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A FUNCTIONAL TAXONOMY OF NORMATIVE CONFLICT

ABSTRACT. In this paper I argue for three theses. First, most philosophical analyses of the problem of normative conflict, being based on the impossibility-of-joint-compliance test for conflict, are inadequate. Second, expanding on suggestions made by H. L. A. Hart and Stephen Munzer, I develop an understanding of normative conflict which is not tied to the concept of obedience. Such an understanding of normative conflict is expressly functional: normative conflicts arise when one norm interferes with the intended functioning of another. Third, working from a functional concept of normative conflict, I develop a taxonomical classification scheme for the phenomenon of normative conflict. Normative conflict is the genus within which there are three species: normative contradiction, normative collision, and normative competition.

Most philosophical analyses of the problem of normative conflict identify instances of normative conflict through a specific test: the impossibility-of-joint-compliance test.[1] According to this test, a normative legal conflict exists when and only when it is impossible for one norm subject to comply with both of a pair of norms. Normative conflicts, so the tradition has it, occur only when one norm subject is the addressee of two norms having opposite content such that compliance with one of the norms requires violating the other. Such a situation occurs, for example, when a single norm authority address two norms having opposite content to one norm subject, as in "Smith, open the door" and "Smith, do not open the

[1] Some of the legal philosophers who adopt the impossibility-of-joint-compliance test for normative conflict are Hans Kelsen, *General Theory of Law and State*, tr. Krause (Cambridge: Harvard, 1945) pp. 406–408; Hans Kelsen, *Pure Theory of Law* 2d ed. (Berkeley: University of California, 1960) p. 201; J. W. Harris, *Law and Legal Science* (Oxford: Clarendon, 1970) pp. 70–83; Lars Lindahl, *Position and Change* (Dordrecht: D. Reidel, 1977) pp. 28, 82.

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door". In such a situation, no matter what Smith does, he violates one of the commands addressed to him. In the language of deontic logic, the situation faced by Smith is one in which

(1) $O(A)\ \&\ O(-A)$[2]

holds. That is, a genuine normative conflict[3] involves violating the consistency principle

(2) $O(A) \rightarrow -O(-A)$

which forms an integral part of most standard systems of deontic logic.[4] While there is a good deal of recent work in deontic logic which challenges the consistency principle, and the legitimacy of the analogy between alethic modalities and deontic modalities,[5] such challenges are not my concern here.

In what follows, I argue that the impossibility-of-joint-compliance test, and the concept of normative conflict which follows from it, are too narrow. The range of phenomena to which the phrase 'normative conflict' can legitimately be applied is much larger than traditional analyses of the problem have assumed. The remainder of this paper is divided into three sections. In section one I examine the impossibility-

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[2] This analysis of normative conflict follows closely that considered by Risto Hilpinen, 'Normative Conflicts and Legal Reasoning', in *Man, Law and Modern Forms of Life*, eds. Bulygin, Gardies, and Niiniluoto (Dordrecht: D. Reidel, 1985) pp. 191–208. Hilpinen surveys most of the recent developments in normative conflict theory.

[3] Some legal theorists working on the problem of normative conflict deny that there are any genuine normative conflicts. See, e.g., Lars Lindahl, *Position and Change* (Dordrecht: D. Reidel, 1977) p. 82.

[4] Among those who accept the consistency principle as an integral part of standard deontic logic are Hilpinen, Von Wright, A. R. Anderson, and Lars Lindahl.

[5] Recently, challenges to the consistency principle have been raised from a number of quarters. Hilpinen, 'Normative Conflicts and Legal Reasoning', mentions several of the more interesting challenges at pp. 192–193 and notes 4–6. While these challenges are quite important, my concern here is with the nature of normative conflict, not the question of what one ought do when such a conflict is encountered.

of-joint-compliance test for normative conflict and some recent challenges to that model. In section two I present a new concept of normative conflict, one which is not tied exclusively to the impossibility-of-joint-compliance test. My concept of normative conflict is functional: it turns on the functions of norms, on the goals or purposes which underlie norms. In section three I present a taxonomy of normative conflict based on the analysis presented in the second section. I argue that 'normative conflict' is a generic notion which isolates a generic phenomenon within legal systems. I identify three species within the genus normative conflict: normative contradiction, normative collision, and normative competition.

