

Summer 1989

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### Recommended Citation

Douglas N. Husak, Justifications and the Criminal Liability of Accessories, 80 J. Crim. L. & Criminology 491 (1989-1990)

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# JUSTIFICATIONS AND THE CRIMINAL LIABILITY OF ACCESSORIES

Douglas N. Husak\*

## I. INTRODUCTION

Perhaps the most significant and controversial research program among contemporary criminal theorists is the investigation of the advantages and limitations of applications of the distinction between justification and excuse.<sup>1</sup> Some theorists exhibit almost unqualified enthusiasm that careful attention to this distinction can illuminate any number of intractable disputes in the substantive criminal law.<sup>2</sup> Others remain skeptical and cautious,<sup>3</sup> while still others neglect this research program altogether.<sup>4</sup>

It is highly unlikely that this ongoing debate can be resolved by a single conclusive argument. Instead, it must be decided by attend-

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<sup>1</sup> The relevant commentary is growing rapidly: "[e]nough justification-excuse literature now exists to merit the publication of a bibliography." Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1159 n.16 (1987). Although relatively new to Anglo-American thought, this distinction has been most fully developed in the legal systems of West Germany, Italy, Spain, Greece, Latin America, and Japan. See Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments*, 1986 B.Y.U. L. REV. 573, 573.

<sup>2</sup> The most outspoken champions of this distinction in Anglo-American law are George Fletcher and Paul Robinson. They have defended the usefulness of the distinction between justification and excuse in a series of books and articles. See G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); P. ROBINSON, *CRIMINAL LAW DEFENSES* (1984).

<sup>3</sup> See Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984); Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS., Summer 1986, at 89 [hereinafter Greenawalt, *Justifications and Excuses*]; Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984) [hereinafter Greenawalt, *Perplexing Borders*]; Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277 (1986).

<sup>4</sup> The efforts to suppress the distinction between justification and excuse are discussed in Fletcher, *The Individuation of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974). The distinction is almost totally ignored in the otherwise impressive *ENCYCLOPEDIA OF CRIME AND JUSTICE* (S. Kadish ed. 1983), leading Fletcher to complain that the appropriate reaction to its contributions is comparable to what "one would have to an article written today about tort theory that failed to acknowledge the implications of the eco-

ing to the several uses to which the distinction has been put. If the distinction can help shed light on a few stubborn problems in substantive criminal law, the program will have demonstrated its importance.<sup>5</sup>

This Article examines whether applications of this distinction are helpful in resolving what will be called the problem of accessory liability.<sup>6</sup> The issue is as follows: Suppose that a defendant (*D2*) assists another (*D1*) in apparently violating a criminal law, but that *D1* has a valid defense from liability.<sup>7</sup> To what extent does the lia-

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sonic analysis of law." Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 957 (1985).

English commentators are generally more critical of attempts to formulate and apply a taxonomy of criminal law defenses:

The distinction between the definitional and defence elements of a crime . . . is impossible to draw satisfactorily. A rule creating a *defence* merely supplies additional details of the scope of the *offence*. To regard the offence as subsisting independently of its limitations and qualifications is unrealistic. The defence is a negative condition of the offence, and is therefore an integral part of it.

G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 138 (2d ed. 1983).

<sup>5</sup> Fletcher maintains that recognition of the distinction between justification and excuse "could have concrete consequences" in

at least four areas of legal dispute . . . First, it is of critical importance in deciding when external facts, standing alone, should have an exculpatory effect. Secondly, it might bear on the analysis of permissible vagueness in legal norms. Thirdly, it might bear on the allocation of power between the legislature and judiciary in the continuing development of the criminal law. And fourthly, it might be of importance in analyzing the exculpatory effect of mistakes.

G. FLETCHER, *supra* note 2, at 555.

Although this Article confines its attention to the problem of third party assistance, the general remarks about justification and excuse offered here are potentially applicable to several of these other problems. In particular, the problem of third party *interference* lends itself to a somewhat comparable analysis.

<sup>6</sup> Accessories, unlike perpetrators, are those whose liability for an offense is derivative. This Article focuses upon those accessories commonly described as aiders-and-abettors rather than as instigators. See G. FLETCHER, *supra* note 2, at 637.

<sup>7</sup> It is unclear whether a defendant whose conduct is justified has actually committed a criminal offense because of uncertainty about whether the elements of offenses include, perhaps as "implicit negative elements," the absence of justifications. Commitment on this difficult issue is avoided by saying that persons whose conduct is justified *apparently* commit criminal offenses.

Whether or not a defendant whose conduct is justified has *actually* committed a criminal offense depends upon which of two incompatible views of justifications is adopted. According to the "implicit elements" approach, a defendant who acts under a justification *cannot* commit the offense charged. His conduct may have satisfied each of the explicit elements of a given offense, but complete offenses are comprised of *all* their elements; unless the conduct of the defendant satisfies the implicit as well as the explicit elements, he has *not* committed the offense. According to the "license" approach, justifications are construed as licenses or privileges to commit an offense. A defendant who acts under a justification *can* commit the offense charged, although the presumption that the offense constitutes a legal wrong is rebutted. See D. HUSAK, PHILOSOPHY OF CRIMINAL LAW 190-92 (1987).

bility of *D2* depend upon what kind of defense *D1* possesses for his apparent violation?

It is clear that an all-or-nothing answer to this question must be rejected. Suppose that *D1* acts in self-defense in repelling an unlawful aggressor. Surely *D2* has a defense if he assists *D1* in his efforts.<sup>8</sup> But suppose that *D1* attacks an innocent victim, and is acquitted on grounds of insanity. Surely *D2*, if sane, has no defense if he assists *D1*. In each example, *D1* is acquitted, but the consequences for *D2* differ. What accounts for this difference?

A number of theorists contend that this question can best be answered by invoking distinctions between various criminal law defenses<sup>9</sup>—justifications and excuses in particular.<sup>10</sup> According to these theorists, the issue of whether *D2* should be allowed to assist *D1* depends upon whether *D1*'s defense is categorized as a justification or an excuse. If *D1*'s conduct is justified, *D2* may assist him and benefit from his defense. But if *D1*'s conduct is excused, *D2* may not assist him or benefit from his defense.<sup>11</sup> The application of this principle to the above examples is alleged to be straightforward; since self-defense is a justification, accessories may assist those who act in self-defense.<sup>12</sup> Since insanity is an excuse, assistance by acces-

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<sup>8</sup> It is likely that additional conditions must be satisfied before *D2* may benefit from *D1*'s defense. Perhaps *D2* must know of the existence of the circumstances that give rise to *D1*'s defense and act because of those circumstances. See Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 279 (1975); Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293 (1975).

<sup>9</sup> There is some disagreement about how many distinctions a complete taxonomy of defenses should recognize. Robinson argues for five categories. 1 P. ROBINSON, *supra* note 2, at 70, 105.

<sup>10</sup> See J. DRESSLER, UNDERSTANDING CRIMINAL LAW (1987); G. FLETCHER, *supra* note 2; P. ROBINSON, *supra* note 2.

<sup>11</sup> Perhaps the clearest statement of this position has been written by J. DRESSLER, *supra* note 10, at 189-90:

Suppose that D wishes to perform conduct A. She needs assistance to commit A. Should X assist A? If she does, what is her criminal responsibility for her assistance? The answer to this question may depend on whether conduct A is justified, excused, or neither.

If conduct A is justified, then D has committed a proper act. X should be acquitted as an accomplice in the commission of a justified act. Thus, if X provides D with the gun to assist her in killing V in justifiable self-defense, X is guilty of no crime.

Suppose, however, that D kills V due to an insane delusion. X, a sane person, provides D with the gun used in the crime. Although D may be acquitted on the basis of insanity, no logical reason should preclude convicting X of the murder in which she sanely assisted. After all, a wrongful act has occurred—the death of V. The fact that D is relieved of responsibility due to her mental illness should not preclude convicting a sane person of assisting in the commission of the harmful act.

<sup>12</sup> This example may be somewhat oversimplified, since self-defense does not always function as a justification. So-called putative self-defense may only give rise to an excuse.

sories is not permitted.<sup>13</sup> Some theorists express this position by contending that excuses, unlike justifications, are *personal* to those who possess them in the sense that they cannot be shared or transferred to others.<sup>14</sup>

Why should *D2*'s fate be influenced by whether *D1* has a defense and by how that defense is categorized? Those theorists who believe this distinction to be useful argue that justified conduct does not (all things considered) violate a prohibitory norm; it is objectively right, and it cannot be wrong for others to assist in conduct that is objectively right. Any basis for proscribing such assistance cannot refer to the original prohibitory norm because, *ex hypothesi*, that norm has not been transgressed. Excused conduct, on the other hand, violates a prohibitory norm; it is objectively wrong, and it cannot be right for others to assist in conduct that is objectively wrong. The basis for proscribing such assistance can and does refer to the original prohibitory norm. Thus a defendant may be convicted as an accessory to conduct that is excused, but not to conduct that is justified.<sup>15</sup>

The application of the distinction between justification and excuse offers a promising solution in the above examples. In these cases, however, there is little *need* for a theory; reasonable persons could be expected to concur in the outcomes regardless of whatever theoretical differences may divide them. The value of the distinction lies in its application to examples about which our pre-theoretical intuitions are likely to be confused and ambivalent.<sup>16</sup> Suppose that *V* threatens to bloody the nose of one of *D1*'s children unless *D1* burglarizes *X*'s house. Unable to accomplish this result alone, *D1* explains his predicament to *D2*, his sympathetic friend. *D2* proposes to lend a ladder to *D1*, so that he can enter the house through a second story window.<sup>17</sup> *D1*'s conduct falls under the defense of duress, but can *D2* benefit from *D1*'s defense? *D2* did not act under

<sup>13</sup> Again, this example may be somewhat oversimplified since insanity does not always function as an excuse, but as a denial of culpability inherent in an offense. Only when volitional disabilities are present is insanity clearly an excuse.

