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THE RIGHT DEED FOR THE WRONG REASON: A REPLY TO MR. ROBINSON

George P. Fletcher*

The last temptation is the greatest treason;
To do the right deed for the wrong reason.

—T.S. Eliot, *Murder in the Cathedral*, pt. I

So far as there is a school of criminal theory in the United States, it is a school devoted to sifting and celebrating the purposes of the criminal law. Discussions in the literature are dominated by endless recitals of the deterrent, rehabilitative and retributive functions of criminal sanctions.¹ The orthodox view is that all of these purposes are relevant and that any proposed rule of criminal law must be measured by its tendency to further one or all of these goals. If the issue is punishing negligence, for example, the standard mode of analysis is to ask whether punishing negligent conduct tends to further the deterrent, rehabilitative or retributive functions of the criminal law.² If it furthers none of these ends, then it presumably follows that negligence is not a suitable ground for liability. If the issue is punishing impossible attempts, the right mode of discourse again is to trot out the aims of the criminal law and to check whether punishment would harness any of these stalwarts that haul the system of criminal justice.³ This instrumentalist style of thought is so deeply entrenched in the United States that it is hard for our commentators and draftsmen to think

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¹ The leading articles of this school include Wechsler & Michael, *A Rationale of the Law of Homicide* (pts. 1-2), 37 COLUM. L. REV. 701, 1261 (1937); Hart, *Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). Cf. MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962).

² See, e.g., G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122-24 (2d ed. 1961); Comment, *Is Criminal Negligence A Defensible Basis for Penal Liability?*, 16 BUFFALO L. REV. 749 (1967).

³ MODEL PENAL CODE § 5.01, Comment (Tent. Draft No. 10, 1960); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempts, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 578-85 (1961). Cf. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 68-69 (1972) (supposing that the question whether the principle *nullum crimen sine lege* is binding on a legal system can be resolved by examining the purposes of punishment).

of a reason for punishing or not punishing that is not a function of the ends of the criminal law.⁴

It is to Paul Robinson's credit that in his article in these pages⁵ he has broken with this liturgy and embarked on a style of argument that brings him closer to the European tradition.⁶ In a crucial portion of his paper, he argues that claims of justification should prevail regardless of the intent or state of mind of the actor.⁷ He does not claim that his position efficiently furthers any or all aims of the criminal law. Rather he starts from a construction of the criminal law as a received set of principles that ought to be binding on our deliberations when conduct should be punished. The authority for these principles is not their instrumental value, but their grounding in a theory of just punishment implicit in the patterns of liability that have accrued in the common law. In short, Robinson argues for consistency within the common law by taking a segment of the tradition as dominant and rejecting another as aberrant. In this respect, his work is like that of a scientist formulating a hypothesis that would bring order to a morass of data and then using that hypothesis to suppress conflicting data as ephemeral and insignificant.

The dominant pattern of common law, Robinson argues, is that punishment is imposed not for intent, but for wrongdoing. The essence of wrongdoing is causing harm. Therefore if there is no harm, there is no acceptable rationale for punishment—at least not for just punishment. Cases of justified conduct, Robinson claims, are cases where there is no harm recognized by the legal system. Therefore, conduct may be justified solely by objective considerations. For it is these objective considerations that determine whether there is or is not cognizable harm. It follows that if the actor's intent is irrelevant to the occurrence of harm, it is also irrelevant to a claim of justification. In assessing self-defense, we should ask only whether the actor was being attacked. In assessing necessity as

⁴ The notable exceptions in the Anglo-American literature are J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960), and H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968).

⁵ Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. REV.* 266 (1975).

⁶ These kinds of issues have received scant attention in Anglo-American discussions of criminal law. German scholars, in contrast, have developed a sophisticated literature on issues of minimal practical importance. For a good review of the problem before us in this paper, see H. WAIDER, *DIE BEDEUTUNG DER LEHRE VON DEN SUBJEKTIVEN RECHTFERTIGUNGSELEMENTEN FÜR METHODOLOGIE UND SYSTEMATIK DES STRAFRECHTS* (1970). In another paper, I have addressed the possible implications of treating the theoretical solution of hypothetical problems as a matter of high priority. See Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *ISRAEL L. REV.* 367 (1973).

⁷ Robinson, *supra* note 5, at 288-91.

a justification, we should ask only whether objectively the actor's conduct furthers the greater good. In brief, the right deed for the wrong reason provides a good defense.

Robinson rounds out his argument by providing an explanation of why we are tempted by the view that the intent to defend oneself should be a prerequisite for self-defense. The explanation turns on the distinction between excuse and justification. The former focuses on the actor; the latter, on the act. There is considerable confusion between these categories in the common law, and one manifestation of this confusion is the intrusion of actor-related issues—such as intent—into the analysis of justificatory claims.

There is much to be said for Robinson's view. Yet in this reply, I shall attempt to show that there is much to be said as well for the other side of the question. I shall argue that it is consistent with the theory of justification to make justificatory defenses available only to those whose intent is meritorious. My aim is not to undercut Robinson's valuable contribution, but to deepen his analysis by explicating another facet of the problem. My purpose—as well as his—is not so much to reform the law as to illuminate the foundations of our system of criminal jurisprudence.

I

First let us take a look at a few hypothetical cases that will illustrate exactly how powerful Robinson's position can be made to appear. Consider a case in which Williams marries a second time thinking that he is still married to his first wife. In fact, his estranged wife has obtained a valid, *ex parte* divorce in another jurisdiction. Though Williams is legally single, he thinks his second marriage is bigamous. Is he in fact guilty of bigamy? In our legal tradition (one could easily imagine others) he is patently not guilty. We may take it as common ground that the prior valid divorce, whether Williams knows about it or not, is sufficient to bar conviction for bigamy.

Consider another case that would be more likely to occur in Jacobean drama than in real life. A man accosts a seemingly strange woman in the dark and rapes her. Much to his chagrin, she turns out to be his wife. Is he guilty of rape? According to the common law and to the California Penal Code he is not.⁸ Equal protection issues aside, no one can be guilty of raping his own wife. Yet his intent is sufficient for rape; why should the wickedness of

⁸ See 1 M. HALE, *PLEAS OF THE CROWN* *629; CAL. PENAL CODE § 261 (West 1970).

his intent not take precedence over the fortuities of objective fact? For reasons yet to be explicated, our system of criminal jurisprudence insists that the objective requirements of the crime be fulfilled. Intent is simply not enough.