I. THE IMPOSSIBILITY-OF-JOINT-COMPLIANCE TEST FOR NORMATIVE CONFLICT

H. L. A. Hart, in rejecting the impossibility-of-joint-compliance test for normative conflict, gives an elegant statement of the test.[6] For Hart, the impossibility of joint compliance test turns on the notion of an obedience statement which can be constructed for any deontic imperative stating that the addressee has complied with the dictates of the imperative.[7] An obedience statement states that a norm-subject has complied with a given norm. For example, the obedience statement for the norm "Killing is prohibited" is "Killing is not done". Obedience statements are in the indicative mood and are subject to truth-value analysis. A normative conflict exists when and only when the obedience statements for a pair of norms are logically inconsistent. Thus, a normative conflict exists between the norms "Smith, open the window" and "Smith, do not open the window" because the obedience statements for those norms, "Smith does open the window" and "Smith does not open the window", are logically inconsistent. Adopting the impossibility-of-joint-compliance test for normative conflict commits one to the view that only those norms for which

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[6] H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law', in *Ethics and Social Justice*, eds. Kiefer and Munitz, (Albany: SUNY Press 1970) pp. 171–199.

[7] Hart, 'Kelsen's Doctrine of the Unity of Law', p. 183.

obedience statements can be constructed can conflict. It is my view that the impossibility-of-joint-compliance test is overly restrictive.

But why is this test for normative conflict overly restrictive? First, the impossibility-of-joint-compliance test restricts normative conflict to those deontic norms which have an imperative character.[8] Permissory norms, so the tradition has it, cannot conflict with one another nor can a permissory norm conflict with an imperative norm for the simple reason that permissory norms are not the sort of norms with which a norm-subject can meaningfully be said to comply or fail to comply. Recently, however, a growing number of legal theorists have challenged the view that deontic permissions cannot conflict with deontic imperatives.[9] Such challenges are, unfortunately, rather underdeveloped.[10] Second, the impossibility-of-joint-compliance test does not take account of the fact that there are legal modalities other than deontic modalities (what Hart calls secondary, power-conferring rules[11]) and, accordingly, does not consider the possibility that non-deontic norms might come into conflict with one another or that a non-deontic norm might conflict with a deontic norm. I will briefly describe the analyses provided by several legal theorists as to why the

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[8] The character of a norm is modality of which the norm is an expression. The character of a deontic norm is either obligatory or permissory. See generally, Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge & Kegan Paul, 1963) p. 71 ff.

[9] Hart, 'Kelsen's Doctrine of the Unity of Law'; Hans Kelsen, 'Derogation', in *Essays in Legal and Moral Philosophy*, ed. O. Weinberger (Dordrecht: D. Reidel, 1973) pp. 261–275 (*contra* the views cited in note 1, above); Stephen Munzer, 'Validity and Legal Conflicts', *Yale Law Journal* 82 (1973) 1140–74; R. Hilpinen, 'Normative Conflicts and Legal Reasoning'.

[10] Hilpinen, for instance, identifies three possible cases of normative conflicts, imperative/imperative, imperative/permissory, and permissory/permissory, but then limits his discussion to only the first of these three types. Hilpinen, 'Normative Conflicts and Legal Reasoning', pp. 195ff.

[11] For Hart there are at least two distinct types of norms necessary for a mature legal system: primary, duty-imposing norms and secondary, power-conferring norms. On Hart's view, neither norm type can profitably be reduced to the other. *The Concept of Law* (Oxford: Clarendon, 1961) pp. 35–42, 90–91, 238.

first of the situations described above should be treated as instances of normative conflict. I then apply a similar analysis to the second of the situations described above.

H. L. A. Hart, developing some ideas advanced by Hans Kelsen,[12] argues that the impossibility-of-joint-compliance test for normative conflict is overly restrictive. Specifically, Hart argues that permissory norms can conflict with imperative norms. Hart agrees that situations in which joint compliance is impossible count as instances of normative conflict, but he claims that there are instances of normative conflict to which the impossibility-of-joint-compliance test is inapplicable. The central difficulty with the test lies in constructing obedience statements applicable to conflicts between imperatives and permissions. Applying the notion of compliance (and of an obedience statement) to a permission seems to be a category mistake: permissions simply are not the sort of norms with which one can comply or fail to comply. To combat this difficulty, Hart replaces the concept of obedience with a looser concept: conformity. 'Conformity', for Hart, applies to cases in which one obeys an imperative and to cases in which one avails oneself of a permission.[13] Conformity statements can be constructed for all instances of conformity to a norm. Accordingly,

> the conformity statement showing that a permissive rule (e.g., permitting though not requiring killing) had been acted on will be of the same form as the obedience statement for a rule requiring the same action (killing is done). So if one rule prohibits and another rule permits the same action by the same person at the same time, joint conformity will be logically impossible and the two rules will conflict.[14]

To be sure, there are shortcomings in the phrasing of Hart's analysis. On Hart's analysis, a conflict would arise only if one were to choose

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[12] In the later phases of his life, Kelsen rejected the view expressed in *The General Theory of Law and State* and in the *Pure Theory of Law*. This rejection is clearest in the essay 'Derogation'. For a discussion of the phases of Kelsen's work and the changes in his thought, see S. Paulson 'On the Status of the *Lex Posterior* Derogating Rule', *Liverpool Law Review* 5 (1983) pp. 5–18.