<sup>14</sup> See, e.g., G. FLETCHER, *supra* note 2, at 762 ("Excuses, in contrast [to justifications], are always personal to the actor."); J. DRESSLER, *supra* note 10, at 190 ("Generally speaking, justifications are universalized whereas excuses are individuated.")

<sup>15</sup> G. FLETCHER, *supra* note 2, at 762.

<sup>16</sup> Independent corroboration of the utility of the distinction between justification and excuse is allegedly derived from the fact that our intuitions about the permissibility of assistance by accessories are most ambivalent in those very cases in which we are uncertain about whether the defense of the accused qualifies as a justification or an excuse. See I P. ROBINSON, *supra* note 2, at 105-16.

<sup>17</sup> Frequently it is difficult to distinguish the aiding-and-abetting of an accessory, which is a kind of derivative liability, from joint perpetration. For a discussion of some

duress; *he* was not "coerced" by a "threat," as most formulations of duress require.<sup>18</sup> *D2*'s motives for assisting *D1* were friendship and sympathy. The commentators cited above would determine whether *D2* has a defense by first identifying what *kind* of defense *D1* possesses. Duress is almost always construed as an excuse rather than as a justification; thus *D1*'s conduct is "objectively wrong," and *D2*'s assistance is legally prohibited. According to this school of thought, if *D2*'s assistance is to be allowed, an argument would have to establish that *D1*'s conduct is "objectively right," and therefore justified.

A number of problems lurk behind this deceptively simple approach. Although a few observations about the concept of excuse will be offered, the focus in this Article is almost entirely on difficulties that surround the concept of justification. Part II refines the concept of justification and argues that this category is better understood as permissible rather than as commendable conduct. Part III points out the deficiencies in the substantive theory of justifications proposed by those commentators who have been most enthusiastic about applying the distinction between various defenses to substantive problems in the criminal law. Part IV examines the implications of the conclusions reached in II and III for the problem of accessorial liability. In sum, the application of the distinction between justification and excuse to the problem of accessorial liability is more problematic than has been supposed.

## II. THE CONCEPT OF JUSTIFICATIONS

To what extent is the categorization of *D1*'s defense dispositive of the issue of how *D2* should be treated? This question cannot be answered without carefully attending to the distinction between justification and excuse. This distinction has been a source of controversy among theorists.<sup>19</sup> Confusion has derived largely from the failure to distinguish between two issues about justifications and excuses: the first problem is simply to *define* each concept; the second is to defend a theory of what conduct is justified or excused.<sup>20</sup> The first problem is conceptual; the second is substantive.<sup>21</sup> Each will be

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of these complications, see Schreiber, *Problems of Justification and Excuse in the Setting of Accessorial Conduct*, 1986 B.Y.U. L. REV. 611.

<sup>18</sup> See 2 P. ROBINSON, *supra* note 2, at 348.

<sup>19</sup> See D. HUSAK, *supra* note 7, at 190-92.

<sup>20</sup> Only when these two issues are resolved is there hope that a third question can be answered: whether particular defenses—necessity or duress, for example—should be categorized as justifications or excuses. Unfortunately, commentators' obsession with this issue has distracted them from more fundamental concerns.

<sup>21</sup> It is doubtful that a *logical* distinction between conceptual and substantive ques-

discussed in turn.

Although there has been considerable debate about definitions,<sup>22</sup> most theorists should find the following accounts acceptable. At least two grounds may give rise to a defense after a person has apparently violated a criminal law. First, properties or characteristics of the defendant's *act* may create a defense. Second, properties or characteristics of the *defendant himself* may create a defense. Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors.<sup>23</sup> A defendant is justified when his *conduct* is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when *he* is not blameworthy or responsible for his conduct, even though it apparently violates a criminal law.<sup>24</sup>

Much confusion surrounding the definitions of justification and excuse would be dispelled by attending to the distinction between judgments about acts and judgments about actors. In practice, of course, it is frequently difficult to specify what a judgment is *about*; more will be said about this problem in Part III. But confusion about the objects of judgment should not infect the *definitions* of these concepts. By definition, if the facts that comprise the defense

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tions should be presupposed. Ultimately, the adequacy of a definition must be assessed in the context of the theory of which it is a part.

<sup>22</sup> There has been a tendency to conflate the definitions of justification and excuse with the various uses to which this distinction might be put. Greenawalt discussed "three possible bases for drawing the distinction: (1) a distinction between warranted and wrongful conduct; (2) a division between general and individual claims; and (3) a distinction based on the rights of others." Greenawalt, *Perplexing Borders*, *supra* note 3, at 1898. In a later article, Greenawalt recognized (1) as "the central distinction between justification and excuse." Greenawalt, *Justifications and Excuses*, *supra* note 3, at 91. But see *infra* notes 25-28 and accompanying text for some difficulties with Greenawalt's understanding of justifications.

Fletcher writes:

The distinguishing features of excuses are: (1) they do not negate the wrongfulness of the actor's conduct, (2) they are personal to the accused, and (3) they do not presuppose that the actor defend either the legal order . . . or that he defend the greater good . . . Claims of justification are distinguishable on all three counts: (1) they do negate the criminal or wrongful nature of the actor's conduct, (2) they are universally available to anyone who wishes to intervene in the situation precisely because (3) they presuppose that the justified actor is acting on behalf of the objective legal order or the objectively greater good.

Fletcher, *Rights and Excuses*, 3 CRIM. JUST. ETHICS, Summer/Fall 1984, at 17, 17. It is not entirely clear which of these claims should be construed as conceptual and which as substantive.

<sup>23</sup> See Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621 (1976).

<sup>24</sup> Many theorists would add the words "without justification" to the end of this definition of excuses. It is unclear whether justification and excuse are *serially* ordered, so that the offering of an excuse concedes the unavailability of a justification. See D. HUSAK, *supra* note 7, at 194-96.

describe the defendant's act, they constitute a justification; if these facts describe the defendant himself, they constitute an excuse.

With these definitions in mind, it is instructive to examine the latest of Kent Greenawalt's thoughts on this topic. In the opening paragraph of the most recent of his two contributions, Greenawalt blurs the distinction between judgments about acts and judgments about actors. In the sentences in which the concepts of justification and excuse are initially presented, Greenawalt writes, "If [the defendant] is fully justified, she will not be subject to blame or to classification as a weak or defective person. If [the defendant] is excused, she may be regarded as wholly or partly free of blame, but she will have demonstrated weakness or some defect."<sup>25</sup> These remarks represent a peculiar introduction to the concepts of justification and excuse. Consider the first sentence. It is misguided to suggest that the presence (or absence) of a justification has any implications about whether the *agent* is weak or defective.<sup>26</sup> Justifications focus entirely on actions, not agents. Next consider the second sentence. A person who is excused is not to blame for her conduct, but it need not be true that she has "demonstrated weakness or some defect." *Perhaps* all excuses presuppose some kind of disability,<sup>27</sup> but this substantive conclusion cannot be established by *definition*.<sup>28</sup>

Problems in defining justifications and excuses, although formidable, pale in comparison with the even larger difficulty in resolving the second question: when and under what conditions *are* defendants justified or excused? No definition can resolve this issue; what

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<sup>25</sup> Greenawalt, *Justifications and Excuses*, *supra* note 3, at 89. This confusion resurfaces elsewhere in the article. Greenawalt writes: "if one is concerned with judging the actor, the actor's blameless perception of the facts ought to be sufficient to support a justification." *Id.* at 102. But why consider justifications at all if "one is concerned with judging the actor"?

<sup>26</sup> Perhaps Greenawalt believes that judgments about acts (always? typically? in the absence of an excuse?) entail judgments about actors. This belief is part of a theory about the connection between agent morality and action morality that may or may not be correct. Presumably "weak or defective persons" can perform justified acts, and persons who are not "weak or defective" can perform unjustified acts. In any event, these claims surely have no place in a *definition* of justifications.

<sup>27</sup> See 1 P. ROBINSON, *supra* note 2, at 92 (defense of the view that excuses presuppose a disability). Even Robinson, however, retracts this view in his discussion of mistakes. 2 P. ROBINSON, *supra* note 2, at 375.

<sup>28</sup> Finally, even if Greenawalt is correct that an excuse absolves an agent from blame but presupposes a weakness or defect, it need not be true that the agent is free from blame *for* the weakness or defect. Insanity, for example, may constitute an excuse whether or not the agent is blameworthy for having brought about his own insanity. For a sophisticated treatment of these issues, see Robinson, *Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).



is required is a theory — or, rather, two theories.<sup>29</sup> The first theory specifies when conduct is not wrongful, and the second theory specifies when persons are not blameworthy for their conduct.