Note that we are not discussing liability for attempted larceny and attempted rape. There are difficult issues in the theory of impossible attempts that we would do well not to tackle at this point.⁹ The issue is liability for the consummated offense, and the answer seems to be undisputed: no liability. Yet one cannot but be puzzled both by the availability of consensus on this issue and by the apparent unavailability of a good reason for exempting these malevolent and dangerous people from liability.

The purposes of punishment help us little in explaining why the would-be bigamist and the would-be rapist should be acquitted. Both are dangerous and so far as culpability is measured by intent, both are fully culpable. Punishing them would serve the purpose of social protection. It would also represent just retribution for a morally reprehensible frame of mind. Further, both defendants are in need of treatment—at least as much as someone who has the bad luck to consummate a bigamous marriage or punishable rape. Reasoning from the ends of the criminal law, we are at a loss to explain our common assumption that these hypothetical actors should be acquitted.

One might argue that the principle of legality requires the acquittal. The law says that you are not guilty of rape for forcing intercourse upon your wife; therefore if the woman turns out to be your wife, you are simply not guilty. That apparently is all that needs to be said. Yet appealing to the law or to the principle of legality does not justify the rule that objective circumstances are sufficient. Why should the law read that way? If it is not right, we should change it. If the courts are powerless to change a rule enacted by the legislature, we should look more carefully at the rule actually enacted. The legislature never says explicitly that the *belief* in the existence of a fact should not be equivalent to the *existence* of that fact in analyzing liability. Why should a court not hold that believing a woman not to be one's wife means that, for the purposes of liability, she is not one's wife? After all, the arts of

⁹ The tension between subjectivist and objectivist points of view recurs in the theory of impossible attempts. Compare *People v. Jaffee*, 185 N.Y. 497, 78 N.E. 169 (1906), with *People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 462 (1961). The problem in the theory of attempts is that there is no revered value like "legality" that stands squarely in favor of the objectivist point of view. Cf. text accompanying note 12 *infra*. Though many people have reservations, the subjectivist point of view is ascendant. Cf. MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

statutory interpretation have brought us other wonders of criminal law. No statute, so far as I know, ever explicitly provided for strict criminal liability. Yet Anglo-American courts have unhesitatingly applied strict liability in crimes ranging from bigamy to selling adulterated tobacco.¹⁰ If there were an impulse to subjectify the conditions of liability—that is, to make them turn solely on the actor's state of mind—then surely the courts could interpret the relevant rules and the relevant statutes accordingly.¹¹

Yet there might be another sense in which the principle of legality precludes the concept of subjective criminal conduct. One interpretation of legality finds its warrant in the importance of fair warning to those who might be prosecuted for crime. In this context, the argument would be that if the courts changed a well-received rule of the common law they would be acting unfairly toward defendants who might then be prosecuted. Yet the actors that we are concerned about intend to commit crimes; there is no sense in which they rely upon the traditional rule in deciding what to do. Though fair warning is an important aspect of the rule of law, it hardly applies on behalf of people who intend to commit crimes.

To appreciate the law's reluctance to recognize the concept of subjective crime, we have to turn from procedural aspects of legality (legislative supremacy, fair warning and the like) to a substantive principle of legality implicit in our legal tradition. The view that a legal system is committed to particular substantive principles derives support from the assumption that there is a difference between the sphere of law and the sphere of morality. The most common effort to clarify this distinction holds that the law applies to external and objective phenomena, while moral principles apply to internal and subjective phenomena.¹² Now it is often difficult to make sense of this claim, for there are no doubt important subjective states indispensable to the resolution of legal problems. Yet there is a core of truth to the maxim, and it is one that can help us understand our intuitive resistance to punishing the man who, with the wickedest of intents, engages in conduct that objectively fails to meet the definition of criminal conduct.

¹⁰ See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943) (introducing adulterated drugs into interstate commerce); *State v. Goonan*, 89 N.H. 528, 3 A.2d 105 (1938) (bigamy). Cf. *United States v. Park*, 95 S. Ct. 1903 (1975) (interpreting and qualifying *Dotterweich*).

¹¹ For an example of judicial subjectification of an element of liability, see *Queen v. Ashwell*, 16 Q.B.D. 190, 203 (1885), in which the court held that defendant "took" a sovereign and thereby committed larceny at the moment he became aware that he had the coin.

¹² See, e.g., R. STAMMLER, *THE THEORY OF JUSTICE* 41 (Husik transl. 1925); H. KANTOROWICZ, *THE DEFINITION OF LAW* 43 (1958). See generally Morris, *Punishment for Thoughts*, 49 *MONIST* 342 (1965).

We are drawn to the premise that crime occurs in the external world, not in the mind. This is not a moral premise, for one might agree with Jesus that "whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."¹³ The externality of criminal conduct is to be seen rather as testimony to the importance of public and visible facts in the justification of criminal punishment. Public facts assure the community's acceptance of the finding of guilt and exempt the political authority from the suspicion of carrying on a private vendetta against the person accused of crime. The public act of punishing then is not in danger of appearing, itself, to be a criminal act. The general principle that crime occurs in the external world relates not to the morality or the effectiveness of punishment but to the political foundations of the state's power to punish criminals.

This is the kind of reasoning, I believe, that leads Robinson to insist on harm as a universal condition of criminal liability. Harm is the palpable manifestation of a crime's occurring in the external world. My own preference would be to focus on the concept of wrongdoing rather than that of harm. Yet whatever concept one begins with, there are distinctions to be drawn and qualifications to be made. Does the requirement of harm or wrongdoing accommodate inchoate offenses like criminal attempts? Does it account for crimes of risk-creation like reckless driving? An even more important question is how one characterizes subtle differences in harmful events that are not punishable under the law. "Raping" one's own wife, killing a fly, and killing an aggressor in self-defense—all of these events are harmful and yet not harmful in the sense required for criminal liability. What is the difference between these kinds of harm? For our purposes, the critical difference to be explored is that between harms that seem far afield of the criminal law (*e.g.*, killing a fly) and harm that is a justified exception to a recognized offense (*e.g.*, killing an aggressor in self-defense). These are the issues to which we shall have to turn as our inquiry deepens.