[13] Hart, 'Kelsen's Doctrine of the Unity of Law', 185.

[14] Hart, footnote omitted.

to act on the permission. There are, or should be, *two* possible conformity statements corresponding to each permissory norm, only one of which will possibly create a conflict. The conformity statement reflecting a choice not to act on the permission would not (indeed, could not) conflict with the obedience (conformity) statement for the prohibition. Additionally, Hart's linguistic shift from 'obedience' to 'conformity' smacks of hand-waving. It is no less difficult to analyze conformity in terms of availing oneself of a permission than it is to analyze conformity in terms of obedience. More will be said on this issue shortly.

Conceding that permissions can conflict with imperatives, while enlarging the phenomenal field to which the phrase "normative conflict" can properly be applied, does not, however, suggest that deontic permissions can conflict with one another. Permissions, for Hart, can conflict with imperatives only when acting on a permission makes compliance with an imperative impossible. Since there is a *prima facie* case for the claim that talk of compliance with a permission is a category mistake, the analysis which admits of permission/imperative conflicts will not justify admission of permission/permission conflicts since acting on one of a pair of permissions will not (indeed, cannot) result in making *obedience* with some norm impossible. Curiously, Hart is one of those who insist that there can be no conflicts between permissory norms.[15] I find Hart's view curious on two scores. First, he provides no argument for his position; he merely asserts it.

> The 'joint-conformity' test of conflict is applicable only to rules all or all but one of which require or prohibit action. Permissive rules cannot conflict, but joint conformity with two permissive rules may be logically impossible (e.g., "Opening the window is permitted," "Shutting the window is permitted").[16]

The single statement is all that Hart has to say on the issue. The second curious feature of Hart's position is that it seems incompatible

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[15] Hart, at 198, note 43.

[16] Hart. Unfortunately, this is not a particularly good example since opening a window is not, logically speaking, the contrary of shutting a window. Not-opening is the contrary of opening.

with his basic move which allows for permission/imperative conflicts. Since a permission/imperative conflict is analyzed in terms of logically contradictory conformity statements, why is it that when two contradictory conformity statements (e.g., "The window is opened", "The window is closed", assuming that 'closed' is the negation of 'opened') are derived from two permissory norms, there is no conflict? Hart seems to face a dilemma. Either permissory norms can conflict, or there is more to his analysis of conflict as the impossibility of joint conformity than meets the eye. Hart needs either to revise his position so as to admit that there can be permission/permission conflicts, or to explicate his understanding of normative confict more fully. In either case, the burden falls on Hart. Despite the difficulties I find with Hart's case against the possibility of permission/permission conflicts, his analysis is significant in that it recognizes that an analysis of normative conflict based solely on the notion of impossibility of joint compliance is overly restrictive. Hart, however, is not the only theorist prepared to move beyond the impossibility-of-joint-compliance model of normative conflict.

Stephen Munzer, an American academic lawyer at the University of California, Los Angeles, adopts the view that two permissory norms can conflict.[17] Munzer's analysis of the possibility of permission/permission conflicts follows Hart's analysis to some degree, and it suffers from some of the defects inherent in Hart's analysis. Nevertheless, Munzer's view is a thought-provoking and interesting avenue toward an expanded understanding of normative conflicts. Munzer begins his analysis by asking a question which needs to be asked, but which seldom is: "What is it for two rules to conflict"?[18] Although this question has the form of a single question, Munzer contends that it raises at least two related questions: "What is it for two rules to conflict in themselves"? and, "What is it for two rules to conflict on a particular occasion"?[19] In his initial answer to these two questions,

[17] Stephen Munzer, 'Validity and Legal Conflicts', *Yale Law Journal* 82 (1973) pp. 1140–74.
[18] Munzer at 1144.
[19] Munzer.

Munzer unnecessarily complicates the issue by adopting part of Hart's analysis and terminology.

