BYU Law Review

Volume 1986 | Issue 3 Article 6

9-1-1986

The Principle of Interest Balancing as a General Basis of Justification

Theodor Lenckner

The Principle of Interest Balancing as a General Basis of Justification

*Theodor Lenckner**

I.

My topic, the principle of interest balancing (or lesser evils)[1] as a basis for justification, requires some clarification at the outset. In German criminal theory, at least, the principle of interest balancing is handicapped by a misunderstanding which goes back to a decision of the Reichsgericht (the former German Supreme Court) of 1927, often described as a "pioneering" decision, which concerns so-called extra-statutory necessity.[2] In that case, which involved a medically-indicated abortion, the Court

---

* Dr. jur.; P.Doz, Tübingen, 1964; o. Prof. und Dir., Institut für Kriminalwissenschaft, Münster, 1964.

1. [Ed.] The German term being translated here as "interest balancing" or "lesser evils" is "*Güterabwägung.*" Literally translated, this term means "balancing of goods." On its face, the term can refer both to abstract types of goods that the legal order is designed to protect and to the concrete goods at issue in a particular case. Unfortunately, the phrase "balancing of goods" is not commonly used in Anglo-American law, so one must be content with two slightly less accurate translations to avoid giving the impression that *Güterabwägung* refers to something distinct and foreign. In many ways, "lesser evils" is the closer translation. It embodies the idea of weighing goods, and merely assesses them from a negative perspective. The problem with this term in English is that it is too concrete. It tends to be used only in discussions of justifying circumstances, and furthermore, it refers primarily to the concrete interests at stake in the particular case. "Interest balancing," on the other hand, is an abstract notion, but perhaps too much so. A "good" in the sense envisioned by *Güterabwägung* is not merely any interest, but a legally protected interest (*Rechtsgut*). In what follows, the terms "lesser evils" and "interest balancing" will be used to emphasize different aspects of the single underlying term, depending on the context. "Interest balancing" will be used when the reference is to the general process of balancing as a methodological or analytical approach; "lesser evils" will be used where the reference is more concrete, or relates particularly to the notion of justifying necessity. The latter convention is appropriate since in German theory, the notion of *Güterabwägung* has particular relevance to the necessity defense, where it corresponds to the Anglo-American notion of lesser evils. *See, e.g.*, MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

2. Judgment of March 11, 1927, Reichsgericht, Ger., 61 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 242. The decision held that the defendant was entitled to a defense of necessity, even though there was no basis for such a decision in existing statutory law (hence, "extra-statutory necessity"). For a discussion of this famous case, see G. FLETCHER, RETHINKING CRIMINAL LAW 799-80 (1978).

developed its famous theory of interest balancing. The key sentence of its opinion read as follows:

> In situations in which the only means of protecting a legal interest lies in an act which fulfills the external elements of a crime . . . , the question whether that act is lawful, or not prohibited, or wrongful, [*rechtsmassig oder unverboten oder rechtswidrig*], must be decided with reference to the relative value, inferable from the law which is in force, of the conflicting legal interests involved.[3]

Materially restricting the balancing process to the "relative value . . . of the conflicting legal interests involved" was consistent with the simplification of the criterion of evaluation: in the process of balancing the interests, according to the Reichsgericht, "one must use, as a point of departure, those evaluations which have found general expression in current penal provisions for the protection of legal interests."[4] On this basis, the Reichsgericht found a relatively simple solution for medically-indicated abortion. Comparing penal provisions for offenses of homicide and bodily harm, on the one hand, with those for abortion, on the other, shows that the life and health of the pregnant mother are legal interests valued more highly than the life of the unborn fetus. Therefore, an abortion is justified if it constitutes the only means of protecting the life and health of the woman.

No doubt the outcome in this case corresponded to a general sense of justice; however, it is probably mere coincidence that the theory of interest balancing in this case also appeared to be "correct." The Reichsgericht's formulation limited the notion of interest balancing in connection with the necessity defense to a comparison of abstract legal goods or values. In other words, since the "value" of a "legal interest," which is always first derived from an abstraction, can only be a "type of value"—for example, property as a legal interest—the "relative value . . . of the conflicting legal interests" is determined exclusively by ranking these abstract interest types in a general hierarchy of interests. What order such a ranking ought to have and what significance can be attached to the order of enumeration, if life, limb, liberty, honor, and property were ranked in the cur-

3. 61 RGSt at 254.
4. *Id.* at 255.

rent German provision on necessity[5] may here be left as an open question. In the context here concerned, it is crucial to see that balancing interests exclusively according to their abstract ranking is, in its substance, not comprehensive enough in its reach to be a suitable instrument for solving conflicts.

This can easily be demonstrated on the basis of a few examples. In the area of justifying necessity, which is in German law the classical domain of interest balancing (or lesser evils),[6] any number of cases can be found in which assessing the availability of a necessity defense according to whether the act is the only means of protecting a legal interest of higher value does not function. For instance, if life was the most highly valued legal interest, life would necessarily prevail over every other legal interest in cases of necessity. But this is by no means the case. First, to refer once more to medically-indicated abortion, which became the classic case of justifying necessity in the German development: If it is true that the life and health of a person who has been born are legal interests weightier than the unborn's legal interests in life and health, then clearly nothing changes in the general relative rating of these two interests when, for example, the woman does not give her consent to the abortion. According to this version of the theory of interest balancing, an abortion to save the life of the woman would thus be permissible even against her express will. Obviously, no one would wish to draw this conclusion, and the Reichsgericht did not do so in this oft-cited case. On the contrary, the pregnant woman's consent was treated as an additional prerequisite for justification.[7] Although doubtlessly correct, this does not follow from the principle of weighing interests as presented in the decision of the Reichsgericht. According to this principle, moreover, it would not be possible to limit justification to cases where abortion is in the best interests of the woman. Rather, if human life is to be preserved at the expense of unborn life because it is of higher value, this principle must also apply, for example, to afford a defense to a doctor who is forced at gunpoint to perform an otherwise illegal operation. This outcome probably does not merit extensive discussion, however. The doctor may be excused in this case, but his conduct is not justified. The same applies to an

5. STRAFGESETZBUCH [StGB] § 34 (W. Ger.).
6. *See supra* note 1.
7. Judgment of March 11, 1927, Reichsgericht, 61 RGSt 246.

ill and completely destitute person who can procure the money necessary for a vital operation only by theft. Although life is a legal interest which is clearly of higher value than property, the theft in question would not be regarded as justified. Such a case is, admittedly, scarcely imaginable in an almost perfect social welfare state, but it again demonstrates the inadequacy of abstractly conceived interest balancing.