II

If we may take it as common ground that Williams, the would-be bigamist, is not guilty of bigamy, then we may begin to broaden the arena of discussion by posing some closely related hypotheticals:

A. Suppose *A* writes a letter to *B*, inviting *B* to use *A*'s car whenever *B* wishes. Before receiving the letter, *B* takes *A*'s car with the intent to steal it. Is *B* guilty of larceny?

¹³ *Matthew* 5:28.

B. Suppose FBI agents break into a psychiatrist's office. They identify themselves to the janitor who happens to be in the office at the time. The janitor believes the agents have a right to do what they are doing, but decides nonetheless that he should protect the psychiatrist's files. He forcibly removes the agents from the office. It turns out that in fact the agents were acting illegally. Is the janitor guilty of assault?

C. Suppose that a physician is about to inject air into a patient's veins with the intent to commit euthanasia. The patient is ignorant of the doctor's intentions, but for other reasons desires to kill him. As the doctor stands over him with the needle poised, the patient grabs him and begins to choke him. Is the patient guilty of assault?

D. Suppose that *R* impermissibly takes *S*'s car for a ride. Unbeknownst both to *R* and *S*, the car is loaded with explosives timed to detonate in two hours. *R* leaves the car on a country road, where it explodes, injuring no one. If he had not taken the car, it would have exploded in a crowded neighborhood, probably killing several people. Is *R* guilty of joy-riding?

These four cases bear a critical resemblance to the case of the would-be bigamist. In all of them there is a critical fact, which if known and acted upon by the actor, would provide a sufficient reason for acquittal. If Williams knew of the prior divorce, his innocence would be patent. Similarly the defendant would undeniably merit an acquittal if he acted on the consent of the owner in case A, knew the agents were acting illegally in case B, intended to defend himself in case C, or intended to further the greater good in the case of necessity posed in case D. Yet in our cases the redeeming knowledge or intent is wanting—in the latter four hypotheticals as well as in the case of the almost-bigamous marriage.

The question we must address is whether the solution to the bigamy or rape cases applies to these four hypothetical cases as well. If it does, then Robinson is right and the concept of justification rests on objective criteria. If we wish to say that in these latter four cases (or some of them) the actor should be guilty of the consummated offense, then we should have to provide a distinction between the cases of guilty conduct and the baseline cases of would-be bigamy and rape.

In an effort to generate the necessary distinctions, let us take a closer look at the four cases before us. An intriguing theme unites the first three. In all of these, something about the apparent victim prompts us to think that if the accused had known more about the victim, he should clearly be acquitted. The victim in the first case consents; in the second, is engaged in committing burglary; in the

third, is about to kill the accused. In the fourth case, the victim—the owner of the car—is not responsible for the loading of the explosives and the impending danger that could generate the defense of necessity. So far as the role of the victim is important, the fourth case is arguably distinguishable from the other three.

The role of the victim would seem to be critical. In the first case, the victim consents in fact; the problem is that this consent is not communicated. To determine the significance of that fact we have to formulate a theory about why consent should function as a defense. There seem to be two possibilities. Consent might be a defense because if the victim concurs in mind and spirit, his interests are not violated by the accused's taking his car; alternatively, consent might be a defense because if the actor knows of the consent, then his conduct is inspired by good motives and his action is not culpable. The first theory is a variation of the view that there is no crime where there is no harm. There is no harm if the victim desires the suspect to take his car. The second theory is more familiar to us, for the cases actually litigated tend to be those of apparent rather than actual consent.¹⁴ Apparent consent is a defense not because it negates the existence of harm, but solely because it bears on the culpability of the actor. Therefore, in cases of apparent consent, we are inclined to argue in the idiom of culpability and to insist upon the actor's believing in good faith (and perhaps reasonably) that the victim consented. The question is whether the principle we apply in analyzing apparent consent should apply in analyzing consent in fact.

The issue is joined. On the one hand, if consent is analyzed under the rubric of harm, then actual, but uncommunicated consent is sufficient to exempt the actor from liability. On the other hand, if actual consent is analyzed on analogy to apparent consent, the focus of analysis falls on culpability rather than on harm. So far as culpability is the controlling issue, the consent must be communicated. Thus we see that the question whether the consent needs to be communicated—in other words, whether the actor must act on the consent—turns on whether the starting point of our analysis is the issue of harm or the issue of culpability.

The argument for taking the issue of harm as our starting point is that if an actor brings about a state of affairs that is approved in the legal system, he has done nothing to warrant the state's intervention. Fulfilling the wishes of another is presumably a state of affairs that is affirmatively good, and this is what the actor in case A has done.¹⁵

¹⁴ In the field of torts, see *O'Brien v. Cunmary S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891).

¹⁵ See MODEL PENAL CODE § 2.11(1) (Proposed Official Draft 1962) (pro-

The impulse to treat consent as a matter of culpability derives from the simple fact that our would-be thief, taking the car without knowing of the owner's consent, is plainly dangerous. Next time he is likely to take a car from someone who has not consented. He may not cause harm to the apparent victim in this case, but he is likely to cause harm to others. The tension between these two types of harm—to the identified victim and to possible future victims—highlights the difference between two schools of criminal jurisprudence. Insisting on harm to an identified victim is an aspect of an approach to criminal law that focuses on the individual case to be judged. Considering possible future victims is a move toward an instrumental use of the criminal sanction; this approach mutes the facts in the particular case and brings into the litigation another set of speculative facts bearing on the consequence of convicting or not convicting the accused. The dangerousness of the defendant is irrelevant under the first approach, but controlling in the second. The choice between these two schools of thought turns on whether one perceives an important difference between punishment and civil commitment or, alternatively, whether one sees the criminal sanction as but one among several procedural weapons available to isolate and confine dangerous persons. There is no doubt that as we shift from the former to the latter theory of criminal law, we are more inclined to state the issue in consent cases as a matter of culpability rather than harm. In these contexts, the concepts of culpability and dangerousness are coextensive. Formulating the issue as one of culpability is a way of assuring that the criminal sanction will be used against potentially dangerous thieves.