A conflict of rules in themselves, Munzer argues, requires that joint conformity be impossible. In adopting this requirement, Munzer is accepting Hart's view that there is a sensible way of analyzing availing oneself of a permission in terms of conformity with that permission. Unfortunately, Munzer is no clearer than Hart as to what it might mean to say that one has conformed to a permission, other than to say that one has availed oneself of it. Despite this serious defect, the remainder of Munzer's analysis is quite insightful. The first insight in Munzer's analysis is in his explication of conflict on a *particular occasion.*

A normative conflict on a particular occasion requires, for Munzer, that on such an occasion the norms in question clash. While talk of a normative clash is, for Munzer, metaphorical, the metaphor expresses the notion of a sharp division or opposition which is hidden in the meaning of "conflict".

> The words "clash" and "collision" – which I shall use interchangeably – are meant to capture this idea of sharp disagreement or opposition and of the quandry in which norm-subjects are placed by rules requiring or allowing incompatible courses of behavior. To be somewhat more specific, two rules clash or collide if, and only if, an act or omission of the norm-act type figuring in the rules violates, or results in the violation of, *a duty-imposing rule or some strong and intimately connected pressure or policy in favor of a permissive rule.*[20]

Munzer's metaphor of clashing norms is insightful in several respects. First, the notion of a clash presents one with a new way of approaching the concept of a normative conflict which does not turn on compliance. Using the metaphor of a normative clash, the central feature of a normative conflict is that there is an opposition between norms; the norms operate in opposite directions. The chief virtue of Munzer's metaphor is that it moves away from analyzing normative conflict in terms of logical contradiction. Hans Kelsen, whose work deeply influenced that of Munzer, suggests a similar analysis in some of his later writings, using a metaphor of tension.

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[20] Munzer, at 1145, emphasis added.

A conflict of norms is thus something entirely different from a logical contradiction. If it can be compared with anything at all, it is not with a contradiction in logic, but rather ... with two forces operating in opposite directions. Both situations, the conflict of norms and the conflict of forces, can be described without any contradiction.[21]

I take both the clash and tension metaphors to be attempts at describing the basic nature of normative conflict: forces operating in different directions on the behavior of the norm subjects. Whether the forces meet head-on (a clash) or whether the forces pull in different directions (a tension) is of little significance. I treat the language of clashes and tensions as alternative ways of picturing the metaphor of opposing forces.

The second way in which the clash and tension metaphors are insightful is that they provide a way of analyzing permissory norms such that talk of conflict between two permissions makes sense. Since the clash/tension metaphor does not focus on compliance, the problem which Munzer and Hart encounter of talking about conformity with a permission is avoided. A normative conflict occurs either when, as a result of the interaction of two or more norms, a duty-imposing rule is violated, or when a strong public policy in favor of a permissory rule is violated. The insight is that permissory rules may be adopted in order to implement or further public policies and that thwarting such implementation may create a normative conflict. The important point here is when the *policies underlying norms cannot both be attained*, the *norms conflict*. Two policies can move in different directions and thus create conflicts between the permissory norms designed to implement them. There are two avenues available for analyzing permissory rule which follow from this insight.

The first, which Munzer adopts,[22] imbues a permission backed by a strong public policy with quasi-imperative force. Munzer provides a compelling example, which I will not rehearse here, of how a permission can be imbued with quasi-imperative force (simply imagine a

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[21] Hans Kelsen, 'Law and Logic', in *Essays in Legal and Moral Philosophy*, ed. O. Weinberger (Dordrecht: D. Reidel, 1973) p. 235.

[22] Munzer, 'Validity and Legal Conflicts', at 1145–1146.

strong legal advantage that one can gain, e.g., a tax credit, only by availing oneself of a permission). The defect in Munzer's analysis, however, is that it fails to take advantage of his basic insight: normative conflict can be analyzed without relying exclusively on the notion of compliance. Imbuing permissions with quasi-imperative force simply turns certain permissions into a species of imperatives and thereby retreats to the impossibility-of-joint-compliance test of conflict.

