhill directly toward (B)'s SUV, as he is parking the car. Behind (B)'s car, in the middle of the road, are two children (C) and (D), who are calmly playing ball. When (B) sees (A) careering toward him, although he has noticed the presence of the two children, he stops parking and accelerates rapidly off the road, so that (A) kills the two children. If (A) had hit (B), both would have been seriously injured, but neither would have died, and the children would have been unharmed.
- A driver (A) has lost control of his vehicle after being hit by another and is heading toward a crowd of people just leaving a football stadium. (A) cannot brake the vehicle, but can change course so that, instead of hitting the crowd full on, only some of the pedestrians will be hit.
- A switchman (A) notices that a convoy is about to enter the station. According to the pre-established railway schedule, he must redirect

45. Sartorio (2008, p. 126); Malm (1989, pp. 248–258).
46. Sartorio (2008, p. 122).
47. Øverland (2005, pp. 702–711).

> it to Track 2, in order to prevent it colliding with the train standing on Track 1. Just as he is going to switch points, (A) sees a passenger (B) wandering on Track 2, who will be fatally crushed.

In these three cases, it would be possible to actively deflect the harm to a third party, with no special justification needed. It is not a matter of being able to justify the transfer by applying standards of necessity, which would never justify a murder, but from the beginning, people other than those designated by nature are considered competent to manage the danger. The first example is a classic case of "ducking harm." In as far as the law generally recognizes that evasive action can be taken as described, and child (C) cannot, on grounds of solidarity, demand that the driver not move the car, no general duty of solidarity can demand death, therefore, (C) is called upon to bear the loss in the conflict.[48] In the second example, it cannot be said that only those called to be run over at first are solely competent due to the danger at issue. In as far as a slight change in the direction of the vehicle does not constitute a bizarre act of managing one's own sphere, not out of keeping with a standard predictable and neutral act,[49] the driver cannot be considered to be diverting the harm to a stranger, as provided by law. All members of the group are called *ab initio* to bear the loss under identical conditions; they are in the same "risk zone," without anyone being able to rationally claim that they have nothing to do with the danger.[50] Something similar also holds true for the third example. Since the switchman is only complying with a set schedule; it is easier to establish the neutral character of his action. The switchman's legal duty to change the route of the convoy means that, from

48. Of similar opinion and Haslett (2011, pp. 274–279); Ferzan (2017, p. 225). The "ducker's" evasive action is irrelevant in law and, contrary to what Simons (2005, p. 655) claims, does not impose any special duty of assistance to the person who is injured because of his evasive action.

49. It will not always be easy to delimit conduct deflecting the danger to a third party from conduct that simply involves a legitimate redirection of the danger within the same risk zone. Can a driver who has lost control of the vehicle and is driving on the third lane of a motorway cross over to the first lane and change the victim of the crash? The presence of lanes supposes here a certain normativization of the expected happening, so that an unjustified change now seems to involve *ad hoc* reorganization of an unacceptable course of injury. For more on this, see Coca-Vila (2018, pp. 66–79). Similarly, see Øverland (2005, pp. 704–708); see or Hevelke and Nida-Rümelin (2015, pp. 222–224), who maintain the existence of a generic obligation of predictable behavior.

50. Øverland (2005, p. 702).

the first, the disoriented passenger has to bear the cost of the conflict, and the transfer of harm does not constitute an illegal manipulation of fate.[51]

Secondly, it must be said that actions taking advantage of a rescue resource over which one has a prior claim, regardless of who reaches it first, are generally equally admissible, even when it means exposing—in naturalistic terms—a third party to harm that may not seem to concern him at first sight. Consider the following examples:

- A lorry driver (A), whose brakes have failed, chooses to drive into the emergency lane, although he has seen a child (B) playing there, who will be killed.
- After colliding with a second yacht, the boat in which a father (A) and his son (B) are sailing starts to sink. When (A) goes to find the life jacket for his son, he notices that the one from his boat has fallen into the sea and is now being used by (C), a passenger from the other yacht, who refuses to give it up.

In these cases, those who have to bear the loss due to the nature of the first instance and those who are designated to do so normatively are not the same. Despite the lorry driver actively transferring the harm to a third party, he is strictly adhering to the pre-established conditions for action when faced with brake failure. Therefore, his action constitutes legitimate use of a resource corresponding to him—in response to the specific threatened harm—a *prior claim*.[52] And the same happens in the second example. Although the passenger from the other yacht has taken the life jacket, the fact that she has it does not cancel the father's right as owner. Since the father has a better legal right to the resource, in the eyes of the law, the person who should bear the loss is still the occupant of the other yacht. The better claim to the life jacket determines that taking it from the stranger to give to the son does not constitute an illegal transfer of the misfortune.