The difference between these two schools of jurisprudence should be stated more precisely; for if we can orient ourselves to this ongoing tension in two ways of thinking about criminal law, we shall see more clearly what is at stake in analyzing the narrow issues before us in this Article. For the sake of convenience, let us refer to these schools of thought as the legalist theory of criminal law and the instrumentalist theory of social control. These labels are not meant to pass judgment on the merits of these competing schools, but to organize their characteristic features in a way that we may find convenient.

The legalist theory starts from the assumption that criminal punishment is to be distinguished sharply from civil commitment. The former is inflicted only against those who are guilty of violating the law; the latter, against those who are dangerous to society.

viding that consent is a defense when it "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense").

The focus in criminal prosecutions should not be on the benefit to be gained from confining or not confining a particular accused, but solely on the question whether his conduct at a particular time justifies the state's treating him as a criminal. The ends of the criminal law, therefore, are irrelevant in deciding in particular cases whether the accused is guilty and subject to punishment. These ends of social efficacy might be important in justifying the criminal law as a whole, but not in determining the propriety of convicting and punishing a particular individual.¹⁶ The legalist theory invites our attention to history as a means of discovering the principles of liability implicit in the system of criminal law. It encourages the view that there is a "classical" system of liability that crystallized at some point in our historical development. That classical system, in turn, provides a model for assessing changes and deviations occurring in our own time. The legalist theory, coupled with the quest for a classical system of liability, generates many of the assumptions that we have made in this paper. The classical view of criminal guilt leads us to hold that harm, wrongdoing, and culpability are required for criminal liability.¹⁷

The instrumentalist theory rejects the importance of criminal law as a separate discipline and locates the criminal sanction within a matrix of devices designed to further the all-encompassing goal of social protection. The instrumentalist maintains that there is no intrinsic difference between criminal punishment and civil commitment; they both function to further the same goal of confining dangerous persons. As a result, the critical inquiry is whether particular rules are compatible with this ultimate goal. Because the goal of social protection is contingent on the effectiveness of the criminal sanction, the facts of the individual case are less important than projections about the impact of punishment on the accused and on other persons who might be deterred. If the legalist lives in the past, the instrumentalist lives in the future.

Modern criminal jurisprudence, at least in the United States, is heavily committed to the instrumentalist school of thought. That commitment accounts for our preoccupation with the purposes of the criminal law. Now one might be inclined to think that these two schools of thought are fully independent and coherent systems for working with the criminal law. They might be thought analogous to the Ptolemaic and Copernican systems of astronomical interpre-

¹⁶ Cf. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELIAN SOC'Y 1 (1959), reprinted in H.L.A. HART, *supra* note 4, at 1.

¹⁷ The most sophisticated development of the classical principles of common law criminal liability is found in J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960). Hall lists *mens rea*, conduct, harm, causation and punishment as the principles characteristic of criminal conduct.

tation. Either functions fully well for its adherents, and the choice between them should be made on aesthetic principles that transcend the explanatory power of the theories.¹⁸

On some issues the two schools of thought do, in fact, overlap and thus provide different slants on the same phenomena. The issue of culpability, for example, can be interpreted under either theory. For legalists, culpability is a traditional presupposition for just punishment. For instrumentalists, culpability is an indication of dangerous propensities that ought to trigger the concern of a socially protective system of criminal law. Yet not all issues are subject to this kind of refraction through alternative lenses. The notable example is the one we have discussed in this paper, namely, the requirement of objective events as a necessary condition for criminal liability. So far as one can discern, the instrumentalist has no reason to endorse objective events as a precondition for the criminal sanction. Would-be thieves and rapists are culpable and dangerous regardless of the fortuities of external events. The requirement that the would-be bigamist actually be married to someone else at the time of the second ceremony makes no sense at all in an instrumentalist system of thought. So far as the ends of the criminal law are concerned, the only relevant fact is what the actor thinks when he is getting married. The view that crime is an external and objective phenomenon simply cannot be justified by appealing to the oft-recited aims of the criminal law.

In the final analysis, the difference between the legalist and the instrumentalist turns on whether anything should be taken as given—as data that must be explained—in the legal system. The legalist veers toward a maximal view of the data that he must work with. The radical instrumentalist takes nothing as given; everything must be tested for compatibility with reason and the chosen ends of the system. Thus the radical instrumentalist has no trouble dispensing with the rule, say, that a prior valid divorce categorically prevents a conviction for bigamy. If that rule is not compatible with the ends of crime prevention or other selected goals of the system, then it simply must be rejected.¹⁹ Legal rules are not to be explained; they are to be tested for their compatibility with a

¹⁸ See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

¹⁹ For recent examples of writing in this vein, see Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain*, 84 YALE L.J. 683, 687-88 (1975) (resolving disputed points in the law of entrapment by first positing the true purpose of the defense); Schulhofer, *Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (assuming that the requirement of harm should be retained only so far as it furthers one of the perennial purposes of the criminal law).

system of thought derived from the value preferences of the theorist.

Perhaps one should concede that the instrumentalist can never be dislodged from his stronghold of abstract structure and rationality. There are no facts that he is willing to accept as proof against his system. Every received rule that might count against his view can be rejected as a deviation from the "true" purposes of the criminal sanction.

The methodology of this Article is now becoming explicit. We started from the assumption that there are some features in the criminal law that could be taken as given. They are not to be tested against some preordained rationalist system, but to be taken as data that might inductively generate an explanatory system of thought. The rules serving this function were those requiring particular objective manifestations as the precondition for criminal liability. Because I take these rules as data to work with I am obviously committed to the legalist school of thought.²⁰

The dichotomy between legalism and instrumentalism can help us to frame the issue more precisely. We can see how legalism draws us toward the requirement of harm as an organizing principle of the criminal law; instrumentalism, toward the view that harm in the particular case is irrelevant. Robinson's rejection of subjective elements in the theory of justification can be seen as a thoroughgoing reaction against instrumentalism and a turn toward a legalist jurisprudence. This basic commitment explains Robinson's position on questions like whether consent must be communicated in order to constitute a defense. To summarize the argument, the legalist accepts the requirement of harm as an historically typical feature of the criminal law. When the victim consents in fact there is no harm and therefore there ought to be no liability. In fact, for all the reasons advanced and because of our underlying commitment to the legalist theory, Robinson and I concur that consent need not be communicated in order to constitute an effective defense.