Another example is a case which, although not likely to occur in actual life, played an important role in the legislative deliberations concerning necessity as a ground for justification. If a seriously injured person can only be saved through an immediate blood transfusion, and if, because blood reserves or voluntary donors are not available, this is only possible by forcibly extracting the required quantity of blood from another person, the life of the injured person is set against the physical integrity and the liberty of the involuntary "donor." Although the decision in accordance with the abstract principle of lesser evils would also be clear in this case, such a coerced blood transfusion for the purpose of saving the life threatened would not, in terms of majority opinion today, be a justifying necessity.[8]

In the cases described thus far, the offensive (*tatbestandsmässig*) act remains wrongful despite the fact that it operates to protect a legal interest, which—at least abstractly conceived—has a higher value. There are also, however, examples of the converse, i.e., cases in which acts may be justified by necessity even though they do not serve to protect interests of a higher value. Under German law, even a homicidal act may be permissible in a situation of necessity. Although this may be a narrow exception, it cannot be ruled out completely. This is illustrated by the situation often discussed in literature on double effects where it is necessary to crush the skull of a child in the process of birth in order to save the mother's life. This is widely held to be lawful, although under German law two legal interests of equivalent value oppose each other in this example, since according to German criminal law, human life begins with the pro-

---

8. *Compare* BUNDESTAGSVORLAGE, ENTWURF EINES STRAFGESETZBUCHES (StGB), (Begründung) 160 (1962) *with* H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 292 (3d ed. 1978) *and* A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 34, Marginal No. 41 (21st ed. 1982) [hereinafter A. SCHÖNKE & H. SCHRÖDER]. Coerced kidney transplants obviously present similar issues.

cess of birth.[9] Thanks to modern medical technology, the skull crushing technique has little practical significance today. Similarly, one can hope that the case of tyrannicide, which also might be justified by necessity, will remain a problem of merely theoretical interest. There are, however, everyday situations in which the problem is ultimately one of life against life. Consider, for example, the situation in which a driver violates traffic regulations while transporting an emergency case to a hospital. Consider also the situation in which a doctor is suddenly called from a party to the scene of a serious accident. He can only reach the victims by driving his vehicle while under the influence of alcohol—a punishable offense under section 316 of the German Criminal Code.[10] Traffic safety is generally recognized as the legal interest underlying the designation of traffic offenses. But traffic safety represents the life, health, and property of an indeterminate number of people.[11] According to the Reichsgericht's principle of weighing interests, it follows that justification on the ground of necessity in these examples would have to be excluded from the very outset since the equivalent legal interest of life also comes into play on both sides. Nevertheless, the general view is that such acts may be justified in individual cases.

Even more numerous are those situations of necessity in which legal interests of higher value may be violated in order to protect an interest of lesser value. Two examples will suffice. A mental patient who is dangerous because of his unpredictable behavior may be temporarily locked up even for the protection of mere property, even though this is contrary to the general relative ranking of the conflicting interests involved. (Personal interests—in this case, liberty—are superior to property interests.) The same holds true where a doctor faced with a patient's damage claim can defend himself only by violating his duty (backed by criminal sanctions in Germany[12]) to remain silent concerning matters arising within the scope of the doctor-patient relationship. Obviously, this must be permissible, although here again, according to the rule that personal legal interests are more highly rated than mere property interests, the abstract lesser evils notion would appear to require the contrary result.

---

9. *See* A. SCHÖNKE & H. SCHRÖDER (A. Eser), *supra* note 8, § 10.

10. StGB § 316.

11. *See* H. RUDOLPHI, SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH § 1 (3d ed. 1984).

12. StGB § 203.

If the theory of interest balancing, in the sense of a simple comparison of the value of the legal interests involved, has only limited use in cases of necessity, then it has even less utility as a general explanatory model for justificatory defenses in general. Indeed, numerous justifications involving a clash of interests directly refute this theory. A few examples will suffice. The right of self-help under section 229 of the Civil Code expressly recognizes a creditor's right in certain circumstances to arrest a debtor suspected of intending to abscond with property, although personal liberty is a more highly valued legal interest than mere property interests.[13] Furthermore, nothing in the "relative value of the conflicting legal interests involved" can explain why, for example, rights of intervention under the law of criminal procedure sometimes vary in extent depending on whether the person involved is the accused, a suspect, or a non-suspect. An accused, for example, is subject to more physical interference than a third party,[14] and a suspect is more likely to have to submit to a search of his home than a non-suspect,[15] although the relative rating of the conflicting legal interests remains the same in each case. This becomes particularly apparent in the case of self-defense. In contrast to American criminal law and many other legal systems, German criminal law relating to self-defense does not, as a matter of principle, recognize the theory of interest balancing. Except for a few extreme cases involving abuse of rights, the German law governing self-defense permits, in principle, any necessary defense. Necessity is determined exclusively according to the type and intensity of the attack and the possibilities of defense open to the person being attacked. If the defense is necessary in this sense, even an attack which does not constitute a danger to life may be warded off by the use of deadly force. Mere infliction of physical injuries on an attacker is thus all the more permissible when protecting goods, even though this also contradicts the principle of lesser evils.