However, returning to the prioritization of duties on the horizontal plane, this regulation for attributing the position of default competence for the loss has two consequences: on one hand, certain active variations in the course of action do not constitute deflection of the harm. On the other

51. Jakobs (1993, p. 590, n. 66).

52. Likewise, Quong (2009, pp. 523–532); similarly, Tadros (2011, p. 257) or Frowe (2014, pp. 54–63). The fact that the space is public or that children were in the space before is irrelevant. An emergency lane is specifically designed to ward off the threat to the lorry driver, so he is the one with the prior claim in this case.

hand, attributing the position of *dominus* opens the door to the fact that several agents occupy that position *ab initio,* without the cause of variation in determining the action of one *dominus* to another being able to, or should, be seen as a relevant alteration of the danger. From now on, this analysis of the horizontal relationship among the beneficiaries of the opposing grounds of obligation goes, in the last instance, to differentiating between two large groups of collisions: those in which the two beneficiaries occupy the position of *dominus*, meaning that they are directly affected by the danger, and comprise a defined community of danger; and those in which only one of the two beneficiaries is concerned with the danger characterizing the dilemma. This difference, and not the one interceding between action and omission, is fundamental when settling conflicts. In the first scenario, in which both the beneficiaries seem to be directly involved in the danger, the analysis of the horizontal relationship, lacking a better right for one of the contenders, has to conclude by confirming that the two opposing claims are equivalent.

- This occurs in the example of the father who has to save his two children who are in danger of drowning. Faced with the colliding claims by the two children, it is impossible to establish a prior claim.
- The same occurs in the case where the driver of a car with brake failure can only choose between continuing in the same direction and run over the whole group, or turning the car to hit one end of the group. Given that all members comprise a community of danger, even those who, at first, were not destined by the nature of the situation to die, their claims to salvation are equivalent, on the horizontal plane at least.

In the second scenario, although the initial analysis of the horizontal relationship may seem to state that the two beneficiaries are equivalent, the residual competence for the danger based on the principle of *casum sentit dominus* determines legal preference of the claim of the beneficiary not in need. This is how the primacy of the *statu quo* must be understood: Where other things are equal, it is prohibited to transfer the danger from the person who should suffer it, to someone who has nothing to do with it.[53]

53. For a consensual perspective (hypothetical contracts), see Øverland (2005, pp. 696–697), (2011, pp. 558–566). See also Tadros (2012, p. 273), (2011, p. 259), who believes "the

- A patient in the hospital waiting room has a higher normative status than the patient already admitted and whose survival depends on a kidney transplant, even when the doctor could remove a kidney from the former to save the life of the latter.

2. Ranking Opposing Claims in the Vertical Plane

The second partial judgement on prioritization comes from an analysis of the relationship between the obligor and beneficiary from a vertical perspective, i.e., from the perspective of the conflicting grounds of obligation. More specifically, the kind of grounds indicates the degree of the exercise of autonomy on which to refocus the origin of each reason for obligation. This is to say that the greater the exercise of autonomy by the obligor to whom the origin is refocused, the greater force with which the law guarantees the duty and, by extension, the higher the ranking of the grounds of obligation when it comes into conflict. In short, this explains that the duty of assistance by the bodyguard who is contracted for the work must be stronger than the general duty of rescue. Nonetheless, we must distinguish between three different kinds of duties.[54]

In the first place, I am referring to the duties of guarantee, as expressions of the maximum intensity of obligation, also extending to fully free behavior of the obligor. This maximum intensity is linked to the possibility of attributing the specific harm to the infringer of the duty, and unsurprisingly, infringement of such duties is punished with maximum severity. Besides the duty not to actively harm, these include duties taken on when risk is assumed, duties when you create a dangerous situation, the nuclear parent-child duties, in addition to certain duties held by public servants.[55] In second place is a lower class of duties, which I call the intermediate rank

priority of the status quo" is the way to prevent the strong from systematically tending to survive at the expense of the weak. Similarly, Tamblyn (2015, p. 52).