Yet it is not so plain that in the other three cases posed above, we should reach the same result. What is true for consent may not be true for self-defense and necessity. In fact, I am inclined to believe that there is an important difference between consent and the other issues raised, and my reasons go beyond the dichotomy between legalism and instrumentalism. As I have noted, the drift

²⁰ For a penetrating discussion of some of the deeper philosophical and psychological differences between the legalist and instrumentalist points of view, see 1 F. HAYEK, *LAW, LEGISLATION AND LIBERTY* 8-34 (1973) (referring to what we have called the instrumentalist mentality as "constructivist rationalism").

toward instrumentalism leads to a more subjective criminal law, a greater emphasis on culpability as the index of dangerousness, and therefore to the requirement of a justificatory intent. The more difficult question, to which we now turn, is whether there are grounds for demanding a justificatory intent without accepting the instrumentalist commitment to social protection as the rationale for deciding which individuals are to be singled out as criminals.

III

As we turn from the issue of consent to the other three cases posed above, the problem of harm becomes more refined. In cases B and C, the victims' conduct supports exempting the defendant from liability, as does the expression of consent. Yet there is no sense in which the FBI agents or the physician bent on homicide desires to be assaulted. The accused does not execute their will or fulfill their desires. If there is no legal harm to them, it is because of what they have done—not because of what they want. What they have done could lead to the view that there is no legally cognizable harm only on the theory that their conduct—burglary in one case and attempted homicide in the other—forfeits their interest in remaining free from assault. This view implies that those who engage in these wrongful forms of aggression have a lesser interest in personal security. Therefore, even if the janitor and the patient act with culpable intent, the victims have no standing to complain. Because they are acting wrongfully, they are not "harmed" for purposes of the criminal law.

This view is obviously harder to maintain than the claim that if the apparent victim concurs in the taking of his car, he is not harmed by the would-be thief. It is the difference between a theory of moral forfeiture based on wrongful conduct and of voluntary forfeiture based on an expression of will. The view that self-defense derives from a theory of moral forfeiture raises some serious problems, particularly in the case of an insane, excusable assailant. Self-defense might be proper even against someone like an insane assailant who is not culpable for his aggression.²¹ But if it is, the defense obviously cannot rest on a theory of moral forfeiture.²²

The difference between consent and self-defense emerges in this context. The insanity of an assailant does not preclude the defense of self-defense.²³ Yet the insanity of a party purporting to

²¹ See Fletcher, *supra* note 6, at 378-80.

²² For a discussion of other bases for the theory of self-defense, see *id.* at 376-80.

²³ See Fletcher, *supra* note 6.

consent precludes the assent from being legally effective.²⁴ This suggests that the role of the victim—of the morally responsible victim—is critical in case of consent, but less important in cases of self-defense. In cases of self-defense, it is much harder to conclude that the conduct of the victim yields the conclusion that he is not “harmed” for the purposes of the criminal law.

There might be a refined difference between cases B and C that would lead us to think that the janitor should be acquitted, but that the patient should be convicted. The presence of the FBI agents in the psychiatrist's office is an illegal state of affairs that should be rectified. It seems plausible to argue that anyone who rectifies the situation—even someone who acts for the wrong reasons—should be exempt from punishment.

It is harder to argue that repelling an aggressor is intrinsically good in the same way that terminating an illegal occupation of the psychiatrist's office might be regarded as an end in itself. Though there are many strains in the theory of self-defense,²⁵ it seems most plausible to view the defense as a means of personal protection rather than as a vehicle for negating the evil represented by aggression. If retreat or calling the police would serve as well, then it seems reasonable to demand these alternative means of self-protection. Self-defense appears to be better conceived as a necessary evil rather than as the bringing about of a state of affairs that is affirmatively desirable.

We are left with the impression that case B is closer than case C to our baseline cases (uncommunicated consent, would-be bigamy) where objective facts are sufficient to preclude conviction. In fact, the German Supreme Court once ruled in a case like that of the transgressing FBI agents that the defender's knowledge of the illegality was not a prerequisite to the justification of his forcibly expelling the illegal intruders.²⁶ It need not follow from this holding that the defender's knowledge is similarly irrelevant in a case of self-defense.

Though Robinson defends his thesis in a situation like that posed in case D, the problem of necessity or lesser evil seems to be the most difficult context in which to argue that the actor's knowledge of the justifying circumstances is irrelevant. This is the one

²⁴ *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906) (insane patient incapable of consenting to operation).

²⁵ See Fletcher, *supra* note 6, at 376-80.

²⁶ See Judgment of Nov. 10, 1882, 4 RGRsprSt. 804. Forestry agents entered defendant's house to look for deer that they suspected her son to have hunted illegally. Defendant forcibly resisted the search. She was charged with “facilitating” her son's illegal shooting of a deer. It turned out that the forestry agents did not have authority to enter her house; apparently the house was too far away from their geographical zone of authority. If their entry was unlawful, the court reasoned, defendant's resistance was justified regardless of her motives. *Id.* at 805.

case of the four in which the victim does not in any way bring the harm on himself. Indeed under German law, the victim would be entitled to compensation for the damage done to his property for the sake of preserving that of another.²⁷ As case D is posed, however, this rule might not apply; the owner's car seems to be doomed in any event. But in Robinson's hypothetical case in which an innocent farmer must suffer the burning of his field to save those of others, the rule would assure the farmer compensation. In the common law, compensation would also be assured—provided the case is thought one of private rather than public necessity.²⁸ In view of the availability of compensation, it is difficult to argue that there is no harm in these cases. Even if one concludes that there is no formal "legal harm" under the criminal law, that label hardly appears to warrant treating case D just like the problems of consent and the cases of would-be bigamy and rape.²⁹

The sense that emerges from this study is that the four cases posed above are ordered in a scale of increasing difficulty. Case A, posing the problem of uncommunicated consent, seems to be the easiest to assimilate to the model represented by the case of the would-be bigamist. Cases B, C, and D are progressively more difficult to treat as instances in which objective considerations preclude liability regardless of the actor's intent.

Despite these nuances and differences of degree, there appear to be two major lines of thought directed to treating all of these cases in the same way. The instrumentalist, as we have seen, can find little value in objective impediments to conviction. He is inclined to sweep all of the refinements away and to focus entirely on the actor's intent as an index of dangerousness. The extreme objectivist is inclined to insist that all of these cases are alike—but in the opposite way. They all represent instances in which the objective circumstances, standing alone, are sufficient to bar conviction.