The second avenue, the one which I prefer, turns on recognizing that policies and principles as well as norms can be elements of a legal system.[23] Once policies are recognized as elements of legal systems, and permissory rules are recognized as means through which policies can be implemented, the clash metaphor provides a way of making sense of conflicts between permissory rules. Two permissory norms conflict if each is designed to implement a particular policy, and, either the policies are opposed to one another, or availing oneself of one of the permissions makes it impossible to avail oneself of the other permission (and, accordingly, impossible to implement the policy associated with that permission). Two policies are opposed to one another when one of the two promotes or encourages behavior that the other is designed to thwart. For example, residential tax credits for energy conservation are designed to encourage fuel conservation, while deregulation of the natural gas industry is designed to increase fuel supplies and thereby reduce prices. One clearly foreseeable consequence of deregulation, however, is increased energy consumption. Since one foreseeable effect of deregulation thwarts implementation of one of the policies underlying residential energy conservation tax credits, the policies conflict. Given that different norm authorities are constantly making policy decisions, it is not difficult to imagine that policy conflicts frequently can and do arise. The upshot here is that Munzer's clash metaphor enables one to

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[23] See, e.g., Ronald Dworkin, 'Is Law A System of Rules', in *Essays in Legal Philosophy*, ed. R. Summers (Los Angeles: University of California Press, 1968). It is Dworkin's well-known view that principles as well as rules are parts of a legal system.

make sense of talk of conflicts between permissory norms without turning permissions into disguised imperatives. Unfortunately, Munzer himself does not seem to realize the full power of the analysis that he has developed.

The preceding paragraphs have been devoted to demonstrating that the traditional concept of a normative conflict (which limits conflicts to deontic imperatives) is overly restrictive within the deontic quadrat. There are good reasons for believing that deontic imperatives can conflict with other deontic imperatives, that they can conflict with deontic permissions, and that deontic permissions can conflict with other deontic permissions. When Hart's basic insight about the concept of law, namely, that there are non-deontic norms which are elements of legal systems, is incorporated into the "clash" analysis of normative conflict, the phenomenal field to which the phrase 'normative conflict' can properly be applied expands even further.

Non-deontic norms can conflict with deontic norms and they can conflict with other non-deontic norms. Such conflicts are almost universally overlooked by legal theorists. Even Munzer, one of the few theorists willing to consider the possibility of permission/permission conflicts, limits his discussion of normative conflict to deontic norms. In what follows I develop a taxonomy of normative conflict based on Munzer's insight that normative conflict can be understood without relying exclusively on the impossibility-of-joint-compliance test. Rather, normative conflict can be understood functionally, that is, through reference to the functions which norms serve within a legal system, or the goals or purposes underlying the norms. Since there is virtually no discussion in the literature of normative conflicts involving non-deontic norms, I will provide examples of such conflicts taken from Anglo-American law rather than theoretical arguments about the possibility of such conflicts.

I take the phrase 'normative conflict' as a generic term identifying a genus of a particular phenomenon within the field of our legal experience. Within this genus there are three species: normative contradiction, normative collision, and normative competition. Traditional analyses of normative conflict are limited to the first of these species. In the next two sections I describe the general phenom-

enon of normative conflict and then proceed to identify the special features of each of the three species listed above.

II. THE PHENOMENON OF NORMATIVE CONFLICT

I define normative conflict in terms of Kelsen's and Munzer's clash and tension metaphors. For Kelsen, a normative conflict is a conflict of forces, forces which operate in different directions on a single point. One force, one norm, pushes in one direction, the other in another, perhaps opposite, direction. Kelsen's metaphor can be explicated profitably in terms of the functional concept of a legal system.

Assume that the forces of which Kelsen speaks are conflicting norms. The directions in which the forces push are the goals underlying the norms. The function of the norms is to secure the underlying goals. The point on which the forces act is the behavior of the norm-subject. Each norm seeks to guide (push or pull) the behavior of the norm-subject toward that norm's goal, whether that goal be securing certain behavior or implementing a policy. However, when the norms conflict, the behavior of the norm subject is pushed in different directions, toward different goals. Since the norm-subject cannot go in two different directions at once (he cannot, by hypothesis, fulfill the goals of both of the norms), at most one of the goals of the conflicting norms can be attained. The core of the normative conflict is that the interaction of the norms hinders the functioning of each.

It may well turn out that unless one of the norms is made inoperative (derogated) neither goal will be achieved. Consider the case of a billiard ball struck directly by the cue with the shooter intending to send the ball straight into one pocket. Now add another shooter and another cue and another target pocket. If the two cues hit the billiard ball at the same time, the ball will not travel directly into either of the desired pockets. The same result may occur when two norms guide a norm-subject in different directions – the behavior of the norm-subject may well be other than that desired by either norm. The central feature of the generic phenomenon of normative conflict is that two or more norms interfere with the functioning of one

another.[24] The generic phenomenon of normative conflict occurs when norms interact in ways such that the function of one or more of the norms involved is thwarted. The norms get in each other's way. Goals may conflict (as when two different norm authorities adopt different, conflicting policy goals), the means chosen to implement compatible goals may conflict, and the means chosen to implement one goal may conflict with another goal.