Many theorists have defended theories of excuses, although no one theory has attracted an overwhelming consensus.<sup>30</sup> Commentators have appreciated the *need* for a theory of excuses and have expended a great deal of effort in this direction. By contrast, it is disappointing and remarkable that few theories of justifications have been proposed.<sup>31</sup> Most significantly, some theorists have failed to appreciate the *need* for a theory by conflating the problem of defining justifications with the separate task of defending a theory to identify when conduct is justified.<sup>32</sup>

The writings of Paul Robinson are noteworthy in this regard. Since Robinson has provided the most detailed and sophisticated account of defenses in Anglo-American criminal theory, it is important to examine his position on justifications. “The conduct of a justified actor,” writes Robinson in the section that introduces the concept of justification, “is not culpable because its benefits outweigh the harm or evil of the offense itself.”<sup>33</sup> When justifying cir-

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<sup>29</sup> It is highly unlikely that a single theory can suffice to establish the conditions under which conduct is not wrongful, as well as the conditions under which agents are not blameworthy for their conduct. The former question raises problems in what is called *action morality*, the latter in *agent morality*. The relationship between these two theories with different objects of judgment continues to confound philosophers. See S. HUDSON, *HUMAN CHARACTER AND MORALITY* (1986).

<sup>30</sup> Four candidates are worthy of mention. The first is utilitarian. An excuse should be recognized whenever so doing would produce a result such as happiness that the utilitarians identify as good. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORAL AND LEGISLATION* (O. Piest ed. 1948) (1823).

The second claims that the various excusing conditions are symptoms of some disability, usually described as the inability to control one's conduct, or involuntariness. This view, associated with Aristotle, is defended in 2 P. ROBINSON, *supra* note 2, at 223 n.1: “For the purposes of the criminal law, the [disability that causes an excusing condition] must be such that the act constituting the offense is not the product of a meaningful choice.”

The third locates excuses by reference to character. This view, with a legacy traceable to Hume, is described in Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *LAW & PHIL.* 5, 7 (1982): “Acts may or may not indicate character traits. If an act does indicate an undesirable character trait, then blame is appropriate; if it does not, then blame is inappropriate.”

The fourth identifies excuses with circumstances that distort the agent's practical reasoning. Internal distortions, such as the effects of alcohol, or external distortions, such as duress, can render decision-making irrational. For a critical discussion of this view, see Moore, *Causation and the Excuses*, 73 *CALIF. L. REV.* 1091 (1985).

<sup>31</sup> See the discussion of the “four theories of justification” that allegedly “deserve attention” in Dressler, *supra* note 1, at 1164-65.

<sup>32</sup> See *infra* text accompanying notes 33-36.

<sup>33</sup> 1 P. ROBINSON, *supra* note 2, at 70.

cumstances obtain, "the harm sought to be prevented or punished by an offense . . . is outweighed by the need to avoid an even greater harm or to further a greater societal interest."<sup>34</sup> The paradigm example Robinson uses to illustrate the category of justification is a case of "necessity": a defendant burns a field of corn between a raging forest fire and a densely populated town in order to create a firebreak and save the town from destruction.<sup>35</sup>

Robinson's account appears to conflate the definition of a justification with a substantive theory of when conduct is justified. This confusion should be evident if one inquires *why* anyone would be inclined to describe conduct that creates a net benefit as justified. Presumably Robinson believes it is appropriate to deem such conduct as justified because he believes it is not wrongful. If he thought that any instances of conduct that created a net benefit *were* wrongful, it is hard to imagine that he would countenance them as justified.

The failure to distinguish definitional from substantive questions gives rise to a number of related difficulties. Most importantly, Robinson would find unintelligible the propositions that (a) conduct may be justified although it creates a net balance of social harm, and (b) conduct may be unjustified although it creates a net balance of social benefit. A defense of (a) will be sketched in Part III. But whether or not these claims are true, they are clearly coherent. Because his account of justifications does not sort conceptual from substantive issues, Robinson must regard these claims as contradictory.<sup>36</sup> According to Robinson, if conduct did not produce a greater good, it simply *could* not qualify as a justification.

Since conduct is justified when it is not wrongful, the key to presenting a defensible account of justifications is to attend to how the concept of the "not wrongful" should be understood. A number of theorists have observed that the concept of the "justified" or "not wrongful" is ambiguous between conduct that is "merely permissible" and conduct that is "commendable."<sup>37</sup> There is a great deal of difference between conduct that a system of norms should tolerate and not punish or condemn, as opposed to conduct

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<sup>34</sup> *Id.* at 83.

<sup>35</sup> *Id.*

<sup>36</sup> It is noteworthy that Robinson does not conflate the concept of an excuse with a substantive theory about when persons are excused. He writes that an actor is excused when "he is not responsible for his deed," 1 P. ROBINSON, *supra* note 2, at 91, and he is not responsible for his deed when a disability deprives him of "meaningful choice," 2 P. ROBINSON, *supra* note 2, at 223 n.1.

<sup>37</sup> See Dressler, *supra* note 3, at 69-77. Any number of additional ambiguities are unimportant for present purposes.

that is worthy of praise and emulation. Our moral vocabulary is sufficiently rich to capture this difference in the variety of circumstances in which it has significance.

Which of these two senses of justifications is pertinent to the criminal law? It is crucial to appreciate the reasons for adopting the former interpretation; justifications should be understood as conduct that is permissible, although not necessarily commendable or praiseworthy. Justifications, after all, are important to the criminal law because they are a type of defense. Defenses, according to Robinson, are "any set of identifiable conditions or circumstances that may prevent conviction for an offense."<sup>38</sup> Undoubtedly, the judgment that conduct is permissible is sufficient to "prevent conviction"; it need not also be praiseworthy.

Conduct is legally permissible, according to Hohfeldian analysis, when a defendant has no legal duty not to perform it—when no law prohibits it.<sup>39</sup> By definition, no instance of permissible conduct should be subject to punishment.<sup>40</sup> If some permissible actions were not justified, it would be necessary to invent a new category of criminal law defense to represent the concept of "permissible but unjustified,"<sup>41</sup> since a defendant whose conduct is permissible violates no legal duty and is entitled to an acquittal. Hence it is fair to conclude that all permissible actions are justified in the sense relevant to the criminal law. The converse is true as well—all justified acts are permissible. It is difficult to imagine how conduct could be commendable and praiseworthy unless it were at least permissible.<sup>42</sup>

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<sup>38</sup> I P. ROBINSON, *supra* note 2, at 70. Surely this definition is too broad, since it seemingly includes as criminal law defenses situations in which a defendant avoids apprehension or bribes a judge. Perhaps such consequences led Robinson to qualify his definition by remarking that he is referring to the "casual sense" of the term "defense." *Id.*

<sup>39</sup> Hohfeld uses the term "privilege" to describe the permissible. W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 38-39 (W. Cook ed. 1978). Once again, clarity about Hohfeldian analysis requires a decision about whether justifications should be construed as exceptions to prohibitory norms, or as licenses to infringe such norms. *See supra* note 7.

<sup>40</sup> "[A] justification need do no more than demonstrate that the reason for the criminal justice system's intervention—harm—is absent. It is not necessary that the conduct be affirmatively desirable or morally good. It is enough that it is not undesirable or not morally bad." Dressler, *supra* note 3, at 83.

<sup>41</sup> Greenawalt recognizes the explanatory power of a concept of "partial justification," according to which an action "is *less inappropriate* than it would otherwise be," but he notes that "the term justification has an either-or quality that makes people hesitant to speak of a partial justification." Greenawalt, *Justifications and Excuses*, *supra* note 3, at 92. Had Greenawalt explicated the justifiable in terms of the permissible, there would be little need to introduce a concept of partial justification. No action is more or less permissible than another, although it may be more or less commendable than another.

<sup>42</sup> *But see* Buckoke v. Greater London Council, 2 All E.R. 254, 258 (1971) (Lord Den-

Thus the biconditional is true that acts are justified if and only if they are permissible.

This conclusion may seem apparent. Nevertheless, some theorists have not considered it while others have gone to extraordinary lengths to resist it. Robinson does not so much as entertain the possibility that justified action might not be commendable.<sup>43</sup> George Fletcher considers but rejects the possibility that all permissible conduct is justified.<sup>44</sup> He provides two arguments for concluding that justified conduct is "right and proper," and thus should be understood as praiseworthy, and not merely as permissible. His first reason is etymological. "Justification," he reminds us, "derives from the word *jus* which means Right. Justifications render conduct right; and if it is objectively right, individuals surely have a personal right to engage in the conduct in question."<sup>45</sup>

There are several problems with this initial argument. First, it is doubtful that much significance should be attached to ordinary language or etymological arguments. The concepts employed here are sufficiently technical to warrant skepticism that their meanings should be governed by their original or ordinary uses. Fletcher is appropriately critical of such arguments elsewhere,<sup>46</sup> but these same reservations are not expressed in this context. Second, if this etymological argument is accepted, the word "justification" must be abandoned as poorly chosen to represent this category of criminal law defense. What is required is a concept that means "conduct that apparently violates a criminal law but is not legally wrongful." If the word "justification" lacks this meaning, it should be replaced with a more suitable candidate. Third, even if "justification" is synonymous with "right," the latter concept itself is notoriously ambiguous and hardly resolves the debate. Hohfeld distinguished at least four senses of legal rights,<sup>47</sup> and theorists have had no difficulty uncover-

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ning, MR)(driver of fire engine should be congratulated for running a red light in certain circumstances, although the law compels every driver to stop at red lights regardless of emergency).

