Andrew Ashworth, Juan Ignacio Piña Rochefort, Altruism and the Criminal Law: Duties of Rescue and Tolerance

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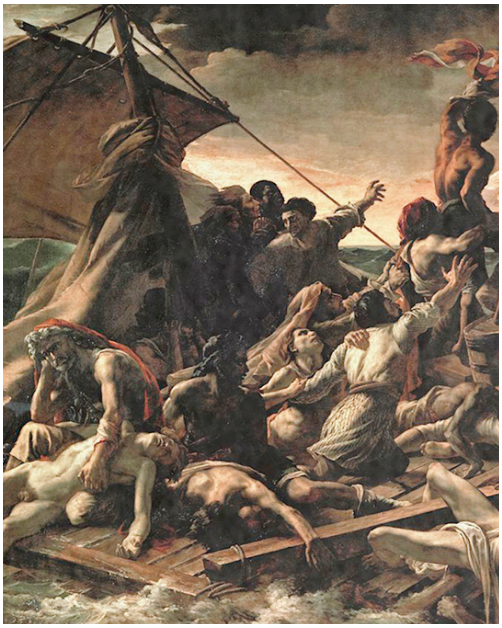

Can criminal law require citizens not only to refrain from causing harm, but also, at times, to act for the benefit of others? And if so, what form should such positive obligations take, and where should their limits lie, so as not to undermine the fundamental right to personal autonomy of those subject to criminal norms? These critical questions lie at the heart of the recent monograph by Andrew Ashworth[1] and Juan Ignacio Piña Rochefort,[2] *Altruism and the Criminal Law: Duties of Rescue and Tolerance* (Hart Publishing, 2025), which offers a systematic contribution to the debate on the criminal treatment of positive obligations.

The authors develop their argument through a comparative analysis of two legal duties that embody positive obligations: first, the duty of easy rescue, and second, the duty of tolerance under the state of necessity. However, in line with the method of analysis that prevails in the common law, they do not confine themselves to the technical features of the provisions[3] through which breaches of these duties are criminalised. Instead, they turn to the normative background of the criminal norm, focusing on the "why-question"[4] of criminal law: why a given criminal rule exists and claims legitimacy. There, they identify a common source: the principle of altruism, and they examine the place that this principle may legitimately occupy –if at all– within criminal law.

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3. In those legislations in which such provisions exist.
4. On the centrality of the "why-question" in legal theory, see *Finnis*, Describing Law Normatively, in *Philosophy of Law: Collected Essays*, Volume IV, Oxford University Press (2011), ch. 1.

The assumption that the book addresses to both common law and continental jurists is well founded; otherwise, it would not have been selected for review here. What is far from self-evident, however, is *why* it can speak equally to both audiences, given that the legal treatment of altruistic positive duties not only differs between the two traditions but starts from diametrically opposed premises. In continental law, the idea of altruism through general positive duties –that is, duties binding for all citizens– is well established, with its most characteristic expression being the so-called duty of easy rescue, namely the offence of failing to provide assistance to another in cases of emergency. By contrast, in the common law there is no criminalisation of the failure to perform an easy rescue, and the prevailing view has long been that altruistic duties are incompatible with the very spirit of the common law.[5]

Despite this fundamental contrast, the book provides common ground for reflection. Jurists trained in the continental tradition will find in it a systematic analysis of the reasons why the criminalisation of failures to fulfil positive (altruistic) duties is justified, thereby shedding light on the rationale and interpretation of the relevant provisions. Conversely, common law jurists may draw from it a persuasive *de lege ferenda argument* for introducing such duties into their positive law, given that altruism is not at all unknown to the common law, but on the contrary already present, albeit in a different form, in doctrines such as necessity.

Beyond these points, however, the authors' deeper aim appears to be to highlight, through the example of altruism, a shared *semantic*[6] structure of criminal law, grounded in the types of duties embedded in legal norms. From this perspective, the apparent gap between continental and common law criminal systems may ultimately be bridged.

In the first chapter, the authors lay the theoretical foundations for what follows by outlining the "grammar"[7] of criminal law in the common law tradition. Despite the evident methodological differences, this grammar displays striking similarities to that of the continental tradition. Within this framework, they articulate six fundamental principles concerning: (A) the primary focus on liability for acts (positive conduct), (B) the exceptional nature of liability for omissions, (C) the defence of necessity, (D) the requirement of causation, (E) the principle of subjective responsibility (*mens rea*), and (F) the rule of law requirements (comparable to the principle of legality in continental systems). Of these six principles, the first two (A and B) are crucial to the authors' argument, since

5. See the eloquent statements of *Macaulay* in: Indian Penal Code as Originally Framed in 1837, with notes by *Macaulay*, McLeod, Anderson and Millett, Chennai, Higginbotham and Co (1888), p. 138 ff.