54. Here I follow Silva Sánchez (2008, pp. 462–469). Similarly, see Ashworth (2013, p. 69) for differentiation among five categories of duty depending on the intensity of criminalization, which covers both the question of the relative seriousness of the offense and the question whether the offense is conduct-based or result-based in its formulation.

55. Assuming that both negative duties of not interfering, based on the principle of autonomy, and positive duties, based on the principle of solidarity, can be infringed by action or omission, it is not feasible to establish a general priority of negative duties over positive ones. I have argued at length for this claim in Coca Vila (2016a, pp. 275–305), (2018, pp. 74–76). Certain positive duties of care, such as that of a mother to her child, or the

and whose justification arises from more tenuous acts of freedom by the actor. These can have a positive origin (qualified solidarity), for example, some state duties (the general duty of the police to prevent crime) or duties based on non-nuclear family relationships (duty of assistance among non-dependent family members);[56] intermediate rank duties can also arise from the principle of autonomy. This typically happens with the duty to rescue after fortuitously causing the danger. A driver who accidentally puts another in a dangerous situation has a more intense duty to assist him than third parties would, but not equivalent to that of the person fully responsible for creating the danger.[57] Finally, this tripartite is completed by the general duties of solidarity.[58] Among these, in addition to the general duty to rescue are the duty to report or prevent crimes and the duty to assist in polling stations, among many others.

On the plane of the type of duty, conflicting claims can be effectively prioritized when they are of different types. This means—assuming that duties of the same type cannot be prioritized, yet the duties of guarantee take precedence over those of intermediate rank, and both of these over general solidarity—the comparative analysis in this plane shows a difference in rank only when there is a collision of different types of grounds of obligation in the same category.

- The ground of guarantee obliging the father to save his child takes precedence over that of intermediate rank that obliges him to save a person who has been endangered by a fortuitous accident, and in turn, both take precedence over the grounds obliging the same person to rescue a person in need with whom he has no ties.

Thus, similar to what happens in the analysis of the horizontal relationship, an examination of the vertical relationship can conclude by establishing a ranking among the claims involved, or otherwise, by deciding on their equivalence. This occurs when both grounds of obligation belong to the same category of duty.

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prison guard to the prisoner, acquire the rank of duty of guarantee and are punished as a breach of a prohibition based on the principle of autonomy.

56. See, especially, Silva Sánchez (2008, pp. 464–466).

57. This is sensitively discussed by Rodin (2011, pp. 84–87).

58. This is what Ashworth (2013, p. 43) calls "civic obligations." On its basis, see von Hirsch (2011, pp. 243–251).

- On the vertical plane, the two concurrent grounds of obligation in the case of the father who cannot save both his children from drowning are equivalent, as they share the same kind of duty (duties of guarantee). The same conclusion must be reached when what is at stake is the patrimony of a child (duty of guarantee) or the life of his brother (duty of guarantor). When addressing the type of conflicting grounds, both claims are equal.

3. Reconciling the Results of Prioritization on the Two Planes

Once the pertinent ranking has been reached on the two planes, the results from both dimensions can be reconciled. Whenever a difference in rank can be established on the horizontal plane, that will be the deciding factor in settling the conflict. That is to say, wherever it is possible to establish a right of defense, in accordance with the classic rules of justificatory defenses, by one of the two parties involved in the conflict, the obligor always has to comply with the ground of obligation that guarantees the claim of that person. In that case, the obligor operates as his imposed representative, so that the higher-ranking ground of obligation always protects the person with this prior right.[59] This rule of primacy can be explained by the pre-eminence of the principle of deserving as a criterion for distributing scarce resources. In cases where the conflict can be resolved based on the relationship freely formed by the two interested parties, the kind of grounds of obligation is irrelevant. This also applies when the actor may have a particular interest in fulfilling the ground of obligation toward someone with a lower claim in the horizontal relationship. Not even a morally or legal privileged relationship among obligor and beneficiary can undermine the best right of one of the two beneficiaries.

- A wife must rescue the stranger that her husband has put into peril, even when both are in the same state of emergency, since in the equality of interests involved, the stranger already has a better right on the horizontal plane over the husband of the obligor, in accordance with the logic of the justificatory defenses.

59. About the derivative nature of the obligation to rescue of the proxy from the right of the imperilled, see also Bazargan-Forward (2018).