<sup>43</sup> This failure results from Robinson's commitment to a utilitarian account of justifications. See *infra* Part III.

<sup>44</sup> See the references in Dressler, *supra* note 3, at 69-77 nn.38-99. But see the possible concession in Fletcher, *The Right and the Reasonable*, *supra* note 4, at 954 ("Claims of justification concern the rightness, or at least the legal permissibility, of an act . . .").

<sup>45</sup> Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1358 (1979).

<sup>46</sup> For Fletcher's response to Lord Cross, see G. FLETCHER, *supra* note 2, at 701-02.

<sup>47</sup> Hohfeld identified four kinds of legal rights: privileges, claim-rights, powers, and immunities. None of these corresponds to the commendable. See W. HOHFELD, *supra* note 39.

ing additional ambiguities.<sup>48</sup> A perfectly respectable kind of right is a Hohfeldian privilege or liberty,<sup>49</sup> which is the category of the permissible as used here.

Fourth, the conclusion that persons *have* a right to engage in whatever conduct *is* right is either tautological or false. At the very least, its truth depends upon a theory of rights that is probably defective. Perhaps the leading theory about the nature and function of rights is that they insulate right-holders from interference that would otherwise be legitimate on utilitarian grounds.<sup>50</sup> According to this theory, the state may prevent citizens from doing what would otherwise be permissible if such prevention serves utilitarian objectives.<sup>51</sup> But the pursuit of utilitarian gains does not warrant the state in preventing citizens from doing what they have a *right* to do. If this theory is acceptable, it is false that persons have a right to engage in any instance of right conduct.<sup>52</sup> Finally, even if persons have a right to engage in a given course of conduct, it does not follow that their conduct is beyond criticism, praiseworthy, or worthy of emulation and support by others. Some rights may be wrong to exercise.<sup>53</sup>

Fletcher's more significant argument for believing that some permissible actions are not justified derives from his views about the nature and function of the "ideal of law," which he identifies as "to suppress violence and to channel disputes into orderly processes."<sup>54</sup> He continues, "[i]f the law were content to label [justified] conduct . . . as permissible, it would in effect encourage rather than suppress violence."<sup>55</sup> This is because "if our legal ideal is the suppression of violence, then we must employ a set of ideas that enables us to de-

<sup>48</sup> See, e.g., Montague, *Two Concepts of Rights*, 9 PHIL. & PUB. AFF. 372 (1980).

<sup>49</sup> See Williams' "correction" of Hohfeldian terminology. Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129 (1956).

<sup>50</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 82-94 (1977).

<sup>51</sup> Thus, for example, the state is permitted to interfere in a person's liberty to drive in either direction on Lexington Avenue, if making the road one-way promotes the utilitarian goal of facilitating the flow of traffic. The state would not be permitted to convert Lexington Avenue into a one-way street if persons possessed an antecedent *right* to travel in either direction. See R. DWORKIN, *supra* note 50, at 269.

<sup>52</sup> Of course, Fletcher might simply *mean* that right conduct is conduct that persons have a right to perform, but then his position is a tautology rather than a substantive insight.

<sup>53</sup> A familiar example is the proposal of Nazis to march in Skokie. It is consistent to believe that persons have the right to affiliate with the Nazi party, and that Nazis have the right to assemble, but that such conduct is wrong and is not worthy of support or emulation. See Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981).

<sup>54</sup> Fletcher, *supra* note 45, at 1359.

<sup>55</sup> *Id.*

termine upon whose side we should intervene.”<sup>56</sup> As long as we subscribe to Fletcher’s hypothesis that the possessor of a justification has a right to act, the implications for intervention by accessories are clear: they may intervene only on behalf of the party who is in the right. But if we abandon Fletcher’s hypothesis, the law may be forced to stand idly by, powerless to prevent combat between private citizens. Thus to reject Fletcher’s argument is to encourage anarchy.

Of course, this argument is question-begging if our project is to provide an unbiased assessment of the issue of whether the distinction between justification and excuse is useful in illuminating the problem of accessorial liability. Fletcher’s claim is that his account of justifications is preferable precisely *because* it has this use. This argument can hardly provide an independent ground for believing that the distinction can be applied for this purpose. Such reasoning is circular.

More importantly, there is some question about whether Fletcher’s remarks accurately express the “ideal of law.” In any number of circumstances, it is unclear on which side of a controversy, if any, persons may intervene. There is no reason to believe that the existence of these circumstances represents an erosion or breakdown of the ideal of law.<sup>57</sup> Instead, it may represent a reasoned judgment that law is not ubiquitous or pervasive and that some kinds of disputes are private and should be resolved solely by the parties. In fact, the Anglo-American legal tradition is hostile to the suggestion that the law should prefer one side to another in each and every disagreement. Presumably, many domestic disputes provide examples.<sup>58</sup>

Fletcher might respond by pointing out that such situations do not require a theory of justification, which becomes necessary only

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<sup>56</sup> *Id.* at 1360. See the claim that the government should not abandon its “monopoly on force.” Hassemer, *supra* note 1, at 603.

<sup>57</sup> As Fletcher states:

According to the ideal of the criminal law as a self-regulating set of conduct rules, the rules must generate a solution *ex ante* for every case. The ‘permissible’ flows from a skepticism about the possibility of a single solution. . . . The notion of the permissible thus has no place in this idealized system of self-regulation. Fletcher, *The Right and the Reasonable*, *supra* note 4, at 977.

This quotation indicates that Fletcher should be understood to assert the “strong incompatibility thesis” that in every conflict one of two parties will be justified, and not merely the “weak incompatibility thesis” that *if* one party is justified in doing X, the other cannot be justified in stopping that person from doing X. For a different interpretation of Fletcher’s position, see Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289, 1333 (1987).

<sup>58</sup> Of course, the law should neither be neutral about *all* domestic disputes nor about the measures that can be used by private parties in settling them.

when conduct apparently violates a criminal law. Even in these circumstances, however, it is no defect of a theory that it sometimes fails to identify the party on whose behalf intervention is warranted. If two persons on the Titanic engage in a struggle upon simultaneously reaching a lifeboat with a single space available, it may be inappropriate for bystanders to assist either.<sup>59</sup> But—and this is the important point—it does not follow that either party must lack a justification for the offense of assault. The fact that bystanders have no better reason to intervene on one side or the other of a conflict does not entail that the actions of one or both parties in the conflict cannot be justified. Both are justified in the sense that both are acting permissibly.<sup>60</sup>

This section has clarified the concept of justification and provided reasons to believe that this criminal law defense category is better identified with the permissible than with the commendable. It remains to be seen how these observations bear on the content of a substantive theory of justifications and ultimately on the issue of the criminal liability of accessories.

### III. THE SUBSTANCE OF JUSTIFICATIONS

Under what conditions is it not wrongful to apparently violate a criminal law? More generally, under what conditions is conduct permissible? It seems hopeless to answer the former question without committing oneself to a position on the latter. If so, it should be clear that a reply requires nothing less than a comprehensive moral theory.<sup>61</sup> Thus it is not surprising that no solution can be defended with much confidence. Different moral theories lead some commentators to categorize conduct as justified that others categorize as excused, and that still others denounce altogether.<sup>62</sup>

Fortunately, for present purposes, it is less difficult to identify

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<sup>59</sup> Fletcher might agree, and might respond that this example does not describe what he calls "incompatible actions." Fletcher writes: "Acts are incompatible if they cannot be performed simultaneously." Fletcher, *supra* note 45, at 1358. Presumably, acts become incompatible only if one act in the pair is defined by use of a "success verb." *D*'s act of rape is not incompatible with *V*'s attempt to resist rape, but is incompatible with *V*'s successfully resisting that rape. Still, the restriction of the domain of Fletcher's thesis to the universe of pairs of actions in which one or more is described by a success verb seems *ad hoc* and arbitrary. The fact remains that the ideal of law does not suffer from the existence of circumstances in which it fails to identify a unique combatant on whose behalf third party intervention is appropriate.

<sup>60</sup> In Fletcher's sense of justification, in which the justified party acts commendably, his "incompatibility thesis" is more plausible. See *supra* note 57.

<sup>61</sup> Morawetz appreciates the extent to which law and morality intersect in criminal law defenses. See Morawetz, *supra* note 3, at 278.