III. A FUNCTIONAL TAXONOMY OF NORMATIVE CONFLICT

A. *Normative Contradiction*

Within the genus of normative conflict, there are three distinct species: contradiction, collision, and competition. The species of normative conflict which I call normative contradiction corresponds directly to the traditional analysis of normative conflict. Normative contradictions are purely deontic phenomena, (i.e., only deontic norms can contradict one another) which are identified in terms of the impossibility-of-joint-compliance test for conflict. I endorse the language of contradiction here because this species of conflict can be explicated in terms of contradictory obedience statements. A normative contradiction exists when true obedience statements for the conflicting norms are inconsistent, or those statements (taken together with other true statements) entail inconsistent statements. The functional aspect of a normative contradiction becomes clear when one notices that the explicit goals of each of the contradictory norms are to secure some identifiable behavior from the norm subject. The norms function properly only when there are true obedience statements corresponding to each of the norms. When, however, it is impossible for the obedience statements for a pair of contradictory norms both to be true, there is a functional conflict. At least one of the norms is failing to secure the desired behavior – it is failing to

[24] For a similar view of the nature of a normative conflict, see R. A. Samek, *The Legal Point of View* (New York: Philosophical Library, 1974) at p. 51.

function properly. Several examples of normative contradictions should help clarify this definition.

Perhaps the clearest case of a normative contradiction is found in the *Case of the Sheriff of Middlesex*.[25] In the case the sheriff was ordered by one norm authority to turn over the proceeds of an execution sale to the judgment creditor and ordered by another norm authority to refrain from handing over the proceeds. The sheriff found himself in a situation in which two norm authorities had imposed inconsistent commands on one norm subject. The sheriff found himself confronted with a pair of norms which have the structure

(3) $O(A)$ & $O(-A)$

where the norms were issued by different norm authorities. True obedience statements for this pair of norms would be of the form "*A* is done" and "It is not the case that A is done", which are obviously inconsistent. While the clearest examples of normative contradiction are of this type, they are quite rare.

A slightly more complex, but far more common, type of normative contradiction is that which occurs when an individual finds himself confronted with duties (to one or other individuals) which cannot both be fulfilled. All that needs to be the case is that joint performance of the duties be impossible. For instance, in *Daly v. Liverpool*,[26] it was held that the duty of a bus driver to drive carefully was, given the facts of the case, incompatible with his duty to keep to a regular schedule.[27] The duties here are not inconsistent in and of themselves, but joint performance of them is. Unfortunately for the driver, keeping to the timetable makes driving safely impossible, and *vice versa*. The situation of the bus driver was such that given the truth of the obedience statement for one of his duties, either "*x* keeps to his timetable" or "*x* drives safely", the other cannot be true. Thus the truth of one obedience statement, together with other true statements about conditions, entails a statement that is inconsistent with the truth

[25] 11 Ad. & E. 273, 113 E.R. 419 (1840).
[26] 2 All E.R. 142 (1939).
[27] *Id.* at 145.

of the other obedience statement. For example, suppose the traffic and road repair conditions in Liverpool are such that one cannot drive safely and yet complete a 15 mile route in an hour and fifteen minutes. Suppose further that the driver's timetable calls for completion of the 15 mile route in no more than an hour and ten minutes. If these suppositions prove to be true, then it is impossible for the driver to do both of his duties. The functional nature of this conflict should be clear. One of the clear functions of a duty-imposing norm is to see to it that the duty is done. In a situation such as the one here described, performance of both of the driver's duties simply cannot be secured. Accordingly, one of the norms must fail to function properly; it must fail to secure the performance of the duty.

It should be clear that normative contradiction falls squarely within the generic definition of normative conflict. In a normative contradiction the norms push the behavior of the norm subject in different directions. In the case of the sheriff, the directions directly oppose one another. In the case of the bus driver, the directions are merely different, not directly opposite. Safety is not the opposite of keeping to a timetable; it is simply incompatible with it. In both cases, however, the norms interfere with one another in such a way that at least one of the norms cannot function. In both cases, the functions of the norms are relatively clear: get the norm subject to do what the norm commands, direct the norm subject's behavior in a certain direction. The conflict lies in the fact that norms push in different directions and the norm subject cannot go in two different directions at once.

B. *Normative Collisions*

Normative collisions involve either conflicts between deontic imperatives and deontic permissions, or mixtures of deontic and non-deontic norms, or they involve only non-deontic norms. Permission/imperative conflicts have already been discussed in light of the work of Hart and Munzer. A paradigm case of a normative collision involving a deontic norm and a non-deontic norm is found in the recent Supreme Court case *NLRB v. Bildisco and Bildisco, Inc.*[28]

[28] U.S., 104 S. CT. 1188, 79 L. Ed. 2d 482 (1983).