Although the role played by the kind of duty in the prioritization system proposed here is supplementary, it will prove fundamental when the horizontal relationship does not allow for duties to be prioritized. The most intense normative relationship between the obligated and one of the interested parties combined with the equipoise between the rights of both imperilled determines the solution of the conflict. Only in this restricted sense are the criminal law duties "agent relative."[60] This is perfectly compatible with the individualist view of the conflict defended here: the victim of the conflict cannot, in this case, reasonably argue anything against the prioritization based on the type of the ground of obligation since, from the start, his normative status is normatively weaker than that of his adversary, due to less intense ground of obligation.[61] The normative relationship between the imperilled and his proxy configures therefore the claim of the other interested party in the conflict.

- In the often-cited case of the father who has to choose whether to save his child's life or that of a third party, the decision of parity on the horizontal plane between the two persons in need does not mean that it is impossible to prioritize the grounds at issue. Here, the type of duty determines a definite ranking. The duty of guarantee takes precedence over that of general solidarity, so the father must save his child before a third party.

This ends reflections on reconciling the two partial decisions on prioritizing. In any case, in the configuration of the system outlined here, no system for conflict resolution has been totally defined, basically because it

60. I adopt therefore a limited objectivist point of view by resolving conflicts between grounds of obligation. The relationship between one beneficiary and the obligor, regardless of its foundation, could not serve to justify conduct that would otherwise be wrong when one of the beneficiaries deserves to bear the costs of the conflict. See Donaldson (1990, pp. 11–14); or Tadros (2012, p. 271). That relationship is, however, decisive in case of equipoise in the normative relationship among the two beneficiaries. On this see Bazargan-Forward (2018). On the defense of duties of loyalty, Oldenquist (1982) is essential reading.

61. Even when human lives are at stake. The principle of the imponderability of human life does not mean that the actor can choose in such cases, as it is one thing for human lives to be worth the same, and quite another that the system cannot establish dissimilar degrees of protection. To this extent, I agree with Husak (1989, pp. 514–515). And this applies regardless of the number of lives that can be saved. The father must save his son even if doing so means allowing two other infants to die. See on this Bazargan-Forward (2018).

cannot be dismissed that the above analysis reaches the conclusion that the two opposing grounds for obligation are hierarchically equal. The method for conflict resolution, both for different ranking and equivalent grounds, is examined next.

IV. INSTITUTING A DUTY FROM CONFLICTING GROUNDS OF OBLIGATION

A. Settling Conflicts Between Prioritized Grounds of Obligation

Settling conflicts between prioritized grounds of obligation has always been a secondary problem. However, this still means that an answer must be found here to two fundamental questions concerning conflicts between grounds of obligation of different rank. On one hand, I am referring to the way in which the system decodes the precedence to solve the conflict, and on the other, to the manner of explaining the solution to the end victim of the conflict.

Starting with the first question, it can be said that the determination of the proper duty from prioritized grounds of obligation always raises the higher-ranking grounds to the category of true duty in criminal law. The obligor must obey the higher ground, which then seems to be the only duty that the legal system demands in the specific case. This means that, setting aside conflicts that have been responsibly generated by the same obligor,[62] non-fulfillment of the lesser-ranking ground of obligation cannot be understood as an infringement of duty. The violation of the proper duty to meet

62. I deal with this problem in Coca Vila (2016a, pp. 340–341, n. 74); and earlier Hruschka (1987, pp. 150–155). It is sufficient here to point out that, in exceptional cases, it is possible to attribute the unavoided result in a conflict through two extraordinary imputation structures: *omissio libera in causa* or *actio libera in causa*. This conclusion has been also recently suggested in the philosophical debate by Cordelli (2018), who provides a defense of the legitimacy of moral "prospective duties" to acquire and maintain capacities to help. I cannot deal here with the topic of conflicting prospective duties (*Obliegenheiten*), or among prospective and actual duties. For a more complete look at this topic, see Kindhäuser (1994). As an example of the former: Should a doctor use the phone line to make requests for materials to sterilize medical instruments for tending to future patients when using the phone may block possible emergency calls? And of the latter: Should a lifeguard make a huge physical effort to save the life of a drowning dog when that will incapacitate him to carry out any further eventual rescue operations of the swimmers?

the lesser-ranking ground can, at most, be excused depending on the individual circumstances of the case.