<sup>62</sup> Greenawalt is persuasive in illustrating this point by reference to different atti-

*defective* theories than to defend an adequate alternative. Little can be said to recommend Robinson's approach; his account is clearly wrong, even if the correct theory remains elusive.<sup>63</sup> His supposition that conduct is justified when it promotes a net social benefit is utilitarian. Robinson's unabashed reliance on utilitarianism as an acceptable account of justifications is remarkable in light of the fact that utilitarianism has been thoroughly discredited in most philosophical circles.<sup>64</sup> It should not be necessary to rehearse the standard and familiar difficulties with utilitarianism. In any event, Robinson appears to be sensitive to these difficulties elsewhere in his writings. He does not presuppose a utilitarian theory of excuses, although the application of utilitarianism to the question of whether conduct is justified is no more plausible than its application to the question of whether agents are blameworthy for their conduct.<sup>65</sup>

It might be hoped, however, that a comprehensive theory of morality is not required after all. A theorist might concede difficulties with utilitarianism generally but insist that it nonetheless represents an adequate theory of justifications as a criminal law defense. A person requires a justification only when he has apparently violated a criminal law. Perhaps utilitarianism offers a satisfactory answer to the question of when the apparent violation of a criminal law is permissible, although it is defective as a theory of permissible conduct in general. This position is coherent, but implausible. Justifications such as self-defense do not seem to depend on the belief that the repelling of unlawful aggressors promotes more utility than disutility. Surely persons have a *right* to protect themselves from unlawful aggression, even when their actions fail to produce preferable consequences.<sup>66</sup> The onus is on Robinson to explain why, if utilitarianism is a radically defective theory of action morality in other contexts, it is adequate as an account of when the apparent commission of a criminal offense is permissible. Robinson does not address this issue. But this position is worthwhile to explore despite its ini-

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tudes about the desirability of retreat in cases of self-defense. See Greenawalt, *Perplexing Borders*, *supra* note 3, at 1905-06.

<sup>63</sup> Perhaps no single, unifying principle accounts for each of the justifications the criminal law should recognize; but matters become murky if no coherent alternative exists at all. See the challenge posed by Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>64</sup> Perhaps the most persuasive critic of utilitarianism is Bernard Williams. He writes that "the simple-mindedness of utilitarianism disqualifies it totally," and concludes that "[t]he day cannot be too far off in which we hear no more of it." J. SMART & B. WILLIAMS, *UTILITARIANISM, FOR AND AGAINST* 150 (1973).

<sup>65</sup> For an attack on a utilitarian theory of excuses, see H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY 28 (1968).

<sup>66</sup> See Morawetz, *supra* note 3, at 290.



tial implausibility; interesting conclusions for the problem of accessorial liability emerge if exactly *why* utilitarianism does not provide an adequate theory of justifications becomes clear.

Perhaps Robinson reasons as follows. Apparently, committing a criminal offense is presumptively wrongful; it brings about whatever harm the criminalization of that conduct is designed to prevent. Bringing about a harm can be permissible only insofar as it prevents the occurrence of an even greater harm. Thus, he is led to defend the utilitarian view of justifications presupposed by the Model Penal Code: conduct is justified when "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."<sup>67</sup>

This reasoning is seductive. There is a trivial sense in which a presumptively wrongful act can be permissible only if that presumption is defeated or overcome in the particular case by a more weighty consideration. But it should not be assumed that the greater good that provides the justification must be understood in terms of *consequences*. The supposition that only preferable consequences can justify presumptively wrongful conduct begs the question against deontological theories<sup>68</sup> that do not assess rightness by reference to superior results.<sup>69</sup> According to deontological theories, rightness is a function of conformity with acceptable principles, not of the production of optimal consequences.

Greenawalt provides several examples designed to expose the weaknesses of a utilitarian theory of justifications. He concentrates primarily on a select class of cases involving *mistakes*: "situations in which from the standpoint of all existing human knowledge an action appears to be desirable, but unforeseeable consequences make it turn out to be undesirable."<sup>70</sup> Suppose that a medieval doctor, acting on the best medical information available at the time, fails to administer what contemporary science recognizes as a cure. How should we characterize what modern medicine would condemn as malpractice? Several (somewhat complicated) possible descriptions

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<sup>67</sup> Model Penal Code § 3.02(1)(a) (1985). See the discussion in Lenckner, *The Principle of Interest Balancing as a General Basis of Justification*, 1986 B.Y.U. L. REV. 645.

<sup>68</sup> Perhaps question-begging would be tolerable were it not for the fact that the great majority of contemporary moral philosophers subscribe to some version of a deontological theory.

<sup>69</sup> See G. FLETCHER, *supra* note 2, at 769-70 ("[T]he theory of interest-balancing fails to take into account important values that shape the theory of justification. Of these additional values, we should take special note of the concept of autonomy . . . . Once accepted, the value of autonomy does not lend itself to being offset by competing social interests.").

<sup>70</sup> Greenawalt, *Perplexing Borders*, *supra* note 3, at 1908.

suggest themselves, but only two will be considered here.<sup>71</sup> The moral philosophers of today, retrospectively evaluating such conduct, might pronounce it as unjustified but excused. A second possibility is to deem the conduct justified, notwithstanding its bad consequences.

Robinson, applying his utilitarian perspective, is committed to the first alternative. He embraces what might be called the *mistake thesis*: a mistake about a justification, however reasonable, can only give rise to an excuse, but never to a justification. He reasons, "[h]is conduct has not, in fact, avoided a greater harm or furthered a greater good; it has not caused a net benefit, but rather a net harm."<sup>72</sup> Fletcher concurs, although his thinking is less utilitarian.<sup>73</sup> Greenawalt, on the other hand, rejects the mistake thesis, and regards the second alternative as obvious: "that the law should treat [the] defense as one of justification seems plain."<sup>74</sup> The truth of the mistake thesis is crucial in assessing utilitarianism as a viable theory of justifications as a criminal law defense. If it is incorrect, conduct may be justified notwithstanding its bad consequences. Should the mistake thesis be accepted?

Perhaps no single argument can resolve this dispute, and for good reason. It is notoriously difficult to decide what features should be incorporated into descriptions of the defendant's act. There is no consensus in philosophy or in law about the extent to which consequences of acts should be included in their descriptions.<sup>75</sup> Notice the ambiguity in Greenawalt's reason for rejecting the mistake thesis, and embracing the view that some mistakes about justifications may give rise to a justification. He contends that "[i]f one wants to make a moral evaluation of [the actor's] behavior or to recommend behavior for others faced with similar ascertainable facts, the word 'justification' is much more suitable than the word 'excuse.'" <sup>76</sup>

The difficulty in this argument is transparent, for everything de-

<sup>71</sup> Such cases might lead one to abandon the justification/excuse dichotomy as oversimplified and unworkable, *see id.*; or be thought to necessitate the creation of a new defense type such as "justified wrongs," *see Morawetz, supra* note 3; or be said not to involve mistakes at all, but the defense of *lege artis*, *see Hassemer, supra* note 1, at 599.

<sup>72</sup> 1 P. ROBINSON, *supra* note 2, at 114-15.

<sup>73</sup> *See G. FLETCHER, supra* note 2, at 696; Fletcher, *The Right and the Reasonable, supra* note 4, at 972-73.

<sup>74</sup> Greenawalt, *Perplexing Borders, supra* note 3, at 1908-09.

<sup>75</sup> Legal theorists have long debated whether consequences should be included within the *actus reus* of an offense. Salmond, for example, defined acts to include their accompanying circumstances and consequences. *See J. SALMOND, JURISPRUDENCE* 401 (11th ed. 1957).

<sup>76</sup> Greenawalt, *Justifications and Excuses, supra* note 3, at 94.

pends on how "the actor's behavior" is described.<sup>77</sup> If his act is characterized as "failing to save his patient, even when a cure is readily available," it is clear that the doctor's conduct would not be proscribed. But if his act is characterized as "applying the best medical treatment available at the time," his conduct is commendable. Both descriptions are true; which should be preferred? This question illustrates the extent to which the research project of applying the distinction between justification and excuse cannot be implemented without first presupposing some controversial views about the philosophy of action.<sup>78</sup>

But an (inconclusive) reason may be provided for rejecting the mistake thesis, even without sinking into the quagmire of action theory. Justifications are a part of action morality.<sup>79</sup> Arguably, a condition of adequacy for a theory of action morality is that it be capable of guiding conduct.<sup>80</sup> If so, there is good reason to reject a theory of justifications that withholds judgment until the effects of conduct, unforeseeable at the moment of decision, become known. A theory should not require omniscience before it offers useful advice. This approach could not guide conduct effectively; the principle, "do whatever will produce the best consequences, even though there is no way to identify them at the time of choice," cannot be translated into meaningful behavior. Such advice cannot be followed, and it is odd to include within a viable theory of action morality a principle to which persons are incapable of adhering.<sup>81</sup>

On the other hand, the advice "act according to the best information available at the time,"<sup>82</sup> is capable of guiding conduct *ex ante*, which is the only time that *guidance* is required. According to this approach, conduct that conforms to the best practical advice that can be given is beyond moral reproach and must be held to be justi-

<sup>77</sup> Notice also the ambiguity in what the actor "has done." *Id.* at 95.

<sup>78</sup> Greenawalt claims to derive support for his thesis by noting that "the central characteristic of justified action is that it is warranted." Greenawalt, *Perplexing Borders*, *supra* note 3, at 1903. He then compares the meaning of a warranted action in ethics with a warranted belief in epistemology, concluding that "to be justified is to have sound, good reasons for what one does or believes." *Id.* Horowitz counters that "[a] good way to begin the discussion of exculpation . . . is to ban words like *warranted*." Horowitz, *Justification and Excuse in the Program of the Criminal Law*, *LAW & CONTEMP. PROBS.*, Summer 1986, at 109, 110.