6. By the "semantics" of criminal law what is generally meant is the approach within which the meaning of a legal rule is examined. In the present work, the meaning of criminal rules is derived from the type of individual duties they impose on members of the legal community.

7. On the notion of the "grammar" of criminal law as the set of rules and principles governing its subsequent "articulation" through positive legal norms, see *Fletcher*, Rethinking Criminal Law, Oxford University Press (2000).

they appear –at least at first sight– to form the core of criminal law as a system of *prohibitive*[8] commands. Yet criminal law also imposes certain *positive*[9] commands, either *special* ones –linked to special legal obligations resting on specific individuals– or *general* ones, addressed to all members of the legal community. Although the latter are not the norm, since they involve a more intensive restriction of freedom of action, numerous legislative examples show that they are neither rare nor marginal, but function as essential legislative tools. Nevertheless, these tools are not fully utilised in English law, where no general altruistic duty of easy rescue exists.

In the second chapter, the authors shift their focus from the "grammar" to the "semantics" of criminal law, or in other words, from the *principles* and *rules* of criminalisation to the meaning of the conduct that is criminalised, and thus to the question of *what type of duty lies behind each offence*. From this perspective, Ashworth and Piña Rochefort seek to determine when such conduct embodies wrongness of sufficient gravity to justify criminalisation. To this end, they distinguish between the "semantic core" and the "semantic periphery" of criminal law. The *core* includes conduct that violates either negative duties arising from the harm principle –which, as the authors emphasise, belong to the "core of the core"– or special positive duties. These special duties are regarded as "second-stage" obligations, having developed later in the course of social evolution.[10] With respect to both categories, there is broad agreement across legal traditions as to the legitimacy of their criminalisation, and the overwhelming majority of criminal offences consist in the breach of either the general negative duty not to harm or a special positive duty to protect legal interests. By contrast, the semantic *periphery* of criminal law encompasses so-called "altruistic obligations": general positive duties to protect others from dangers in whose creation the duty-bearer played no part. They are described as "peripheral" because there is no consensus as to the legitimacy of their criminalisation. The main concerns relate, first, to the difficulty of drawing boundaries between law and morality when defining what conduct citizens owe to one another; second, to the severe restriction of individual freedom imposed by positive legal obligations; and third, to the challenge of harmonising such duties with the harm principle as the foundation of criminalisation.

From this analysis it emerges that the harm principle dominates the core of criminal law, understood as a prohibition on harmful *actions*, while the criminalisation of *omissions* is accepted only exceptionally, where a specific duty to act exists. This has led, almost unconsciously, to the

8. Of the form: "act generally as you wish, but *do not* kill, *do not* rape, *do not* steal, etc."

9. Of the form: "act *only in this way*" (as required by the applicable rule of law in the specific case – for example, provide assistance in a situation of danger).

10. Hence their characterization by *Dworkin* as "associative or communal obligations"; see Law's Empire, Hart Publishing (1998), 195 f. Examples of such obligations are those arising from law, contract, prior dangerous conduct, or the assumption of responsibility.

common belief that criminal acts carry greater blameworthiness than criminal omissions, and that negative duties can be breached only by action, while positive duties can be breached only by omission. This assumption explains why negative duties constitute the rule in criminal law, whereas positive duties are either confined to special cases or entirely absent, as with the general duty of easy rescue in the common law. However, the authors do not endorse this view and instead seek to dismantle the conventional association, on the one hand, between actions and negative duties, and, on the other, between omissions and positive duties. They argue that the phenomenology (active or omissive) of the infringement is not decisive either for determining the nature of the duty breached or for the degree of criminal punishment it attracts. In support of their position, they invoke the following example:

Let us assume that a duty to aid those who are in a life-threatening situation exists. X, a swimmer, while in the sea, suffers a muscle contraction that will probably prevent him from reaching the shore before drowning. Y, a fisherman, is in his boat fishing nearby.

(a) Situation 1: Y hears X's cries for help; however, sea currents carry his boat in the opposite direction from X. Unless Y halts this contrary movement of the boat by using the oars, the swimmer will be unable to reach him. Y fails to do so (*he omits to act / remains inactive*), and X drowns.

(b) Situation 2: Y is becalmed in waters without any current and, seeing that the swimmer X is swimming toward him to be rescued, begins rowing in the opposite direction (*he acts*), knowing that this will prevent X from reaching his boat. Indeed, X fails to reach the boat and drowns.

In both cases, Y breaches the positive duty to provide assistance. However, the way the breach occurs –whether through inaction (first situation) or through an action other than the one required (second situation)– is irrelevant. What matters instead is the type of duty –positive or negative– resting on the agent. Based on this distinction, Ashworth and Piña Rochefort develop a classification of duties according to their nature.