In investigating the reason why the principle of interest balancing, in the sense outlined here, cannot provide a basis for justification, we need to consider the following points:

1. Conflicts which are to be resolved using justifications do

13. BÜRGERLICHES GESETZBUCH [BGB] § 229 (W. Ger.).
14. STRAFPROZESSORDNUNG [StPO] § 81(a), (c) (W. Ger.).
15. *Id.* §§ 102, 103.

not, in reality, occur between legal interests as abstract qualities, but rather between interests and values in their concretely manifested form. This may not make an appreciable difference with regard to legal interests such as life itself, but probably will with respect to physical integrity, and most certainly will with respect to property rights. What the law must settle in a case in which, for example, a threat of physical injury can only be averted by damage to property, or vice versa, is not the conflict between bodily integrity and property as legal values in the abstract, but rather the conflict between the two in the concrete form in which they are affected. Thus, for example, if physical integrity is threatened with minimum impairment, whereas ownership of valuable property is threatened with total destruction, then the danger to physical integrity may be very remote, while the danger to the property may be highly likely to result in immediate damage.

2. The interests involved in a particular conflict do not exist in isolation. Behind these interests we find concrete concerns of their holders, concerns connected for the most part with a surrounding field of further interests. This means that all the circumstances of a particular case must be considered, for it is only in the light of these surrounding circumstances that careful analysis can establish what interests on both sides are affected. Through this process, circumstances may acquire a weight which augments or diminishes the abstract value of a legal interest in a particular case. This may even go so far that a legal interest of a lower abstract rank is, in a concrete situation, found to be more worthy of protection than a higher-ranking interest. Consequently, when interests are weighed, it is not their abstract value which is the ultimate issue, but rather the extent to which they merit protection in a particular case. Human life may be a more highly valued legal interest than unborn life, but if a mother is nevertheless prepared to put her life at risk for the sake of the life of her child the law must obviously respect her decision, with the result that the life of the embryo no longer appears to be the interest which is less worthy of protection.

3. Conflicts which are settled in the framework of justification are frequently incapable of being reduced to the simple formula of a conflict of interests through which, figuratively speaking, the violated and the protected interests can be laid on the scales to see which way the scales tip. For in these conflicts, general principles of law and order often play a role, and they

can no longer be reduced to the common denominator of "legal interests" unless one wishes to completely dissolve this concept and ultimately blur legal interests into the general concept of legal order. The definition of self-defense as a conflict between the interests of the attacked person and those of the attacker is not exhaustive. In addition to this purely individual legal consideration there are also the social dimensions. Self-defense always serves to maintain the legal order as a whole, since the danger to the specifically threatened legal interest emanates from a wrongful attack. The principle that right need not give way to wrong singles out the law of self-defense from all other grounds for justification and gives it special sharpness, explaining also why under German law a person who has been attacked may defend him- or herself, as a matter of principle, although he or she could have evaded the attack without difficulty. Even in the case of necessity, such general legal principles may completely change the outcome of a weighing of legal interests. Although this point will be further discussed at a later stage, I would like to give one example now:

At a time when food is being rationed and allocation to individuals drops far below the requisite level for continued existence, a person procures an extra pound of butter in violation of the relevant rationing regulations. He could rightly plead that, compared to the threat of injury to his health resulting from permanent malnutrition, it is of no consequence at all whether the rationing system is illegally deprived of this small quantity of butter. Nevertheless, justification is generally denied in such cases of so-called social necessity, and rightly so, because the legal system could not recognize the right sought by this particular defendant without granting every other person the same right. If this were allowed, the rationing law would become meaningless.[16]

In summary, the weighing process, which decides whether conduct fulfilling the definition of an offense is justified, is substantially more complex than is initially suggested by the concept of lesser evils, especially if that concept is understood in the sense of a mere comparison of values of the abstract legal interests involved. The weighing of interests only makes sense if consideration is given, in the words of the civil law scholar Hubmann, to all the "positive and negative preferential tenden-

16. A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 8, § 34, Marginal No. 41.

cies" inherent in the concrete circumstances of the case.[17] This also applies where, as is often the case, reference is made instead to the necessity of a "comprehensive balancing of interests." It is occasionally objected that the term "interest" draws a veil of semi-darkness over everything, a veil all the more dangerous because it does not quite completely darken, but apparently allows the making of distinctions.[18] Despite these undoubtedly existing dangers, it is obviously impossible to dispense with the frequently used term "interest" or to replace it with a better term. Furthermore, the concept of "interest" can completely carry out its intended function if it is not understood solely as an insubstantial "want" or "need," but rather as an "involvement of the will in something,"[19] whereby this "something" always consists of some value recognized by man, who therefore endeavors to realize or preserve it. This can only give rise to misunderstanding where there is a one-sided materialization of the concept of interest. Admittedly, the values to which interests are related appear in the natural and material interests of life—life itself, physical integrity, liberty, property, and so on—in particularly striking form. However, there is no reason, neither objectively nor according to the literal sense of the word, for the concept of "interest" to be thus restricted. For instance, we also speak quite naturally of "intellectual" and "cultural" interests when we intend to refer to some involvement with intellectual and cultural values. It is no different with legal and moral values. Law and order and the fundamental ordering elements of the law are also examples of values which face man and which prompt him, as a "value-conscious being," to strive after and respect them. Hence, these values also generate interests and become the subject of interests—not only for individuals, but also, at the same time, for the community. Viewed in this manner, there should be no misgivings about using the expression "interest balancing" to describe the method we use for settling legal conflicts.[20]

This idea is, of course, not new. The principle that interests must be balanced, in the comprehensive sense intended here, ap-

---

17. Hubmann, *Grundsätze der Interessenabwägung*, 155 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 92 (1956).

18. *See* Welzel, *Studien zum System des Strafrechts*, 58 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 509 (1939).