As I suggested earlier, I do not believe that someone committed to the legalist perspective need take this extreme objectivist position favoring acquittal in all of the cases A to D. One can begin to draw distinctions without abandoning the legalist's commitment to principles implicit in the legal system as it has evolved.

²⁷ BGB § 904 (Staudinger 1956).

²⁸ See *Surocco v. Geary*, 3 Cal. 69 (1853) (no liability for blowing up house to prevent spread of fire); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 24, at 125 (4th ed. 1971).

²⁹ A recent Austrian Supreme Court decision, however, held that in abortion prosecutions the defense of necessity may be made out by appealing solely to objective criteria. Judgment of Oct. 29, 1959, 30 *Entscheidungen des Österreichischen Obersten Gerichtshofes* 308. The court goes on to say that all claims of justification are valid regardless of the actor's state of mind. *Id.* at 309.

IV

Each of the hypothetical cases we have considered is subtly different from the others, and each could stand as a distinct category of analysis. Yet the tendency of legal theory is to reduce the relevant categories in the interests of a workable scheme for solving problems. In the preceding section, we pursued a single standard for resolving our conundrum, namely the role of the victim in bringing on the harm. Yet this approach dissolved in the difficulties of equating moral forfeiture and actual waiver. In this section, we shall turn to another perspective on the problem. I shall attempt to show that a large number of cases of the sort posed above may be solved by becoming more attentive to the structure implicit in the issues bearing on criminal liability. In particular, we have to sharpen our sensitivity to the difference between the Definition of offenses and claims of justification, which represent exceptions to the rule laid down in the Definition. By elaborating and defending this distinction, we will be in a position to argue that unlike elements of the Definition, claims of justification presuppose a meritorious intent.

The term "Definition" is introduced here as a term of art to refer to what German jurists mean by the *Tatbestand*³⁰ and Spanish jurists, by the *Tipo*.³¹ There is no term in English to refer neatly to those elements that define the typical or paradigmatic case of criminal conduct. The term "elements of the offense" might once have fulfilled that function,³² but it has since shifted in meaning. It now refers to the necessary and sufficient conditions for liability, adverting as well to the atypical cases covered by criteria of justification and excuse.³³ The term "prima facie case" gets at the point, but in a procedural idiom with overtones of arbitrary classification.

The Definition of most offenses is stipulated by the special part of the criminal code. For example, the Definition of murder is the killing of another human being with malice aforethought.³⁴

³⁰ The critical work in the crystallization of the German concept was E. BELING, *DIE LEHRE VOM VERBRECHEN* (1906).

³¹ See 3 L. JIMÉNEZ DE ASÚA, *TRATADO DE DERECHO PENAL* 743-98 (3d ed. 1965).

³² See *Quillen v. State*, 49 Del. 114, 110 A.2d 445 (1955) (absence of self-defense not an "element of the crime").

³³ See *Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962) (absence of self-defense treated as one of the "essential elements necessary to constitute the crime charged"). Cf. MODEL PENAL CODE § 1.13(9) (Proposed Official Draft 1962) (the term "element of an offense" defined to include matters relating to justification, excuse, jurisdiction and the statute of limitations).

³⁴ W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 528 (1972). The term "unlawful" is typically introduced in the statement of the crime, but for

Claims of justification and excuse are not part of the Definition. They appear as the second and third stages of analysis in a set of three ordered questions leading to liability. As these questions are formulated in German theory, they are:

1. Is the Definition satisfied?
2. If yes, is the conduct justified?
3. If no, is it excused?

A finding of guilt requires the trier-of-fact to pass these three hurdles sequentially. That means that questions of excuse—*e.g.*, the issue of insanity—do not arise until it is established that the Definition is satisfied and the conduct is not justified.³⁵

This tripartite structure emerged in German criminal theory in the early decades of this century.³⁶ It has since become the organizing mode of thought in most legal systems that have developed a literature of criminal law. There were some signs that the common law was moving toward a similar conceptualization of issues.³⁷ Yet in this century there has been an increasing tendency to suppress the role of structure in criminal theory and to emphasize the fungibility of all issues bearing on criminal guilt. Thus the Model Penal Code treats all issues bearing on liability—whether matters of definition, justification or excuse—as “elements of the offense.”³⁸ This tendency toward fungibility may be a necessary stage in surmounting the influence of civil litigation on our thinking about criminal liability.³⁹ There is no doubt that the tendency to equate these issues produces a more consistent allocation of the burden of persuasion in criminal cases.⁴⁰ Yet the denial of structural differences among issues bearing on criminal guilt tends to distort our perception of these issues and to inhibit refinement of the theory of liability.

This is not the place to rehearse and defend the distinction between justification and excuse. Robinson accepts the distinction in one of its formulations—the difference between issues relating to

our purposes it is preferable to consider “unlawfulness” as the rubric under which claims of justification arise.

³⁵ For a fuller treatment of this classificatory scheme, see Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 913-17 (1968).

³⁶ *Id.* at 913-14.

³⁷ See generally 4 W. BLACKSTONE, COMMENTARIES *20-33 (a nascent theory of excuses); *Id.* at *177-88 (good discussion of the difference between justifiable and excusable homicide).

³⁸ MODEL PENAL CODE § 1.13(9) (Proposed Official Draft 1962).

³⁹ This is the thesis of my comparative study of the burden-of-persuasion. See Fletcher, *supra* note 35.

⁴⁰ *Cf.* Mullaney v. Wilbur, 95 S. Ct. 1881 (1975) (holding that it violated due process to require a defendant in a state homicide prosecution to bear the burden of persuasion on the issue of provocation).

acts (justification) and those related to actors (excuses). Our concern is rather with the distinction between the first two questions—between Definition and justification—both of which bear on the “act” as opposed to the actor. Robinson elides this distinction in his insistence on organizing the entire criminal law under the rubrics of act and actor. If the distinction is suppressed, questions of justification appear to be merely negative elements of the Definition. Murder becomes the malicious killing of a human being in the absence of self-defense. This simplifying stroke would be defensible if there were no important conceptual difference between Definition and justification. Yet the distinction is important for a variety of reasons. In the ensuing discussion I shall explicate some of the functions of distinguishing between Definition and justification and attempt to show that the distinction can serve as well in organizing our thoughts about objective impediments to liability.