In *Bildisco*, a requirement of the National Labor Relations Act – that management must bargain in good faith with the representatives of a certified union – came into conflict with a permission granted by the Federal Bankruptcy Act – that insolvent debtors may avoid executory contracts. The specific conflict presented was that the provisions of the bankruptcy code appeared to permit an insolvent company to cancel an executory union labor contract, thereby failing to live up to its, the company's, obligation to bargain in good faith. A paradigm case of normative collision involving two non-deontic norms is found in *McCulloch v. Maryland*[29] in which two empowering norms, the provisions of Article I, § 8, clauses 5 and 8 of the constitution, and the tenth amendment right of the states to levy taxes, collide. Normative collisions can best be defined in terms of incompatibility or hostility between norms.

In *McCulloch* Chief Justice Marshall articulates the nature of the conflict presented to the Court in terms of the incompatibility of the norms involved. The power of Congress to create a national bank implies, Marshall argues, a power to preserve. But the power to tax is the power to destroy. The powers of creation and preservation are incompatible with, and hostile to, the power to destroy. Since Maryland had chosen to act on its empowerment and to tax all banks operating within the state not chartered by the state (the extension of the norm being one bank – the Second National Bank of the United States), a normative collision occurred. And, given the supremacy clause of the constitution, it was resolved in favor of the federal government. *McCulloch* is illustrative of several features of normative collisions.

Normative collisions are always avoidable because there is always at least one empowering norm or one permissory norm involved in a normative collision and one must act on the empowerment or avail oneself of the permission before the collision arises. Had Maryland not decided to tax the Second National Bank, no collision would have arisen. There would have been only a potential collision. Additionally,

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[29] 18 U.S. (4 Wheat.) 316 (1819).

normative collisions arise when one norm produces results that are incompatible with or hostile to the results or objectives of another norm. But this hostility or incompatibility need not involve logical inconsistency. Rather, normative collision involves functional incompatibility. A normative collision exists when norms interact such that one of the norms impedes or thwarts the functioning of the other.

Two fields of law in which the problems of normative collisions have been considered rather extensively are those concerning the commerce clause and federal preemption of state action. Since the decision in *Gibbons v. Ogden* in 1824, collisions between state and federal schemes for the regulation of commerce have occupied a good deal of the Supreme Court's attention.[30] The question presented in *Gibbons* was whether an exercise of New York's police power (specifically, a state statute granting a monopoly to Ogden to operate steamboats within New York waters) collided with Congress's power to regulate interstate commerce inasmuch as Congress had licensed Gibbons to operate steamboats in "coasting trade". Ogden, relying on the New York statute, sought to enjoin Gibbons from operating his boats in New York waters. Chief Justice Marshall, using the language of collisions, held that the New York statute interfered with and was contrary to the act of Congress. The nature of the interference was that the New York statute deprived a citizen of rights granted by Congress. Congress intended that Gibbons have the rights to operate his boats in coastal trade and the New York statute clearly thwarted that intent. There was a collision between the norms. Not surprisingly, Marshall found that the state statute had to fall in the face of the federal statute.[31]

Federal preemption of state action involves both explicit and implicit normative collisions. Federal preemption, that is, federal law

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[30] 23 U.S. 9 (Wheat.) 1 (1824).

[31] For a modern commerce clause case expressing the principles articulated in *Gibbons*, see, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state police power colliding with congressional power to regulate interstate commerce).

displacing or preempting all state regulation within a certain field, occurs in cases in which the state regulatory scheme collides openly with the federal scheme or when state regulation constitutes "an *implicit* barrier: when state regulation would interfere unduly with the accomplishment of congressional objectives".[32] In analyzing normative collisions within the context of a preemption case, the Court often asks the following sorts of questions:

> Whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the state is without authority.[33]

> Whether the state policy may produce a result inconsistent with the objective of the federal statute.[34]

> Whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[35]

When the answer to any of these questions is in the affirmative, a normative collision exists between the state regulatory scheme and the congressional statute in question. It is my view that the Court has adopted at least a proto-functionalist analysis of normative competitions – the Court looks to functional considerations in order to resolve normative competitions.