19. E. MEZGER, STRAFRECHT 198 (3d ed. 1949); Mezger, *Die Subjektiven Unrechtselemente*, 89 DER GERICHTSSAAL 248 (1924).

20. *See* T. LENCKNER, DER RECHTFERTIGENDE NOTSTAND 123 ff. (1965).

pears in substance in literature as early as the nineteenth century. Particularly noteworthy is Rudolf Merkel and his work, "The Conflict of Legal Interests and Liability for Damages with Respect to Legal Actions".[21] Merkel emphasized that when conflicting interests are weighed it is not their relative abstract value which is decisive, but rather the "concrete values that confront each other in a particular case," for which the extent of the impending violation, the proximity of danger, any exceptional degree of fault on the part of the person in the situation of necessity, etc., are of significance.[22] For Merkel, therefore, it was self-evident that the violation "of a higher-ranking interest, in terms of its type, can prove to be of lesser significance than the violation of a type of interest which is of lower rank."[23] We would have been spared a number of misunderstandings if the Reichsgericht had followed Rudolf Merkel when delivering judgment on extra-statutory necessity in 1927.[24]

II.

With this introductory clarification of the principle of lesser evils behind us, what remains is an inquiry into the significance of the principle of lesser evils—or, to be more precise, the principle of interest balancing for justification. This question must be explored with reference to the following three points:

1. Is interest balancing a general methodological principle for justification? Do all justifications require such balancing?

2. How must the result of the interest balancing appear in order for a particular action to be justified?

3. To what extent do individual grounds for justification already contain the result of a statutory balancing of interests, and to what extent are these still open to judicial assessment?

1. The balancing of interests is the method used for resolving conflicts of interest. Not all grounds for justification, however, are based upon conflicts of interest, or at least, not upon conflicts that can always be settled by law. According to the conventional though no longer uncontested view, this applies to the actual or presumed consent by the person affected to the viola-

---

21. R. MERKEL, DIE KOLLISION RECHTMÄSSIGER INTERESSEN UND DIE SCHADENSERSATZPFLICHT BEI RECHTMÄSSIGEN HANDLUNGEN (1895).

22. *Id.* at 72-73.

23. *Id.* at 78-79.

24. *See supra* notes 2-4, 6 and accompanying text.

tion of disposable legal interests. Naturally, the history and the details of the theory of consent cannot be examined in this context. Furthermore, consideration cannot be given to the fundamental attacks on consent as a special ground of justification. (I am thinking here of the new theory that sees consent itself as a legal interest, and therefore an issue that involves the definition of a crime rather than questions of justification.)[25] From the traditional point of view, consent, following the ancient maxim "*volenti non fit iniuria*," is a ground for justification because an individual can waive the criminal law's protection of goods or interests over which he has a right of disposition. Thus, justification is here explained not in terms of the relative priority of opposing interests, as established by a balancing process; rather, it is explained according to a principle of "deficient interest" or of "insufficient need for protection."[26] The point is that there is no reason for the law to protect an interest from a particular intrusion when the possessor of that interest does not wish to be protected against the violation in that particular situation. On the other hand, it is sometimes supposed that justifying consent itself constitutes an instance of interest or value balancing because here the exercise of personal freedom collides with the legal interest which is being protected or with the interest of society in preserving such legal goods.[27] It is certainly true that the power of consent held by a person possessing a legal interest is rooted in the constitutionally guaranteed freedom of action. It is also true that this right of self-determination is limited where its actualization encounters opposing interests of greater weight. However, this means only that the limits of individual freedom of disposition are determined through a balancing process. It does not alter the fact that within these limits, the freedom of disposition is an unrestricted primary right of self-determination that makes particular interests available to the individual, which he is free to allow others to violate. This is not the case in German law, for example, with regard to the legal interest of life; however, property interests are for the most part subject to the

---

25. *See* 1 R. MAURACH & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL 215-16 (6th ed. 1983); E. SCHMIDHÄUSER, STRAFRECHT: ALLGEMEINER TEIL 268 (2d ed. 1975); H. ZIPF, EINWILLIGUNG UND RISIKOÜBERNAHME 28-29 (1970).

26. *See* E. MEZGER, *supra* note 19, at 207, 225.

27. *See* P. NOLL, ÜBERGESETZLICHE RECHTFERTIGUNGSGRÜNDE 74 ff. (1955); Noll, *Tatbestand und Rechtswidrigkeit: Die Wertabwägung als Prinzip der Rechtsfertigung*, 77 ZStW 1, 15 (1965).

unrestricted power of disposition of their possessor. Consequently, if an owner consents to damage to his property, for example, there is nothing more to be balanced. Insofar as there is a conflict of interests at all in this situation, it is a purely internal conflict which takes place within the owner's private mind when he is faced with the question whether it is worthwhile for him to sacrifice his property for the sake of certain goals. Even this limited measure of balancing may not be involved, however, because the abandonment of the property may just as well be based upon the fact that the owner simply has no more interest at all in that property. Thus, in the case of consent, a balancing process takes place only when a general power of disposition over the pertinent legal interests is lacking, and the limits of the power of disposition must be ascertained in the individual case. In German law, this is the case with bodily integrity. Under section 226(a) of the German Criminal Code, a battery remains wrongful despite the consent of the injured party because it is "contrary to good morals" (*contra bonos mores*).[28] In this case, we are actually dealing with nothing other than a balancing for the purpose of establishing the limits of freedom of disposition in a particular case. The Sterilization Act,[29] which declares sterilization permissible only under narrowly defined conditions (inter alia where medically or criminologically indicated), provides a statutory example of such a balancing process.