<sup>79</sup> "Action morality" is that part of moral theory that evaluates actions, as distinct from other objects of evaluation, e.g. agents, states of affairs, or character traits.

<sup>80</sup> See R. HARE, *THE LANGUAGE OF MORALS* 1 (1952).

<sup>81</sup> This point may underlie the good sense in the Kantian slogan, "ought implies can."

<sup>82</sup> This (admittedly crude) formulation of a rule to guide conduct is somewhat more stringent than a rule that requires a mistake to be reasonable before it gives rise to a defense.

fied, even if its actual consequences diverge from what is intended. If one is willing to stipulate that the principles of action morality must be capable of guiding conduct, there is less reason to embrace the mistake thesis, and hold that mistakes about a justification can only be excused, but never justified.

Thus far there is no conclusive reason either to accept or to reject Greenawalt's proposal that cases involving mistakes expose the deficiencies of a utilitarian theory of justifications. Can further light on this dispute be shed by additional requirements that an adequate theory of justifications must satisfy? Fletcher and Robinson continually emphasize that justifications render conduct "*objectively right*," although the meaning of this adverb is notoriously elusive.<sup>83</sup> Somehow, they construe the objectivity requirement as support for the mistake thesis.

What is objectivity, and exactly how is the requirement of objectivity alleged to support the mistake thesis to show that mistakes about justifications can never be justified? At least two interpretations of objectivity are available. First, in order to qualify as a defense recognized in criminal law, conduct must *actually be* permissible, as opposed to merely *believed* to be permissible, by the agent.<sup>84</sup> Thus a defendant may believe it to be commendable to discriminate against minorities he holds to be inferior, but his belief, however sincere, does not entitle him to behave accordingly.<sup>85</sup> If beliefs do not suffice to render conduct justified, what does? Again, the answer to this question is dependent on the correct theory of justifications: conduct is justified—objectively—when the correct theory says it is.

Second, any criminal law defense must be "objective" in the sense that it be available to any person in similar circumstances. This seemingly innocuous "universalizability" requirement is in fact complicated and tricky.<sup>86</sup> Many theorists have employed it as a basis for believing that the moral theory embodied by the criminal law

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<sup>83</sup> The concept of objectivity has bedeviled moral and legal theorists for centuries. For the most well-known recent philosophical work on the concept, see T. NAGEL, *THE VIEW FROM NOWHERE* (1985).

<sup>84</sup> "Justification—harmony with the Right—is an objective phenomenon. Mere belief cannot generate a justification, however reasonable the belief might be." Fletcher, *The Right and the Reasonable*, *supra* note 4, at 972.

<sup>85</sup> The view that morality is solely a function of intentions is extraordinarily common among legal theorists, although few, if any, moral philosophers have held this position. See D. HUSAK, *supra* note 7, at 128-32. See also Fletcher's response to Fried. Fletcher, *supra* note 45, at 1362.

<sup>86</sup> See R. HARE, *supra* note 80; R. HARE, *FREEDOM AND REASON* (1963) (a defense and explication of the universalizability requirement in ethics).

must be *impartial*.<sup>87</sup> Most theorists agree that impartiality is a condition of adequacy of any moral or legal theory; disagreement begins in attempting to identify what impartiality entails.<sup>88</sup> Some commentators apparently construe the requirement of impartiality to demand that persons exhibit no favoritism toward themselves or their friends and relatives.<sup>89</sup> A person who allowed his own interests to count more heavily than those of others would be guilty of partiality, and thus of violating the objectivity requirement.

But does objectivity really entail impartiality as so understood? Richard Wasserstrom has noted that many of the problems in professional ethics are generated because the behavior of lawyers is *role-differentiated*: “[i]t is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive.”<sup>90</sup> Wasserstrom was especially interested to explore the extent to which the role of professional in general, or lawyer in particular, could serve to justify conduct that would otherwise be wrong.<sup>91</sup> What is less frequently noticed is that conduct is often role-differentiated in nonprofessional contexts as well. Consider the role of friend, in which a person shows favoritism toward a select group of his acquaintances. Such behavior may conform to the universalizability requirement, as long as he is willing to allow others to demonstrate comparable favoritism toward *their* friends. Would a moral theory that allowed such preference fail the objectivity requirement, according to which objectivity entails impartiality?

Our pre-theoretical intuitions are likely to be ambivalent about such questions. We all exhibit extraordinary favoritism toward our friends and relatives, and typically construe these reactions as expressions of loyalty. A person who showed no partiality toward his friends would probably have none. It is unlikely that these attitudes can be dismissed as evidence of a moral deficiency, for our ideals do not recommend that we demonstrate to total strangers the same care and consideration we show to our friends and relatives. But the favoritism we exhibit toward persons who are close to us pales by

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<sup>87</sup> The constraint which universalizability imposes on partiality is explicated in R. HARE, *FREEDOM AND REASON*, *supra* note 86.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in *ETHICS AND THE LEGAL PROFESSION* 114, 115 (1986).

<sup>91</sup> *Id.*

comparison with the favoritism we show ourselves. There is no good reason why the role of *self* should not be understood as role-differentiated as well. To care more about *our* interests *because* they are ours may be distinctive of what it means to have a personal point of view.<sup>92</sup> Again, it would be preposterous to suppose that such favoritism is the product of a moral shortcoming. As long as special attention to oneself is not excessive,<sup>93</sup> it is not vulnerable to moral criticism. We fully expect such behavior, and would probably fail to comprehend a person who did not exhibit it.

Appreciating that behavior towards one's friends or relatives is role-differentiated is crucial in assessing situations in which a person apparently commits a criminal offense.<sup>94</sup> Suppose a mother diverts a runaway tram from one track to another to save her infant daughter at the cost of an innocent life.<sup>95</sup> Or alter the hypothetical so that she sacrifices two innocent lives to save her daughter. Is either action justifiable? A negative answer might be given if "justifiable" were taken to mean "commendable." But as long as "justifiable" is construed to mean "tolerable" or "permissible," it is more likely that her conduct is justified.<sup>96</sup> Some sacrifices are so great that per-

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<sup>92</sup> See S. SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 56-57 (1982).

<sup>93</sup> Those philosophers who recognize the permissibility of favoritism continue to debate its limits. See Scheffler's cryptic comment that his theory

would allow each agent to assign a certain proportionately greater weight to his own interests than to the interests of other people. It would then allow the agent to promote the non-optimal outcome of his choosing, provided only that the degree of its inferiority to each of the superior outcomes he could instead promote in no case exceeded, by more than the specified proportion, the degree of sacrifice necessary for him to promote the superior outcome.

*Id.* at 20.

One limitation on the permissibility of favoritism toward one's friends or relatives arises in cases in which the former occupies a position of authority in exercising or interpreting rules in a dispute in which the latter is a party. Clearly a judge may not exhibit favoritism toward a litigant who happens to be a friend or relative.

<sup>94</sup> The criminal law frequently takes account of the fact that partiality is expected between persons. The law of criminal omissions, for example, recognizes that persons have affirmative duties to assist those with whom they stand in "special relationships." A mother would be criminally liable for a failure to care for her own infant, when no comparable duty requires her to care for others. Perhaps the most well-known illustrative case is *State v. Jones*, 308 F.2d 307 (D.C. Cir. 1962) (jury could not find defendant guilty of involuntary manslaughter for giving child improper care until they found defendant was under legal duty to care for child).

<sup>95</sup> Some interesting hypotheticals involving these kinds of situations are discussed by Thomson. J. THOMSON, *Killing, Letting Die, and the Trolley Problem*, in *RIGHTS, RESTITUTION, AND RISK* 78 (1986); J. THOMSON, *The Trolley Problem*, in *RIGHTS, RESTITUTION, AND RISK* 94 (1986).

<sup>96</sup> Even Fletcher's thesis that third parties cannot be justified in assisting excused conduct is qualified by the exception "unless perhaps they were close relatives." See G. FLETCHER, *supra* note 2, at 857. But Fletcher does not explore the rationale for this possible counter-example to his thesis.

sons should never be *required* to make them, except perhaps in extraordinary circumstances such as wartime.<sup>97</sup> Instead of rejecting such partiality categorically, moral and legal theory should struggle with the extremely difficult question of delineating its acceptable boundaries.<sup>98</sup>

The important point is that a justification of such conduct should not be precluded by misinterpreting the "objectivity" or "impartiality" requirements. It would be a mistake to suppose that recognizing a justification for the mother in the above examples would commit the law to the absurdity that one life is "objectively" more valuable than another. One life would be objectively more valuable than another only if *anyone* were permitted to save it by diverting the tram. But not just *anyone* should be allowed to divert the tram; only someone who stands in a "special relation" to the infant may do so. A theory of justifications must only be willing to permit all persons who stand in "special (i.e., role-differentiated) relations" to potential victims to behave comparably.

The Model Penal Code does not recognize a defense for the mother in either of the above hypotheticals. Two possible defenses are unavailable. Her conduct is not performed under duress because it is not responsive to a threat of unlawful force. Nor does it qualify as a choice of evils because the harm or evil sought to be avoided is less than or equal to that sought to be prevented by the law defining the offense.<sup>99</sup> Some commentators would correct the apparent injustice that results from this apparent oversight by creating a new defense of situational compulsion or personal necessity.<sup>100</sup> In actual legal practice, of course, a new defense need not be created before defendants escape conviction for saving themselves or their friends and relatives. The familiar approach in Anglo-American law is to entrust the discretion of prosecutors not to bring charges. This strategy remains the preferred alternative when sympathies favor defendants who commit offenses but whose conduct does not correspond to an existing defense.<sup>101</sup>

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<sup>97</sup> Of course, this claim does not entail that such sacrifices would not be permitted, or that persons who make them would not be heroic.