As for the second question, in contrast to what is usually defended by criminal law doctrine at this point, it can be maintained that it cannot be stated simply that such disappointment is essential to safeguard a stronger interest. The higher-ranking duty does not say how to maximize interests from a collectivist point of view, but provides information on the legal sphere in conflict, which, in this specific case, deserves to be guaranteed. More specifically, there are two specific reasons that define the rank, and that also explain how the conflict is settled to whomever pays the price of the conflict. When the horizontal relationship provides for ranking of the grounds of the conflict, the ones enabling settlement of the conflict are directly the principles of autonomy and solidarity, seen from the classic bilateral view of the system of justificatory defenses.

- Therefore, the child seeing his father allow his watch to be lost at sea in order to save his brother can find the reason for his disappointed expectations in his special duty of solidarity. In the same way, the person negligently endangering his travelling companion must assume that the obligor should save the victim first, as he was responsible for creating the situation of necessity and, therefore, must accept the cost of resolving the conflict.

Explaining the resolution of the conflict to the victim is apparently more intricate in cases where the kind of duty is the decisive factor. There can be no direct recourse to the theory of justificatory defenses, although that does not mean that, in these cases, the solution cannot be validated to the one subjected to it. The victim must accept the loss of his interests vis-à-vis the obligor, because his normative status, like that of his opponent, is also defined by the concurrent relationships among kinds of duty. In brief, there is a reason for differentiation, which does not allow the obligor a right to choose. The fact that he would prefer, for personal reasons, to save the person with the least right in no way affects the right of a victim effectively protected by a duty.

- Even though the two interests involved are equivalent, this is not so for the claims of the two children playing in the park when the obligor is the father of one of the children. The father who

decides to violate his duty of guarantee and supererogatory rescues the stranger commits homicide by omission which, at best, can be excused.

B. Settling Conflicts Between Equivalent Grounds of Obligation

Settling conflicts between equivalent duties (parity cases) is trickier. However, given that—unlike Buridán's donkey, who did not know which pile of hay to eat and died of starvation—the lack of a solid reason for deciding the conflict one way or another does not preclude the legal system from making a decision;[63] the solution to the conflict must necessarily be stated through stipulating a disjunctive or alternative duty requiring the obligor to satisfy one of the conflicting grounds. That is to say, the two opposing grounds of obligation become a single duty, now configured alternatively, which gives the obligor a right to choose between the two opposing grounds.[64] Neither can the obligor be forced to turn to lottery mechanisms,[65] since any decision is now random in the eyes of the law; nor can the legal system, once it has accepted that the two grounds of obligation involved are equivalent, question the decision of the obligor deciding to save one of the two persons in need, depending on age, gender, race, or any other personal characteristic.[66] The obligor's *ius variandi* disappears with the start of the rescue attempt, when one of those in need consolidates his claim and can demand it be respected from that time forward.[67]

- The father throwing the life jacket to one of his two children cannot then pull the rope to snatch it off that one and give it to the other child. Once the attempt has started, only one substantial difference

63. The fact that deciding between two options is not necessarily irrational when there are no reasons for preference is shown very clearly in Rescher (1960, pp. 142–175) and more recently in Chislenko (2016).

64. Finkelstein (2001, pp. 305–306).

65. The fact that it may be advisable, since it expresses particular respect for the principle of equality, does not mean that it is mandatory. For more on this, see Coca-Vila (2018, p. 76). On randomness as a decision-making mechanism, essential reading is Duxbury (1999) and more recently, Segev (2018).

66. How to evaluate the obligor's decision morally is quite another question. For Dworkin (2011, pp. 281–284), there are limits when making decisions, since "there are certain grounds of preference that respect for humanity rules out."

67. For more on this, see McMahan (1993, p. 262).

between the interests (aggressive state of necessity) can justify not finishing the rescue. This is the reason why a doctor cannot disconnect the life support equipment from an elderly patient in the same hospital as a young patient with greater expectations of life.

This freedom to act on the obligor's part when faced with equivalent duties is not limited by an accumulation of duties, not even when human lives are at stake.

- The doctor on duty in a local hospital receives two calls for help from different villages at the same time. Either he goes to village (X), where he can save the lives of accident victims (A) and (B), or to village (Y), where an elderly person (C) has just had a heart attack and is in danger of dying.

The common supposition that, if the aim of saving (A) and (C) is equal, the fact that (B), who is physically close to (A), is an additional reason to be considered in ranking the hierarchy of duties, seems wrong to me.[68] Within the framework of understanding the resolution of conflicts such as described here, in view of the individual claims of each person involved, an aggregation of claims is excluded. (C)'s claim to the doctor, accepting the impossibility of weighting human life,[69] is equivalent to that held by (A) or (B) individually. Therefore, the doctor is obliged by a disjunctive duty whereby he either attends (A) and (B), or he attends (C). He is acting lawfully in either case.