2. With the exception of consent and its substitute, presumed consent, all grounds for justification have a common feature in that they deal with conflicting interests that must be weighed against the legal interest which the actor has violated. This applies to self-defense, necessity, conflict of duties, the safeguarding of legitimate interests in the case of defamation, and the numerous privileges which authorize state officials such as police officers to engage in conduct that is normally statutorily prohibited, to name only the most important grounds for justification. In all these cases, the values and interests which are threatened can be protected only if the actor violates other values or interests. One might assume, then, that a violation of certain values and interests in favor of others is permissible when and *only* when the values furthered by the offensive conduct outweigh those behind the conflicting interests. In other

28. StGB § 226(a).
29. Act of Aug. 15, 1969.

words, the actor engages in a balancing process in which "preferred tendencies" outweigh "negative" ones. This is not always true, however; according to the majority view, at least, there is an exception in conflict of duties situations.

A conflict of duties exists, first of all, when an actor is confronted with multiple legal duties but can only comply with one. Suppose, for example, a doctor is called to both Patient *A* and Patient *B* at the same time; because he can only attend to one or the other, the patient whom he does not help worsens in condition, or perhaps even dies. In such cases, it is undisputed that the actor is justified when he complies with the more important duty at the expense of the less important duty. Here again, a balancing process establishes which duty claims priority over the other. Note that even in this case, the relative ranking of the duties is not based solely upon the abstract worth of the legal interests sought to be preserved. Suppose for example that both patients in the foregoing example are critically ill, but Patient *A* is in a more acute life-threatening situation. In this situation the duty toward Patient *A* is more important than that toward Patient *B* despite the equal value of the legal interests involved. In any event, it is fair to conclude that when two duties of equal value coincide, the actor is justified if he is at least able to comply with one or the other of the two duties.[30] This principle is applied in the typical example of the father who is able to rescue only one of his two children who have fallen into water and are in danger of drowning. This follows from the fact that the law, as a code of personal conduct, cannot demand the impossible in its injunctions. Therefore, the duty-bound person must have the power of choice with the result that his decision, whatever it is, will be accepted by the law. If this were not the case, every such rescue would be blocked since the injunction to fulfill one duty would stand in the way of fulfillment of the other duty, and vice versa. Conflict of duties thus assumes a special position because the conflict of interests is here resolved in terms of justification if the actor is at least protecting an interest of equal value.

The situation in which several conflicting commands result in a conflict of duties and the question whether an omission is justified have long been familiar. It has only recently been recog-

30. This is the prevailing view. *See* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 8, § 32. *But see* Kaufmann, *Rechtsfreier Raum und eigenverantwortliche Entscheidung*, in FESTSCHRIFT FÜR MAURACH 337 (F.-Ch. Schroeder & H. Zipf eds. 1972); H. JESCHECK, *supra* note 8, at 295.

nized, however, that there are also cases of conflicting duties of omission, where all conceivable alternative modes of affirmative conduct contravene prohibitory norms. The actor must decide which, if any, of the prohibited courses he can justify.[31] Such cases, although rare, certainly occur. For instance, the driver of a car may, through no fault of his own, suddenly find that no matter what action he takes he will endanger others. If he drives on he will endanger the driver ahead of him; but if he brakes he risks being hit from behind or going into a skid, which will likewise endanger others. Viewing both driving on and braking as acts, the driver is left without alternatives. In reality, however, the driver must violate one or the other of these prohibitions. He cannot refrain from action. In a case such as this, of course, it is clear that violation of the less important of the two duties of omission must be justified. In our example, this would be the danger involved in braking, if that danger were smaller than the danger involved in driving on. The decision becomes problematic, however, when braking and driving on are equally dangerous, making both duties of omission of equal value. On a moral level, such a conflict may not be capable of solution. The law, however, would cease to be a code of conduct if it insisted on the observance of both prohibitions even though such observance is completely impossible in the actual circumstance. Therefore, if the principle "*impossibilium nulla obligatio est*" is considered an unalterable axiom of every system of regulation, the actor must be given a right of choice in the conflict between two duties of omission.[32] One cannot, however, overlook the considerations which militate against this solution, particularly when the problem is posed in its starkest form—*i.e.*, when the gravity of the situation is increased in such a way that each alternative action would consist of an intentional homicide. There is a difference between this case and the previous one involving the clash of two duties to act: the father who must allow one of his children to drown is merely letting fate take its course. Here, the actor is permitted, through recognition of a right of choice, to "play" fate herself—a concession which is certainly not lightly made.

---

31. *See* Honig, *Strafrechtliche Allgemeinbegriffe als Mittler Kriminalpolitischer Ziele*, in FESTSCHRIFT FÜR LARENZ 261 (G. Paulus, U. Diederichsen & C.-W. Canaris eds. 1973); Hruschka, *Oberlandesgericht Karlsruhe*, 39 JURISTENZEITUNG [JZ] 240, 241 ff. (1984).

32. *See* Hruschka, *supra* note 31, at 242.

3. The remaining grounds for justification must now be considered. They are subject without limitation to the principle that in resolving a conflict of interest, acts which are prohibited in themselves are justified if, from a legal point of view, there is a preponderant interest in allowing encroachment on the opposing sphere of interests. Only the type and substance of these interests vary, along with the extent to which the principle of preponderant interests (lesser evils) has been crystallized in relation to individual justifying conditions. With codified grounds for justification, this depends upon the extent to which the legislature has itself undertaken a balancing of interests. In this connection, again, only a few brief comments are possible.[33]