The subsequent sections of the chapter demonstrate that altruistic duties are not alien to the common law. This is shown through a comparative analysis of the already recognised general *duty of tolerance* when it comes to harms inflicted in situations of necessity. Case law has even accepted that such harms may extend to extremely serious interferences, including the loss of life of the person subject to the altruistic duty of tolerance.[11] The unresolved question is how the different treatment of the duty to rescue, on the one hand, and the duty of tolerance in cases of necessity, on the other, can be justified, given that both rest on the same normative principle: altruism.

11. Illustrative is the cited example of the case *Re A*, which concerned the lawfulness of a surgical separation of conjoined twins that resulted in the death of one of them. It was held that the taking of the weaker twin's life constituted a justified sacrifice, which that twin was required to tolerate due to the existence of a state of necessity for the salvation of the other twin.

In the third chapter, the authors explore the philosophical and ideological reasons behind the common law's refusal to recognise a general duty of rescue. The most intuitive explanation lies in the dominance of liberal ideas understood in an *individualistic* sense within the common law area, in contrast to the more *social* conception of freedom that prevailed during the same period (from the eighteenth to the mid-nineteenth century) in Germany and France. Yet the marginalisation of altruism in common law is not attributed solely to liberalism, but above all to three key philosophical positions. The first is the negative conception of freedom associated with Hobbes. In *Leviathan*, freedom is understood primarily as the absence of external interference, rendering the imposition of positive obligations –particularly altruistic ones– normatively impermissible as unjustified intrusions into individual self-determination. A similar conceptual framework underlies the dominant, though partial, reading of Adam Smith, in which the emphasis on self-interest and the "invisible hand"[12] overshadowed the moral dimension of "sympathy"[13] and the recognition of limited positive duties towards others. The analysis culminates in the reception of Mill's harm principle as a general principle of criminalisation, which –despite Mill's own explicit reservations and exceptions concerning omissions in the face of serious danger to others– came to function in the common law as an almost absolute barrier to recognising general altruistic duties. The authors convincingly show that this resistance was not an inevitable consequence of liberal thought, but rather the product of specific historical and social conditions that shaped the interpretation of the aforementioned philosophical works. In continental Europe, by contrast, the development of legal thought followed a different path, as the theories of Kant, Hegel and Feuerbach led to the recognition of altruistic obligations.

In the crucial fourth chapter the authors seek to provide a systematic foundation for the place that altruism may occupy in criminal law, using the duties of easy rescue and tolerance in necessity as central examples. They begin by formulating a narrow definition of altruism, distinguishing it from *supererogatory*[14] conduct, which belongs either to morality or even beyond moral obligation, as acts of heroism.[15] Thus, they define altruistic duties as those that (1) are intended to benefit (2) third parties with whom we are not connected (or the community as a whole) (3) without any direct interest for the agent. They then address the question of whether such

12. The pursuit of individual self-interest under conditions of freedom and competition may unintentionally, as a mechanism driven by an "invisible hand," lead to the promotion of the social interest.

13. In Smith's work, "sympathy" has the meaning of the reasonable empathy shown by individuals toward others, in the sense that it is mediated by an evaluative judgment as to whether the other's feelings or needs appear reasonable. The determination of the circumstances in which "sympathy" is appropriate is therefore preceded by a critical judgment, a feature that resembles altruistic duties, insofar as these too are imposed only in certain circumstances (e.g. danger, necessity).

14. Cf. the *Good Samaritan* standard.

15. A paradigmatic example of such an act is the self-sacrifice of Maximilian Kolbe, who exchanged his life for the survival of another prisoner at Auschwitz.

duties should rest exclusively with the state or may, under certain conditions, be imposed on individuals. They conclude that proximity, temporal immediacy and the impossibility of timely state intervention can justify the imposition of limited altruistic duties on individuals without amounting to an impermissible transfer of state responsibilities. The authors also respond to the main objections raised against altruistic obligations, arguing that these duties do not violate the harm principle –since criminalisation is not exhausted by it– nor the principles of liberalism, as they constitute only exceptional and functionally necessary restrictions on individual freedom. Particular emphasis is placed on the limits of altruistic obligations, given that general positive duties lack inherent boundaries and therefore require strict normative delineation through criteria such as the existence of a genuine emergency, awareness of the danger, proximity, proportionality of the required sacrifice, and proportionality of the threatened penalties.