We are faced with two different kinds of problems in explicating the distinction between Definition and justification. The first is to account for the distinction in principle, and the second is to classify borderline issues, like consent, in one of the two categories. These two tasks are interrelated, for we cannot develop a theory of the distinction unless we take some issues to be paradigmatic of Definition and justification. Thus in developing the theory we must engage in the delicate process of mediating between accepting the classification of issues as given and revising this classification in line with the theory that we develop.

The basic idea behind the distinction between Definition and justification is that in our social and moral life we sense a difference between conduct that is routine and accepted and conduct that may be right, but that is rendered right only by providing good reasons. It is the difference between punching a ball and punching someone in the jaw. There is no need to justify punching a ball. It seems odd even to ask someone punching a ball to justify what he is doing. It is hard to know what to make of the question. Punching a person is different; this is conduct that is typically suspect. Yet in some cases it might be rendered proper and acceptable—say by self-defense, consent to a boxing match, perhaps even by a disciplinary privilege. It certainly makes sense to ask someone whether he has a good reason for punching a neighbor in the nose. That good reason might be his justification.

Now when conduct is called into question as it is, say, in cases of abortion, there are two basic strategies of defense. One strategy is to assimilate the questionable case to those that are considered routine and acceptable. The alternative is to concede that there is something typically or paradigmatically wrong about the conduct,

but to seek to qualify the case as one that is exceptional and motivated by good reasons. There is nothing novel about this bifurcation of strategies; it provides a foundation for the structural difference in common law pleading between traverses and denials, on the one hand, and pleas of confession and avoidance, on the other. In the controversy over abortion, the two strategies take the form of denying that the fetus is an interest worthy of protection or, alternatively, conceding that the fetus is worthy of protection but that in some cases the interests of the mother take priority.

Taking the controversy over abortion as our guide, we can see that there is a radical difference between the two types of cases in which we conclude that there is no "legal harm." To say that the fetus is not an interest worthy of independent protection is to classify the fetus along with organs of the mother's body. To appeal instead to a theory of justification is to acknowledge that the fetus is different from an appendix, but that other interests sometimes require the sacrifice of a concededly worthy interest. Though the result might be the same, the way we conceptualize the issue expresses our sense of the importance of the fetus as an independent interest.

Collapsing the distinction between Definition and justification generates a view of justified harm as though it were the same as consequences that fell beyond the scope of the criminal law. It is to treat aborting a fetus in the same way one treats killing a fly. Now one might admit that there is an important moral difference between these two kinds of harm and yet balk at building the distinction into the criminal law. Why, one might ask, is it important that the criminal law acknowledge moral differences among different types of harm?

To defend the distinction, we have to show that it fulfills important tasks in criminal jurisprudence that go beyond the expression of our moral sentiments. I shall attempt to show that the distinction is important in analyzing first, the issue of acceptable vagueness in the criminal law, and secondly, the scope of legislative control over the criteria of criminal liability. If the distinction between Definition and justification performs these important tasks, then we may find additional warrant for the law as acknowledging the difference between events that are innocuous and harms that are justified.

The preceding discussion made some tentative assumptions about the issues that fall readily into one category or the other. We should round out this list and isolate the borderline issues. We may then move on to the problems of vagueness and legislative supremacy over the criminal law.

The core issues of Definition are (1) the nature of the interest protected (*e.g.*, human beings in the case of homicide, movable property in the case of larceny) and (2) the requirement that the actor either cause harm to this protected interest or create a risk of harm. Offsetting these examples of Definitional elements, we may cite a few widely accepted instances of justification: self-defense, enforcing the law, and disciplinary privileges. As we shall see, many instances of justification (consent, necessity) are in fact borderline cases. Further analysis is necessary before we can classify them one way or the other. It should be remembered that even the core instances of Definition and justification are tentative suggestions, subject to revision upon the evolution of a more refined view of the distinction.

A. *The Problem of Vagueness*

It would be a mistake to think that the classification of issues as matters of Definition or justification is somehow rooted in the logic of conduct or derivable from enduring moral principles. The classification of issues one way or the other springs from the concrete realities of our social and moral life. Working out this claim requires considerable development of the theory and clarification of what one means by the Definition of an offense.

We noted earlier that the Definition specifies conduct that is typically or paradigmatically criminal. Killing another human being is typically wrong. Setting fire to a dwelling house is typically wrong. Yet there are extraordinary cases in which the rule governing the typical case does not apply. What makes these cases extraordinary is the set of circumstances under which the actor kills or sets fire to a house. In this sense, the relationship between Definition and justification is the relationship between rule and exception.

If the Definition specifies what is typically wrongful and criminal, then we must ask: What are the criteria that shape our perception of typicality? The question raised is not: How do we know that unexcused, unjustified homicide is wrong? That question invites a debate about the ultimate sources of our moral views. In this context, we need not enter that fray. Even if we assume that murder is wrong, we do not thereby resolve the question whether self-defense is part of the Definition or an element of justification. The sense for the difference between rule and exception, I would maintain, is governed by conventions independent of our reasons for regarding conduct as wrongful. This claim may later have to be qualified, but let us see now what may be said on its behalf.

We shall examine several schemes for organizing the same issues in alternative ways. In all of these cases, the classification of issues is wholly independent of the outcome of the case. Whether issues are classified as elements of Definition or justification, they still bear on liability. The point of our investigation is to see whether there are good reasons for the classification that are wholly independent of the ultimate decision in the case. Consider these offenses:

(1) The crime of assault may be specified by a Definition prohibiting touching, with a long list of justificatory defenses. In addition to self-defense, necessity and consent, one would have to devise something called "implied consent" to cover all the routine cases of intentional contact on the street, in crowded rooms and on the playing field. Alternatively, one could try to integrate questions of implied consent into the Definition of the offense. The latter would then read something like this: Do not touch anybody harshly, excessively, or unreasonably.

(2) The crime of reckless driving could be reformulated by a Definition prohibiting driving, with a justification called "safe driving" available to those who would not be guilty of reckless driving.