The principle of lesser evils appears in its most general form in cases of necessity. A statutory regulation which is intended to regulate the whole field of necessity, like section 34 of the German Criminal Code[34], can at best reproduce the general principle of justification. Thus, it can say little more than that an act can be justified if the interests it protects outweigh the interests supporting omission of the act. It cannot, however, state when this is in fact the case in a particular instance. Because of the numerous possibilities of varying circumstances in individual cases the statute must leave this decision to the judge, directing him or her to make a comprehensive assessment of the interests involved. Decision by the legislature is only possible if the legislature wishes to regulate a specific, recurring conflict situation. An example of this is found in section 218(a) of the Criminal Code, where recognized indications for abortion are enumerated.[35] Here, the legislature itself has balanced the interests involved and has settled a conflict of interests in a certain manner without intending to exclude the possibility of a judicial balancing which further refines the statutory one.[36] Such specific cases of necessity, suited to particular statutory regulation, are probably relatively rare. For the most part, all the legislature can hope to accomplish is to make the notion of lesser evils more concrete for certain kinds of necessitous acts. It will not ultimately be able to offer more than a guideline—albeit one with enriched content—which will make the judge's decision easier, but cannot relieve him of it. This is the route German law has taken, for

33. *See generally* T. LENCKNER, *supra* note 20, at 133-34.
34 StGB § 34.
35. *Id.* § 218(a).
36. *Cf.* StGB § 218(a)(I)(2), (a)(II)(1), (3).

instance, in sections 228 and 904 of the Civil Code, which enumerate the conditions under which interference with the property of others is permissible in cases of necessity.[37] Section 904 of the Civil Code concerns so-called "aggressive necessity," in which action is taken with regard to the property of someone who is completely uninvolved in the situation (*e.g.*, unauthorized use of another person's automobile in an emergency in order to get a relative to a hospital in time). Section 228, on the other hand, concerns so-called "defensive necessity," in which the actor considers damaging the source of the danger causing the situation of necessity (*e.g.*, warding off an attack by another party's animal).[38] In the former case, the impending damage must be "disproportionately great" in relation to the damage caused by the act for a justification to be recognized; in the latter, the statute recognizes a lesser evils defense if the damage caused is "not out of proportion" to the imminent danger. In the conflict of interests here the balancing is crucially altered by the fact that, due to the "inducement principle" (*Veranlasserprinzip*) the property that induced the necessitous circumstance and was damaged as a result is, from the outset, less worthy of protection. In both cases, however, the statute only makes a rough assessment of contrasting interests. The question whether impending damage is disproportionately great or whether damage caused by the act is not disproportionate remains for the judge to assess.

If there were no special provision on self-defense, even the most clear and tangible case of justification could be inferred directly from the principle of lesser evils. The conflict of interests in self-defense acquires its distinctive feature from the fact that—unlike the case of necessity—we are here concerned not only with the protection of the legal interest attacked in a particular case, but also with the interest in guarding the legal order as a whole against wrongful attack. This is of decisive importance for the question of preponderant interest since the German legislature has assumed such an interest to exist in the case of self-defense where injury to the attacker for the purpose of warding off the assault is "necessary" in the sense already described. To the extent there are exceptions, they can also be explained in terms of the principle of balancing interests. In the

37. BGB § 904.
38. *Id.* § 228.

case of assaults by the mentally ill or by children, for example, even the interest in maintaining the law recedes into the background. Since these limitations are at best intimated in the statute itself, but are not more precisely defined, it is once again the judge who, in this borderline area of self-defense, must give concrete shape to the principle of lesser evils in each individual case.

What has just been shown here in the example of self-defense also applies to all other grounds for justification. They too are merely concrete manifestations of this general principle of lesser evils according to which conflicts must be solved. Apart from exceptions such as the right to inflict corporal punishment, other justifications are also expressly regulated by legislation; as with self-defense, the legislature has balanced the interests and has, in every case, settled the conflict in principle. Here, too, it clearly cannot be ruled out that the statutory balancing process, inevitably bound up with generalizations, must be extended and supplemented by a judicial assessment in the individual case. The generally applicable rule is that interference with protected legal interests where such interference fulfills the elements of an offense can only be justified if the statutory prerequisites for the relevant ground of justification have been fulfilled. This does not mean, however, that such interference *must* always be justified where these prerequisites have been fulfilled, since the statutory balancing process, as embodied in the relevant provision, may be incomplete. Thus, the numerous provisions of the German Code of Criminal Procedure permitting infringement of individual legal interests frequently enumerate only the minimum prerequisites for the permissibility of such measures. All these infringements are additionally limited by the general principle of proportionality,[39] which, once again, must receive concrete shape through a judicial assessment in the individual case.

III.

The problematic nature of the principle of the lesser evils lies in the area where statutory law leaves this balancing to the judge. The problem is thus particularly evident in the necessity

39. [Ed.] The principle of proportionality (*Verhältnismässigkeitsprinzip*) is a constitutional principle that requires that incursions on constitutionally protected rights and freedom may only be permitted to the extent necessary to achieve the purpose that justifies the encroachment.

provisions of section 34 of the German Criminal Code, since the statute itself does not provide any substantive standards that are particularly helpful.[40] According to the first sentence of section 34, an act committed in a situation of necessity is not wrongful "provided that in weighing the conflicting interests, namely, the legal interests involved and the degree of the dangers threatening them, the interest protected substantially outweighs the interest impaired."[41] The second sentence, however, then states that this only applies "insofar as the act is an appropriate means for warding off the danger."[42] If one then poses the question as to when an act which fulfills the definition of an offense is the "appropriate means" of protecting the threatened interest, one finds that it can only be answered by correlating end and means, and thus only through a comprehensive balancing of all the circumstances of the actual case which argue for and against treating the act as one motivated by necessity. In other words, section 34 does not contain more than an enjoinder to carry out a comprehensive balancing of all the relevant interests, in all of their "positive and negative preferential tendencies." (We can leave aside the question whether section 34 requires a two-step balancing process: a threshold balancing in accordance with the first sentence of section 34, and then a secondary balancing of the "appropriateness" of the selected act as a means in accordance with the second sentence.) As has already been noted, this indeterminateness cannot be avoided with a general provision concerning necessity that attempts to deal with all conceivable cases. The general clause of section 34, that has in principle a purely formal nature, cannot be substantively filled out in a manner that would allow the decisions of concrete cases to be deduced. One can at best attempt to identify those cases in which the positive and negative preferential tendencies among the usually complex conflicting interests of a particular necessity situation are capable of being generalized, and in this manner achieve some systematic helps for decision making. It goes without saying that only a few such points can be intimated within the limits of this article.