C. *Normative Competitions*

There is one final type of non-deontic conflict that needs to be mentioned, the sort of conflict that is dealt with by academic lawyers under the rubric of conflict of laws. Conflict of laws conflicts are not traditional conflicts at all. Rather, such conflicts are clashes in which two norms compete or contend with one another. In my own technical terminology, I call such situations normative competitions. The

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[32] Gerald Gunther, *Cases and Materials on Constitutional Law* 9th ed. (Minneola: Foundation Press, 1975) p. 357.
[33] Kelly v. Washington, 302 U.S. 1, 14 (1937).
[34] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[35] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

central feature of normative competitions which distinguishes them from normative collisions is that in a normative competition the laws of two distinct jurisdictions are involved, whereas in a normative collision the conflict is between the laws of a single jurisdiction. A classic conflict of laws problem, and, accordingly, a paradigmatic instance of a normative competition, involves the doctrine of interspousal tort immunity.

Suppose that a married couple from state A are, while traveling in the same car, involved in an automobile accident in state B. The choice of law rule for state A, the state in which suit is brought, is usually the standard *lex loci delictus*[36] rule – the law of the place of the wrong governs substantive legal issues. The competition arises when it is noted that state A, being enlightened, has eliminated the antiquated doctrine of interspousal tort immunity. State B, however, whose substantive law will govern the case, still retains the doctrine of interspousal tort immunity. The problem presented is whether the courts of state A should, in light of the *lex loci* rule, apply the spousal immunity rule of state B even though such an application would violate the principles and policies which inform state A's enlightened legislation. Why should the courts of state A apply an outdated law to two of the citizens of state A simply because the accident occurred 100 feet across the border? Consider the recent Virginia case of *McMillan v. McMillan*[37] involving the doctrine of interspousal tort immunity.

The conflict is between the two legal norms that are competing for dominance within a given forum. Virginia's rejection of spousal immunity, which reflects the public policy determinations of the Virginia courts, competes with Virginia's *lex loci* rule which would give precedence to Kentucky's anachronistic spousal immunity

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[36] When multi-state problems (e.g., parties to an automobile collision reside in different states) the question arises "which state's law applies to this case"? The *lex loci* rule is a choice of law rule directing that the law of the place of the injury governs substantive issues. See generally, Russell Weintraub, *Commentary on the Conflict of Laws* (Minneola, N.Y.: Foundation Press, 1980).

[37] 219 Va. 1127, 253 S.E. 2d 662 (1979).

doctrine. The rules compete in that both cannot be applied within the forum: one must be excluded. And herein lies the conflict, the clash between the norms. The rules pull in opposite directions. The functional nature of a normative competition is, perhaps, a bit more difficult to see. The conflict is between two norms of one system, in *McMillan* between the *lex loci* rule and the rule abolishing the spousal immunity doctrine. Since the couple involved in *McMillan* is a Virginia couple, suing in a Virginia court, there are good policy arguments to the effect that Virginia's elimination of spousal immunity should govern – Mrs. McMillan should be allowed to bring her suit. However, allowing her to bring a suit thwarts, to some degree, the goal of the *lex loci* rule. Two of the goals of the *lex loci* rule are to provide legal certainty (people should be able to determine, in advance, what laws will govern their actions) and to avoid forum shopping (the phenomenon in which litigants seek to bring suit in a forum with a more favorable legal framework). Giving effect to either of the rules involved in a normative competition interferes with the functioning (i.e., the policy implementation) of the other. The *lex loci* rule returns an anachronistic doctrine to the forum state's courts. Favoring rejection of spousal immunity raises the spectre of legal uncertainty and forum shopping. The competing norms lead to different, and incompatible solutions, each of which seems, *prima facie*, incompatible with other public policy decisions made by the forum state.

The important point here is that a normative conflict exists when two norms compete for dominance within a given legal system. The field of conflict of laws is rich with normative competitions, and modern conflict of laws theory is instructive in how such competitions should be approached. One natural suggestion that presents itself is that the principles which underlie modern conflict of laws theory might be applicable to the broader problem of normative conflict. A proper examination of this suggestion, however, is beyond the scope of this discussion.

SUMMARY

In this paper I have shown three things. First, most philosophical analyses of the problem of normative conflict, being based on the impossibility-of-joint-compliance test for conflict, are inadequate. Second, expanding on suggestions made by H. L. A. Hart and Stephen Munzer, I have developed an understanding of normative conflict which is not tied to the concept of obedience. Such an understanding of normative conflict is expressly functional: normative conflicts arise when one norm interferes with the intended functioning of another. Third, working from a functional concept of normative conflict, I have developed a taxonomical classification scheme for the phenomenon of normative conflict. Normative conflict is the genus within which there are three species: normative contradiction, normative collision, and normative competition.

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