<sup>98</sup> See *supra* note 93. See also Morawetz, *supra* note 3, at 298.

<sup>99</sup> Italian law recognizes a defense of duress in some situations in which the harm sought to be avoided by apparently violating the law is *not* less than that sought to be prevented by the law defining the offense. See McAuley, *The Theory of Justification and Excuse: Some Italian Lessons*, 35 AM. J. COMP. L. 359, 362 n.8 (1987).

<sup>100</sup> See the discussion in P. LOW, J. JEFFRIES, & R. BONNIE, *CRIMINAL LAW* 622-23 (2d ed. 1986).

<sup>101</sup> This alternative continues to be applied in many cases of beneficent euthanasia. See Kamisar, *Some Non-Religious Views Against Proposed 'Mercy-Killing' Legislation*, 42 MINN. L. REV. 969 (1958).

Contemporary theorists are appropriately hesitant to rely upon discretion to achieve justice in such cases, denouncing its use as unprincipled.<sup>102</sup> Instead, the response that has attracted the greatest support among commentators is to *excuse* rather than to *justify* such behavior. Andrew Von Hirsch contends that "in view of the overriding interest a person understandably has in preserving his own existence, he is not to blame for a law violation when compliance would have meant his own death."<sup>103</sup> Presumably Von Hirsch would extend this rationale to situations in which a mother violates a law to save her infant instead of herself, for persons have "overriding interests" to "preserve the existence" of their immediate families as well as themselves. And this "overriding interest" persists even in situations in which the persons sacrificed outnumber the persons saved.

Once it is admitted that the basis for a defense for the mother is that the law should not demand certain kinds of sacrifices, there is less reason to suppose that such hypotheticals can be resolved by a balancing of competing interests.<sup>104</sup> Of course, some delicate questions of interest balancing will remain; limited partiality is limited. But the central problem is not whether the gains of apparently violating the criminal law outweigh the benefits of compliance, but whether the sacrifice of conformity to law is too great to require. The most difficult issue is not to determine how to balance competing values, but rather to identify those interests that the criminal law should not demand that persons sacrifice.<sup>105</sup>

Von Hirsch's reasoning draws the wrong conclusion from the right premise. If the criminal law is to acknowledge "a person's understandable preference for his own life or safety,"<sup>106</sup> as surely it should,<sup>107</sup> the central question is whether conduct that exemplifies

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<sup>102</sup> The attack on the use of prosecutorial discretion as an alternative to the application of principle has been led by Fletcher. See Fletcher, *Some Unwise Reflections About Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 269.

<sup>103</sup> Von Hirsch, *Lifeboat Law*, CRIM. JUST. ETHICS, Summer/Fall 1985, at 88, 91.

<sup>104</sup> Thus, there is little reason to follow the German approach that distinguishes between necessity as a justification, when the gain of apparently violating the law outweighs the gain of compliance, and necessity as an excuse, when the gain of apparently violating the law does not outweigh the gain of compliance. See Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?*, 102 LAW Q. REV. 71 (1986).

<sup>105</sup> See German Penal Code of 1975 § 34, quoted in Gur-Arye, *supra* note 104, at 72 (defense of justifying necessity requires a threat to "life, limb, liberty or any legal interest").

<sup>106</sup> Von Hirsch, *supra* note 103, at 93.

<sup>107</sup> The criminal law must somehow acknowledge this sentiment to avoid conviction in such notorious cases as Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884) (Seamen stranded on high seas convicted of murder for killing another seaman to eat his flesh,



this preference should be excused rather than justified. If the basis for the defense is that some sacrifices are too great for the law to require, the plea resembles a justification more closely than an excuse. If the defense *were* an excuse, the sacrifice *would* be required, although persons would not be blameworthy for their failure to perform their duty. Von Hirsch rejects this alternative, although not for utilitarian reasons.<sup>108</sup> Instead, he invokes Kant in support of the conclusion that, from an objective point of view, "each person's life is as important as the lives of other persons. Hence, it is not just to sacrifice *A*'s existence in order to promote the interests—or even, to save the lives—of *B*, *C*, and *D*."<sup>109</sup> Thus Von Hirsch concludes that the mother's action is wrongful, and her defense must be an excuse, not a justification.

The Kantian principle that each life is of equal objective importance has two interpretations—the first obviously true, the second doubtful. Surely one life is as objectively valuable as another in the sense that *any* given individual should be prohibited to sacrifice it in order to save another. But it is less clear that *no* one should be permitted to sacrifice it to save another. Arguably, those who stand in a "special relationship" to the threatened individual may be permitted to do so. At least, nothing in the Kantian principle clearly precludes this conclusion. If "objectivity" is construed to require that special relationships between parties not be taken into account in making moral and legal judgments, the objectivity principle distorts rather than expresses our intuitions about such circumstances.

There is a danger that reflection about these hypotheticals will be unduly influenced by the fact that they involve the loss of one or more lives. The position that *killings* cannot be justified by necessity, embraced by the common law but rejected by the Model Penal Code,<sup>110</sup> is extraordinarily common. Of course, few cases in which questions about justifications arise involve death. But there is no need to formulate special rules for those rare cases in which one or more life is lost, as the basis for favoring special rules about death collapses in the context of self-defense.<sup>111</sup> In most situations, the victim killed in self-defense is an unlawful aggressor, but of course

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although that was only chance of survival). Some judicial opinions recommend an executive pardon.

<sup>108</sup> He reasons that "once one begins to doubt a purely utilitarian theory of justice . . . it becomes questionable whether such killings could ever be justified." Von Hirsch, *supra* note 103, at 90.

<sup>109</sup> *Id.* at 90.

<sup>110</sup> See MODEL PENAL CODE § 3.02 commentary at 15 (1985).

<sup>111</sup> Many of these complexities are discussed in Fletcher, *The Right to Life*, 13 GA. L. REV. 1371 (1979).

he need not be so. Consider Judith Thomson's colorful example of an innocent child strapped to the front of a tank attacking a defendant armed with an anti-tank gun.<sup>112</sup> If the killing of an innocent person is justified in such predicaments,<sup>113</sup> why not also in cases of necessity? In both situations, persons act from "overriding interests" to "preserve their existence." To deem such conduct wrongful might avoid complications for a theory of justifications, but raises comparable difficulties for a theory of excuses.<sup>114</sup>

If an adequate theory of justifications should accommodate rather than reject limited partiality, it is clear that one of several fatal defects with utilitarianism is that it prohibits such favoritism, even in everyday circumstances in which no criminal law justification is required. The theory fails to explain why persons are entitled to prefer their own interests over those of others, and allowed to relax at a movie rather than required to work to alleviate world suffering. In addition, the theory fails to explain why persons are entitled to prefer the interests of their friends and relatives over those of strangers. More generally, utilitarianism cannot account for the significance of "special relationships." In focusing entirely upon consequences, it neglects the particular agent who brought them about. But it makes a great deal of difference *who* is diverting a tram, and what her relationship is to potential victims. In focusing entirely upon results and ignoring the significance of the relationship between the parties involved, utilitarianism makes extraordinary demands upon persons. Conduct normally believed to be beyond the call of duty (or superogatory) becomes obligatory;<sup>115</sup> thus the theory collapses distinctions made in everyday thought. A theory that requires persons to maximize welfare, utility, or preference satisfaction, depending upon the particular version of utilitarianism that is favored, can be applied to show that each of us is violating duties at almost every instant. Of course, much philosophical ingenuity has been expended by (those few remaining) defenders of utilitarianism to overcome this objection, but no attempt has

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<sup>112</sup> See J. THOMSON, *Self-Defense and Rights*, in RIGHTS, RESTITUTION, AND RISK 33 (1986).

<sup>113</sup> But see Alexander, *Justifications and Innocent Aggressors*, 33 WAYNE L. REV. 1177 (1987).

<sup>114</sup> The assimilation of cases of necessity into a theory of excuse is more or less problematic depending upon what theory of excuses is defended. Categorization of necessity as an excuse does not fit comfortably into any of the theories of excuse mentioned in note 30. Perhaps such difficulties illustrate Greenawalt's point about the futility of attempting to categorize each case as a justification or excuse.

<sup>115</sup> For Williams' development of this criticism, see *supra* note 64.

proved remotely convincing.<sup>116</sup>

According to the two interpretations considered thus far, the requirement that justifications be objective does not support the conclusions said to be derived from it: it does not preclude limited partiality, and provides no reason to reject the possibility that a mistake about a justification might result in justified conduct. Objectivity might be preserved in either of the two senses discussed above. The "true" moral theory, whatever its content, might identify such conduct as justified. And such conduct might satisfy the universalizability requirement; all persons in similar circumstances might be entitled to behave similarly.