1. I have already mentioned that the law does not engage in an abstract comparison of colliding legal interests. What can be

---

40. StGB § 34.

41. *Id.*

42. *Id. Cf.* A. Schönke & H. Schröder (T. Lenckner), *supra* note 8, § 34, Marginal No. 24.

stated with certainty is that the balancing of interests must begin with ascertainment of the general ranking of the legal rights involved. In addition, it is clear that the absolute value of their relative positions may be of such crucial importance that so far as the question of justification is concerned, the die has already been cast. On the basis of pure interest balancing we instinctively find that rights of the highest order, particularly the right to life, override rights of a lower order. Conversely, an abstract comparison of interests produces the result that the killing of innocent people to protect mere property interests is impermissible regardless of the circumstances of the individual case. In fact, homicide in the case of necessity is unacceptable per se, even in cases of so-called quantitative life necessity (*quantitativen Lebensnotstands*) which involve varying numbers of human lives on both sides of the conflict. We have no argument with this when the case involves the killing of an innocent bystander, as in the following hypothetical given by Welzel; in order to avoid a collision with a full passenger train, a railway official switches the rails to a siding where three railway employees are working and will unavoidably perish.[43] Human lives cannot be added up and weighed against each other; every life presents the law with an absolute interest of inestimable worth. The decision must be the same in special cases of so-called "joint danger" (*Gefahrengemeinschaft*) in which a number of people find themselves in a life-threatening situation and the perpetrator must choose between non-action which will result in the death of all, and killing some in order to save the others. German literature provides examples of this dilemma in the cases of the ferryman and the mountain climber. Halfway across the river the ferryman discovers a leak that will sink the ferry before it reaches shore. He averts this catastrophe by pushing some of the children he is ferrying into the water, thus saving the lives of the others. In the second example, one of a party of mountain-climbers is hanging free and helpless from a rope, placing the others in imminent danger of being torn from the side of the mountain after him. They cut the rope, and their comrade plunges to his death.

The "Mignonette Case" and the so-called "Euthanasia Trial" in post-war Germany provide the bridge from lawyerly fantasy to historical fact. The first case, named after the British

43. Welzel, *Zum Notstandsproblem*, 63 ZStW 47, 51 (1951).

yacht "Mignonette," involved survivors of a shipwreck who drifted in a life boat for twenty days, the last week without food. Since the weakened cabin boy was near death anyway, the captain killed him by stabbing him in the throat. The survivors drank the blood spurting from the wound and consumed the boy's flesh for the next few days.

Doctors who participated in the Hitler-ordered mass murder of mental patients were called to answer in the Euthanasia Trials. These doctors had placed the names of some of their patients on "transfer lists" which were actually execution lists. They had done so because flagrant noncooperation would only have resulted in their replacement with doctors more than willing to carry out the secret execution orders on a grand scale, thus greatly increasing the number of victims. In all of these cases the majority opinion makes the assumption, not uncontested, that killing in case of necessity is not justified; that it remains contrary to law though the perpetrators are excused.[44] It can make no difference as a matter of principle whether the perpetrator arbitrarily chooses his victims from among those in death's shadow, as in the case of the ferryman, or if fate has already set his victim apart as one who cannot be saved from imminent death, as in the case of the mountain climbers. The danger to these victims was arguably so great that it could not be and was not heightened. But can the absolute worthiness of protection inhering in human life be relativized with life expectancy tables?[45] I will not pursue details of the debate at this point.

2. It may be that cases of necessity like those I have discussed, in which the decision grows out of an abstract balancing of interests independent of the particular circumstances, are the exception. Generally, however, a sense of the relative absolute value of colliding interests constitutes but a single aspect of the comprehensive interest balancing which determines whether the perpetrator perceived the overriding interest and engaged in the proper response. When two interests conflict, the decision between them rests not on a determination of which ranks higher in terms of absolute, abstract value, but which merits greater

---

44. *See* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 8, § 34, Marginal No. 24. *See generally* Küper, *Tötungsverbot und Lebensnotstand*, 21 JURISTISCHE SCHULUNG [JuS] 785 (1981).

45. *See* Küper, *supra* note 44, at 792-93.

protection in the context of everyday life.[46] The appearance of paradox in this statement is a product of the misconception that desert of protection and the absolute value of a right should be congruent. The truth is simply that an interest's worthiness of protection depends not only on its absolute value—making a weighing of the absolute values of conflicting interests the suitable starting point in justification analysis—but also on the peculiar circumstances of the individual case.

An exhaustive enumeration of possibly relevant factors to be added to the absolute value of the conflicting interests is, of course, not feasible. In section 34, the law offers as one such factor "the degree of the threatened danger."[47] This factor could well determine the extent of the colliding interests' worthiness of protection. But the importance of this factor is obvious in the situation where the commission of a potentially dangerous act is the only way to avert a concrete danger, as in the case of the intoxicated doctor who drives to the scene of an accident. Among the factors measuring the claim to protection of interests in concrete circumstances are the gravity of the threatened harm and of the contemplated intervention; the chances of successful rescue; and the likelihood that other, less severe measures would suffice to avert the danger; the existence of a communal risk where damage to the violated interest is unavoidable anyway, whereas the protected interest can still be protected at the expense of the violated interest.