To support their argument, the authors undertake a comparative analysis of duty-to-rescue provisions in various continental legal systems. They examine the conditions triggering the duty, including the notion of an emergency, awareness of danger, proximity and the extent of the sacrifice required. On this last point, Ashworth and Piña Rochefort advocate a standard of "reasonable altruism" rather than "minimal altruism". They propose that the expected level of sacrifice varies according to context: in the duty to rescue it is limited to minor burdens, whereas in necessity greater sacrifices may be required, depending on whether the situation is defensive or aggressive. Where the person subject to the duty of tolerance is the source of the danger (defensive necessity), greater harm may be justified than in cases involving an uninvolved third party.[16] Ultimately, the authors conclude that altruistic duties are compatible both with the rule of law (in the common law) and with the principle of legality (in continental law), and they put forward a *de lege ferenda* proposal for introducing the offence of failing to provide assistance into the common law.

In the fifth chapter, the authors move away from altruistic obligations and examine systematically the other categories of positive duties recognised in English criminal law, highlighting doctrinal inconsistencies and serious legal uncertainty, particularly in the area of homicide by omission. They identify four main categories of non-altruistic (special) positive duties: statutory duties relating to citizenship, obligations derived from regulatory frameworks (such as offences of failing to comply with an order made by the regulatory agency – e.g., a notification requirement under the Domestic Abuse Act 2021), "new generation" omission offences (including duties of reporting, prevention and protection in corporate and economic criminal law),

16. The authors invoke the well-known example of defensive necessity said to have arisen in the Zeebrugge Ferry Disaster, where passengers, seeking to escape an immediate danger, pushed aside a fellow passenger who, paralysed by fear, was blocking the escape ladder, leading to his death.

and positive duties developed at common law. With respect to the latter, the authors criticise English criminal law for allowing liability for omissions to be shaped mainly by the judiciary rather than by legislation, thereby creating uncertainty incompatible with the requirements of the rule of law. This problem is acute in cases of homicide by omission, where the duty to act is rarely grounded in clear statutory provisions or defined relationships, but is usually based on the notion of an "assumption of responsibility", the content of which remains inherently vague and dependent on judicial discretion, undermining the foreseeability of criminal liability.

In their conclusion, Ashworth and Piña Rochefort seek to determine the place of altruistic duties in criminal law by proposing a unified typology of criminal offences based on their semantic structure –that is, on the duties embedded within them. Their synthesis begins with the distinction between *general* and *special* duties, and between *negative* and *positive* duties, leading to four basic categories of criminal liability: (A) the general negative duty not to harm, (B) the general positive duty to provide assistance, (C) special negative duties (which do not in themselves ground criminal liability but lead to aggravated punishment), and (D) special positive duties grounding liability by omission. The authors emphasise that no Western legal system relies exclusively on the harm principle; all incorporate, to some degree, forms of altruistic burden, whether as duties to rescue or as duties of tolerance in necessity. Accordingly, they argue that the fundamental demand of criminal law towards citizens can be summarised as follows: *manage your own sphere of organization freely as you please, but (1) ensure that that organization is not defective, by harming others, and (2) seek to modify it in cases of emergency to provide relief without detriment or even bearing detriments of reasonable intensity*. At the same time, the authors expose an internal inconsistency within the common law, which explicitly rejects the duty of rescue while readily accepting the altruistic logic of necessity and the duty of tolerance, even where this entails extremely serious sacrifices. They therefore conclude that the imposition of altruistic duties through criminal law is not inherently incompatible with either liberalism or the principle of *ultima ratio*. Rather, it is a matter of criminal policy choices, not of any intrinsic lack of legitimacy of general altruistic obligations.

Overall, the monograph *Altruism and the Criminal Law* undertakes a far more ambitious project than its title suggests: it seeks to reposition criminal law in relation to the fundamental existential question of the legitimate scope of penal intervention. The issue is not *whether* criminal law can impose altruistic duties –at least at the normative level, the answer offered is affirmative– but *how much* criminal law is necessary to effectively protect legal interests without turning into an instrument of excessive restriction of individual freedom. The value of the book lies in the fact that the authors do not treat positive obligations as a technical doctrinal problem, but as a substantive issue of legislative design, engaging with the semantics of criminal norms, the philosophical and constitutional foundations of positive duties, and a comparative reading

of common law and continental approaches. Their analysis demonstrates that criminal law is neither a system of moral perfection nor a neutral technical tool, but a mechanism of delicate balance: between its protective function and its equally vital role as a barrier against state arbitrariness, the "terrible weapon of punishment". From this perspective, the discussion of altruism goes beyond duties of rescue or tolerance and touches the very core of criminal legislation: criminal law must be emphatically present where fundamental conditions of human coexistence are at stake, and discreetly absent where its intervention is not strictly necessary. The contribution of Ashworth and Piña Rochefort lies precisely in providing the conceptual tools needed to achieve this *fine-tuning* of criminal law, offering not only answers, but also –and perhaps more importantly– the right and unavoidable questions.