Sometimes the objectivity requirement is construed in neither of the above senses, but is understood to mean something like "right by virtue of its consequences." Perhaps this meaning underlies the Fletcher-Robinson commitment to the mistake thesis.<sup>117</sup> Admittedly, the consequences of such conduct are bad; for example, an innocent person may be killed in an act of putative self-defense. But why should "objectivity" be solely a function of consequences? It is not persuasive to reply by pointing out the inadequacy of a theory that construes rightness solely in virtue of intentions.<sup>118</sup> The more plausible view is that rightness is a complicated mixture of consequences and intentions.<sup>119</sup> Thus, good intentions do not suf-

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<sup>116</sup> Utilitarians have attempted to justify our preferences to ourselves, friends and relatives by attempting to show how such favoritism frequently promotes the greatest good in the long run. They point out that we are in a better position to benefit ourselves than others, and that a tireless commitment to the general welfare is so draining as to leave us unfit to perform it for any appreciable length of time. See H. SIDGWICK, *THE METHODS OF ETHICS* 431 (7th ed. 1907). It seems doubtful that such arguments will justify the full extent of the favoritism we are warranted in showing ourselves. Moreover, it seems false "that the permissibility of devoting energy to one's projects and commitments depends on the efficacy of such activity as an instrument of overall benefit." S. SCHEFFLER, *supra* note 92, at 17.

A closely related strategy is to try to incorporate favoritism into a more sophisticated consequentialist account. Robinson argues that inasmuch as autonomy is an important value, "there is no apparent reason why interest-balancing must fail to consider [it]." 1 P. ROBINSON, *supra* note 2, at 85 n.7. Fletcher counters that the "commitment to the dignity of the individual is betrayed by reducing the value of autonomy to one interest among many in the calculus of utility." G. FLETCHER, *supra* note 2, at 771.

<sup>117</sup> See 2 P. ROBINSON, *supra* note 2, at 7-8.

[J]ustification principles . . . are stated in a purely objective form, without any mention of the actor's subjective mental state. This is entirely consistent with the theory of justification . . . [according to which] *conduct* is justified when, despite its apparent violation of a criminal prohibition, it does not cause a net harm.

*Id.*

<sup>118</sup> See Fletcher, *The Right and the Reasonable*, *supra* note 4, at 974.

<sup>119</sup> See Morawetz, *supra* note 3, at 285 (discussion about why an adequate theory of justification must incorporate both utilitarian and "retributive" elements); see also D. HUSAK, *supra* note 7, at 122-55 (discussion of the mental component of crime).

fice to make conduct justified, but neither do good consequences. "Objective" rightness, if understood to mean "right in virtue of its consequences," simply is not rightness.

This section has described two potential deficiencies in a utilitarian theory of justifications. First, persons who are mistaken about a justification might well be justified rather than excused, notwithstanding the fact that their conduct creates a net balance of harm over good. Second, the scope of the permissible has been shown to be sensitive to special, role-differentiated relationships between persons, and neither the objectivity nor impartiality requirements preclude moral or legal theory from justifying conduct that exhibits limited partiality. Thus utilitarianism has no more plausibility as a theory of justifications than as a theory of morality.

#### IV. ACCESSORIAL LIABILITY

What are the consequences of the above conclusions for the problem of accessorial liability? In short, the implications of these arguments are devastating for the project of resolving each dispute about the liability of accessories by categorizing *D1*'s defense as a justification or an excuse. If it is true that *D1*'s conduct is commendable and praiseworthy—and not merely according to utilitarian standards—then it is likely that *D2* should be permitted to assist. However, as the preceding discussion indicates, not all cases in which *D1* is justified in apparently violating a criminal law conform to this model.

Theorists should have been uneasy in attempting to identify the rights of *D2* to assist by reference to how *D1*'s defense is categorized. It is noteworthy that *D2* cannot *know* whether he has a *right* to assist *D1* unless he knows that *D1* has a justification for his apparent violation of law. If *D1* is merely excused, *D2* has no *right* to assist; his assistance cannot be justified, but (at best) excused. Thus, *D2* cannot ascertain his *rights* unless he knows what type of defense *D1* possesses. Of course, frequently *D2* cannot know what type of defense *D1* possesses; therefore, he must *guess* whether *D1* has a justification or an excuse.<sup>120</sup>

These results are problematic on the ground described above.<sup>121</sup> It is peculiar for a theory to assign or withhold rights from parties from an "omniscient" point of view, requiring information

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<sup>120</sup> Sometimes his fate may depend upon whether he has guessed correctly. See the questionable decision in *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (defendant who intervened in good faith in a struggle between a person and a policeman in civilian dress attempting to arrest that person was convicted of assault).

<sup>121</sup> See *supra* notes 80-82 and accompanying text.

that could not be available to the parties who must choose. Decisions about what rights persons possess should be made within a theory of action morality. If a function of a theory of action morality is to guide conduct, there is good reason to reject a view that withholds judgment until what cannot be known is eventually discovered. A person must be permitted to act on the basis of information available to him at the moment of decision. The alternative is that a theory of action morality will offer him no practical advice. A theory that offers no useful guidance is clearly inferior to a competitive theory that contains a principle that could be followed. The only judgment that *D2* can make with confidence is that he has a right *not* to assist *D1*; thus, *D2* is well advised to err on the side of caution. It is questionable whether the doctrines of the criminal law should be construed to encourage conservatism.

More importantly, the moral argument in favor of allowing assistance from *D2* whenever *D1* is justified crumbles when "justification" is construed as "permissible" rather than as "commendable." If *D1*'s conduct were commendable, it is plausible to suppose that the law should not discourage, and might actually encourage, assistance from others, notwithstanding the fact that *D1*'s conduct apparently violates a criminal law. But these results do not follow if *D1*'s conduct is merely tolerable. The law need not encourage, and might actively discourage, assistance with conduct that it is willing to permit.<sup>122</sup>

This conclusion is reinforced if utilitarianism is abandoned as a theory of justification, and the law permits conduct that expresses a person's partiality toward himself or his friends. If conduct is "objectively justified" in virtue of its consequences, and *D1*'s conduct produces a net balance of good over evil, then *D2* should be encouraged to assist in the production of these consequences. But conduct might be justified even though it produces no more good than evil. The judgment that the mother is permitted to divert the tram from her infant daughter is not grounded on the supposition that her conduct produces a net gain of utility, but rather in her "special, role-differentiated relationship" to her daughter that creates interests she should not be required to sacrifice.

Because the criminal law should not require great sacrifice, and is willing to tolerate conduct that expresses *D1*'s partiality toward his friends, relatives, or himself, it does not entail that any other person—perhaps a total stranger—should be permitted to assist him

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<sup>122</sup> Fletcher seemingly admits as much. See Fletcher, *The Right and the Reasonable*, *supra* note 4, at 977.

in acts exhibiting such favoritism. The rationale that applies to whether a defense for the stranger should be recognized is entirely different from the rationale that pertains to the mother: unlike the mother, total strangers make no greater sacrifice in watching the tram kill one innocent victim rather than another. It makes little sense for the law to allow or encourage *any* *D2*, who bears no special relation to *D1*, to assist her. Thus the proper classification of *D1*'s defense as a justification is not dispositive of the issue of *D2*'s liability as an accessory.

Whether *D2* should be allowed to assist (or interfere) with *D1* is a matter of extraordinary complexity, depending upon, *inter alia*, the relationship between the parties, including the relationship to the victim of their apparent criminal conduct.<sup>123</sup> This result coheres with ordinary thinking about how morality is sensitive to changes in the relationships between the parties involved. Suppose that *D1* is about to kill *V* in an act of justified self-defense in *D1*'s home, from which he has no duty to retreat. If *D2*, who is *V*'s husband, forces *D1* to safely retreat against his will, *D2*'s relationship to *V* might make his conduct permissible when no relationship with *V* would not.<sup>124</sup> Such cases illustrate the pitfalls in attempts to derive the rights of *D2* from the rights of *D1* to act in his own behalf.

Armed with these insights, it is instructive to return to the difficult hypothetical in Part I: *D1* enlists the help of *D2* in burglarizing *X*'s house to prevent *V* from making good his threat to bloody the nose of one of *D1*'s children. Presumably, *D1* should not be required to sacrifice his son's interest for that of *X*. Whether *D2* should be permitted to assist depends upon whether his friendship to *D1* qualifies as a "special, role-differentiated relationship," and, if so, whether his assistance exceeds any limitations placed upon his expression of partiality. To ask this question is not to answer it, but rather to indicate the direction in which the solution to many problems of accessorial liability is to be found. The answer is *not* a simple function of the proper classification of *D1*'s defense as a justification or an excuse. What is required in addition to categorizing *D1*'s defense is a theory of special relationships between accessories, principals, and potential victims. For the reasons described above, an adequate theory of role-differentiated behavior will not be consequentialist or utilitarian. Defending a theory will prove diffi-

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<sup>123</sup> See Gur-Arye, *supra* note 104, at 85.

<sup>124</sup> See Greenawalt, *Perplexing Borders*, *supra* note 3, at 1925; Greenawalt, *Justifications and Excuses*, *supra* note 3, at 107. In both articles, Greenawalt mentions a similar case, but he laments that "there are limits to the number of factors that the law can sensibly consider." Greenawalt, *Justifications and Excuses*, *supra* note 3, at 107.

cult. But in its absence, no comprehensive solution to the problem of accessorial liability will be forthcoming.