Precisely because legal interests of the individual are protected in relation to the individual, the legally proper interests of participants in a given case demand consideration and their weight is to some degree dependent on the further interests to which they are attached. It can be of decisive importance in this context if the danger which threatens the protected interest originates directly from the sphere of dominion of the one directly affected by the act of necessity (*Notstandshandlung*). The distinction, already mentioned, between "defensive" and "aggressive" necessity under sections 904 and 228, respectively, of the German Civil Code[48] is rooted in the fact that the interest violated in the case just mentioned is less worthy of protection than where recourse is had to a person who is completely

46. *See* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 8, § 34, Marginal Nos. 25-26; T. LENCKNER, *supra* note 20, at 96-97, 126-27.

47. STGB § 34.

48. BGB §§ 228, 904.

uninvolved. This difference must also be taken into account in the balancing process under section 34 of the Criminal Code.[49] Finally, mention must be made of one last point. The interests of people who, because of their particular social or professional position have to shoulder special dangers—*e.g.*, policemen, firemen, soldiers and so on—are not of less value than the interests of others, but they may very well be allowed lesser weight in the balancing process.

3. Even if the interest balancing is modified so as to take into account the greater or lesser worthiness of protection of the conflicting interests in concrete cases, it would still not exhaust the comprehensive assessment required for cases of necessity. Weighing interests in this way would make possible a conclusive decision only on two conditions. First, both interests must be threatened and find themselves in the same situation with respect to one another. Second, as a result of the impossibility of preserving both, a choice as to which should be saved and which should be left to its fate must be unavoidable. This is the situation typically created by the collision of duties, that is, of two duties enjoining affirmative action. In contrast, the classic case of necessity is one in which the opposing interests are not in the same situation. Here, one interest is endangered while the other, basically unendangered, is placed in danger because its injury is the only means to preserve the other from harm. Under these circumstances one adheres to the self-evident principle that everyone must bear the harm which threatens him, that no one is justified in shifting it to a third party. Paralleling this principle is another which permits the one affected party to hold his ground with respect to his interests and the one endangering them. This legal position is limited from the outset in the sense that the preservation of his interests only holds good to the extent that other interests which are more worthy of preservation

---

49. Why cases of defensive necessity, to the degree that they are not covered by BGB § 228 (*Sacheingriffe*), should not be covered by StGB § 34 is not apparent, since the proportionality measurement of § 228 is carved out of the general principle of interest balancing expressed in § 34. *See* G. JAKOBS, STRAFRECHT: ALLGEMEINER TEIL 339, 356 (1983); Hruschka, *Rechtfertigung im Defensivnotstand?*, 33 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 21, 22 (1980); Hruschka, *Extrasystematische Rechtfertigungsgründe*, in FESTSCHRIFT FÜR DREHER 203 (H. Jescheck & H. Lüttger eds. 1977). The rule that an overriding interest must appear much earlier in cases of defensive necessity also applies to § 34. More deferential consideration, both quantitatively and qualitatively, is permissible in cases of defensive necessity than in cases of aggressive necessity. *See* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 8, § 34, Marginal No. 30.

are not involved. For example, the threatened property could be intrinsically more worthy of protection where the damage with which it is threatened is greater than that which would be caused to the thing exploited by the act of necessity. In this case, section 904 of the Civil Code requires not only that the threatening harm be greater, but that it be "disproportionately extensive."[50] From this one may draw the general conclusion that through special sacrifices, legitimated through the thought of solidarity, can only be inflicted on an individual if the perceived foreign interests merit disproportionately greater protection.[51] Where the injury consists of the imposition of a sacrifice ensuing from external intervention into an individual's personal sphere of right and dominion, the injury to the autonomy of the affected person cannot be offset in any other way.[52]

Finally, in addition to the previous considerations, the question of the permissibility of an act of necessity must be seen in light of its significance for the law as a whole. Here the interruption of general peaceful relations under the law through the shifting of damage to a third party appears as an independent factor, from which it follows that the danger of mere minimal damage does not give rise to justifying necessity. In addition, the general interest in preserving fundamental principles of legal order as well as the highest legal values may have to be considered in a particular case, and this may mean that a preponderant interest must be denied—in spite of the incomparably greater degree of worthiness of protection of the greater interest. This explains why, for instance, an innocent person who has been sentenced to life imprisonment in a miscarriage of justice is not justified in damaging property during an attempted escape to regain his freedom. In this context reference must be made to the cases of so-called "social necessity" mentioned earlier—for instance, the case of violation of rationing regulations where provisions are scarce. We may also refer to the example of theft of money from a millionaire in order to be able to pay for a vital operation, and finally to the example of a coerced blood transfusion, the impermissibility of which is based above all on the fact that the principle of liberty itself is also involved in addition to the interests affected.

---

50. BGB § 904.

51. *See generally* T. LENCKNER, *supra* note 20, at 106-07.

52. For a definition of the autonomy principle, see Stratenwerth, *Prinzipien der Rechtfertigung*, 68 ZStW 41, 50 (1956).

With that we return to the starting point. The apparently easily manageable balancing of interests formula has proven itself, in reality, to be a very complicated instrument. In the often extraordinarily complex conflict of interest situations it is certainly difficult to discover all the factors which must be considered in order to carry out the all-encompassing balancing that is required. Since the weighing of conflicting interests necessarily involves comparative evaluation, a criterion of evaluation is presupposed, but such a criterion has at best limited access to objective results.[53] Thus, the principle of balancing of interests remains an extraordinarily unstable foundation for justification. One advantage of the balancing of interests principle—which is ultimately only a formal maxim—is that it is open to new developments and new moral concepts which, in this way, find their way into legal decisions. However, this principle's lack of substantive content is also its greatest danger, because the principle can be given content according to arbitrary preconceptions. That justifying necessity could also be claimed for civil disobedience is more than a mere specter today.

53. *See* T. LENCKNER, *supra* note 20, at 155-56.