However, in cases where the two claims in question are identical, is it still possible to give a rational explanation to the victim of the conflict of why he must accept the costs of the resolution? This is certainly the most controversial of the issues in the theory of the collision of duties as criminal defense. It is not surprising that, throughout history, there have been many criminal law scholars who support excusing the duty of infringement, even while recognizing that the victim has a right to

68. Scanlon (1998, pp. 229–242); Coca-Vila (2018, pp. 69–70). On the other hand, see Kumar (2001).

69. Accepted almost unanimously between continental criminal law scholars, for example, Robles Planas (2010, pp. 446–448), and in depth in Wilenmann (2016). A different issue is that the probability or extent of the expected injury, as relevant factors in the weighting, may depend on personal qualities in each case, such as age or gender. The same accident might be fatal for an elderly person, but not for a young, athletic person.

self-defense. This is achieved either by attributing an excusatory nature to the defense of equal conflicting duties,[70] or by recognizing that the obligor's conduct is lawful, but not impeding the victim's self-defense (quasi-justification);[71] or else directly relegating the problem to a "area beyond the law," a "legal vacuum," or a "state of nature."[72] In short, in the eyes of the victim, not wanting to rescue even though it is possible will always be an illegal interference in his own sphere, and he should be able to respond in self-defense.

However, this way of seeing things is not acceptable. On one hand, the two beneficiaries share an identical status in the face of the peril determining the conflict: both are co-responsible for the dilemma, in a broad sense. This means that the peril faced by each person in need can only be explained by the existence of a second subject, more specifically, by the opposing claim to be rescued, which neither is willing to cede. Each person in danger poses a moral obstacle to rescuing the other.[73] To settle this type of conflict, the law cannot ignore the existence of a significant difference between the bystander *in* the conflict and the one involved but not responsible, in a strong sense, *for* the conflict.[74] In addition, it must be stated that the two potential victims have a legitimate interest in which one, at least, will emerge unharmed from the dilemma, and have his claim guaranteed finally. This is the only reasonable claim common to both persons in need.[75]

The person who at first has the possibility of being rescued, thanks to the abstract waiver of the two individuals involved in safeguarding their own interests, cannot subsequently disassociate himself from the costs of enjoyment of the possibility once the roles have been determined. This means that withdrawing *prima facie* protected expectations and ensuring success in carrying out the chosen ground of obligation constitute unavoidable steps in guaranteeing the only shared expectation that is possible to

70. In the German doctrine, see, e.g., Paeffgen and Zabel (2017, pp. 1501–1506).

71. In the Anglo-American criminal law doctrine, not far from this is Chiesa (2007, pp. 136–139).

72. On this, see von Hirsch (1985, p. 91); Hörnle (2007, p. 610).

73. On the distinction between Obstructors and Bystanders when justifying the homicide of the former in emergency situation, see Frowe (2014, pp. 24–40); Øverland (2016).

74. On the distinction between an innocent threatener and a nonresponsible threatener, see Bazargan (2014).

75. Øverland (2005, p. 696); Zimmermann (2014, p. 274).

safeguard in the specific case, i.e., that at least one of the two individuals involved in the conflict will have his own claim protected. To a certain extent, these steps are the "price" that has to be paid in the conflict situation for not removing, at the start, the best option for resolution in the eyes of those involved.[76]

This argument, widely accepted when dealing with replaceable interests (e.g., in the law of general average in maritime law[77]), cannot be removed from the plane simply because personal rights are at stake. Even when human life is at stake, the final victim of the obligor's decision must accept his fate, without this being an intolerable reification or violation to his dignity, but simply the necessary result from having previously enjoyed the possibility of coming unharmed out of a dilemma in which he played a leading role.[78] This is generally accepted when two duties to act collide, and is valid for any conflict between equivalent grounds of obligation, regardless of whether the duty is to act or to omit. Maintaining a taboo, such as the prohibition of actively causing the death of an innocent person, does not justify endowing the person protected by the prohibition with primacy, and much less condemning all those in need to die.[79]

- Thus, the climber who sees the rescuer cut the rope tying him to the second climber cannot protect himself by exercizing self-defense against the rescuer; similarly, the mother of the child whom the father did not save cannot shoot the father from another vessel to make him change his mind; nor can a parent prevent a doctor from separating Siamese twins to save the life of one, when otherwise both would die.

A different issue in these last cases is for the law to excuse the obligor who refuses to comply with his duty, the same as the victim who is

76. See, further, Øverland (2005, pp. 702–711).

77. According to this, all parties in a sea venture proportionally share any losses resulting from an intentional sacrifice of part of the ship or cargo to save the whole in an emergency; see Rose (2018).

78. Similarly, see Hörnle (2007, pp. 604–609), who also denies the general preference of a duty to omit.

79. Similarly, see Coninx (2013, 183–201); Stacy (2002, pp. 507–519); and from a philosophical perspective, Frowe (2018, pp. 467–475). Opposing this approach are Trammell (1975); Michalowski (2002, p. 394).

unwilling to accept his role and resists the obligor.[80] This means that, in general, infringing a duty to kill (by action or omission) is excusable, basically due to rights of conscience and a concession to human weakness in cases where no one can reasonably be expected to act under normal standards of behavior;[81] in the same way, the victim opposing the duty of self-sacrifice must be correspondingly excused.[82] However, in both cases, the ones harmed by infringing the duty can defend themselves by applying standards of self-defense or defensive state of necessity, since the system does not deregulate the conflict, but only decides not to punish the wrongdoing in such cases. Consigning the conflict to a free space in law in which the victim could defend himself (conflict of permissibility) would mean denying those in need the certain guarantee of safeguarding a legal expectation, by authorizing a *bellum omnium contra omnes* in which the probability that all interests will be lost is not excluded. This also would illegitimately expose the obligor to defensive attacks by those in need or by their potential helpers. However, not even in conflicts between equivalent grounds of obligation does the law capitulate to the power of the strongest.[83]

CONCLUSIONS

1. The collision of duties has received hardly any attention from Anglo-American criminal law scholars. Neither the conceptual

80. About the legitimacy of a "substantial interest in not having to be an agent of death," see Walen and Wasserman (2012, p. 554).

81. On this, see Stacy (2002, pp. 512, 516–519); von Hirsch (1985, p. 92). Fabre (2007, pp. 379–380) is, however, more sceptical of this kind of reasoning. Clearly something different takes place when a professional infringes a special duty in the course of his work: the bodyguard who has to protect a politician, but does not shoot to prevent a terrorist attack on the politician, cannot be excused from infringing his duty by citing reasons of conscience or having been caught up in a situation of extraordinary motivational pressure. For more on this, see Coca Vila (2017, pp. 32–40).

82. It may be open to debate whether there are professions (e.g., sea captain, soldier) which entail an inexcusable duty to assume a high risk of death. Also inconclusive about this is Husak (1989, p. 512, n. 97).

83. For a similar reasoning, see Tadros (2011, pp. 202–208, 213–216), who accepts a conflict of permissibility only when the clash itself is valuable, or tends to advance what is valuable, e.g., in boxing matches. See also Frowe (2018, pp. 475–479).

definition of the defense in the continental criminal law doctrine, nor the claim to resolve conflicts based on a principle of the preponderant interest, nor the systematic placement usually given to the problem in the classical tripartite structure of the offenses, constitutes suitable starting points for conflict resolution.

2. Such conflicts constitute a special problem by founding criminal law duties. Resolving it is a *conditio sine qua non* before imposing a legitimate duty on a citizen. To settle conflicts, it is irrelevant whether the due conduct is to act or to omit.
3. Conflicts in which one of the beneficiaries of the grounds of obligation has a better right than another (self-defense, defensive or aggressive state of necessity) are settled by obliging the actor to meet the grounds of obligation guaranteeing the normative status of the individual with the best right. Conflicts in which no better right can be found in the horizontal plane are settled by obliging the actor to fulfill the higher ground of obligation according to its kind (duty of guarantee, duty of intermediate rank, duty of general solidarity).
4. Conflicts in which no difference can be found on either of the two planes between the opposing claims are settled by imposing a disjunctive duty on the obligor. In such a case, the legal system does not impose moral conditions on the obligor's decision.
5. The victim of the conflict must accept the loss regardless of their expectations and when there is conflict between equivalent grounds (parity cases). The duty to tolerate constitutes *both* the price to pay for having counted on the possibility of coming out of it unharmed, *and* an essential condition to be able to legitimately oblige the actor through a disjunctive duty.

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