(3) In the case of abortion the Definition might read: Do not commit abortion. If the law so provides, the list of justifications would include necessity to save a life or preserve the health of the mother. Alternatively, the Definition might simply enjoin us not to commit unnecessary abortions.

(4) The law of theft might enjoin stealing with necessity as a justification, or it might read: Do not steal unnecessarily.

Notice that each of these formulations suffers from a different vice of legislative drafting. If words like "unreasonably" and "unnecessarily" are included in the Definition, then the Definition suffers from vagueness. If, in contrast, these vague modifiers are retained at the level of justification, then the Definition is invariably overbroad. Its sweep includes all touching, all driving, all abortion, and all larceny. The choice between these alternative formulations is, in the end, a choice between an imprecise Definition and one that is overinclusive.

The overbreadth of the Definition is acceptable if its direct and precise language communicates a paradigmatic case of prohibited conduct. This is the case with regard to larceny—at least in our society at the present time. Though there are some extraordinary cases where stealing might be justified, we could readily list the core cases of prohibited conduct. The technical overbreadth of the Definition hardly misleads us.

Yet the analysis of reckless driving as an offense leads to the opposite conclusion. One could say that the Definition summarily prohibits driving and that safe (or non-reckless) driving constitutes a justification. We would hardly know what to make of a prohibition against a routine activity like driving. For the Definition to be coherent, it must incorporate the modifier "reckless." In this context, we are inclined to prefer an imprecise Definition to one that is overbroad.

Of course, one could imagine social circumstances changing so that the imperative not to drive became as morally coherent as the imperative not to touch other people. If the fuel shortage became drastically more severe, the norm with regard to driving might be reversed: The rule would be abstention; the exception would be driving in extraordinary circumstances. In this changed social context, one might properly think of the Definition as running to driving, and the justification as encompassing the special circumstances that made driving necessary or reasonable. Then it would be possible to render the Definition more precise and to tolerate the overbreadth of its sweep.

The minimal demand on the Definition is that it state an imperative that is morally coherent under given social conditions. What makes the imperative coherent is our comprehending the core cases of prohibited conduct. Whether there is a consensus on these core cases would seem to turn on several factors. One factor is the statistical relationship between routine and extraordinary cases. As cases of justified conduct become more numerous, it becomes increasingly difficult to think of the Definition as prescribing the normal, and the justification as providing the exception. In addition to statistical regularity, one needs a moral consensus supporting the wrongfulness of conduct in these core cases. As the moral consensus breaks down, more and more exceptions are urged, until one encounters the proverbial phenomenon of the exceptions swallowing the rule.

When a straightforward imperative has no moral bite, the legal system has no choice but to add modifiers like "unreasonable" and "unnecessary" to the Definition. This is patently the case with "reckless driving." A dramatic example is the evolution of our thinking about abortion in the last two decades. It was once perfectly coherent to treat the Definition of abortion as an imperative not to kill any fetus. To this general prohibition, one could then add the justification: except when necessary to save the life (or preserve the health) of the mother. Yet as the consensus supporting this imperative disintegrated, it became necessary to reformulate the imperative as: Do not commit unnecessary abortions. Yet as disintegration proceeded, this imperative came to

appear unduly vague. Finally, in *People v. Belous*,⁴¹ the California Supreme Court ruled that a statute prohibiting abortion unless necessary to save the life of the mother was unconstitutionally vague.

It would be a mistake to think the problem in *Belous* was the vagueness of the word "necessary." If that word were unconstitutionally vague, then every crime subject to the defense of lesser evils would suffer the same fate as the California abortion statute. Every case of lesser evils requires a judgment whether conduct satisfying the Definition is justified by the "necessity" of furthering a higher, competing interest. If the Definition of larceny were reformulated to reflect this defense, it would read "Do not unreasonably or unnecessarily deprive another permanently of his property." That revised Definition seems no more precise than the injunction not to commit unnecessary abortions. If the latter is unconstitutionally vague, then the former would fall of the same defect. Yet, however plausible the decision in *Belous* might appear, we know that it is absurd to suggest that the prohibition against stealing is unconstitutionally vague.

The only way to escape this antinomy is to recognize that the constitutional problem of vagueness attaches to the Definition but not to the criteria of justification or excuse. If a vague term like "necessary" or "reasonable" can be kept in the category of justification, then the Definition can retain the appearance of precision and pass the constitutional hurdle. Yet the vague justificatory terms can be kept where they are only if the imperative underlying the Definition has coherent moral bite in the society in which it applies. The rule prohibiting abortions has lost its moral force in mid-century America, but the rule prohibiting larceny has not. Thus the Definition of abortion must accommodate the vague terms that lead to its constitutional demise; the rule against theft can stand alone with the problem of necessity relegated to the distinct category of justification.

It should be noted that not every verbal qualification of the Definition generates a case of unconstitutional vagueness. "Reckless driving" is still sufficiently precise to withstand constitutional attack. The reason is that in contrast to our recent experience with abortion, there is a strong consensus specifying the instances of reckless driving that we would tend to take as prohibited. Unconstitutional vagueness is not a function of particular words, but of the disintegration of consensus concerning the range of conduct in question.

⁴¹ 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

Though limiting the rule of void-for-vagueness to the Definition may be necessary to make sense of cases like *Belous*, we should have a deeper rationale for limiting an important constitutional guarantee. One could say that claims of justification and excuse benefit the accused and therefore he is not harmed by their imprecision. Yet there should also be a more plausible, neutral reason for the limitation. The rationale for the limitation is to be found in a reduced expectation of legislative warning. There is no doubt a school of thought that sees statutory regulations as laying down necessary and sufficient conditions for punishment.⁴² Yet there might be a more plausible expectation that we be informed only of the typical, routine cases that are enjoined or prohibited. When the extraordinary cases arise—those covered by the criteria of justification and excuse—we hardly expect to act in deference to legislative guidelines. As a result, we might properly demand that the Definition of offenses meet a constitutional standard of specificity. If the Definition communicates a coherent moral imperative, as it does in the case of larceny and homicide, then we may guide our conduct accordingly. This more modest expectation of legislation informs the view that the Definition and only the Definition is subject to constitutional scrutiny for excessive vagueness.

B. *Legislative Supremacy Over the Criminal Law*

There is a tendency in common law jurisdictions to think of the legislature as supreme in all questions bearing on criminal liability.⁴³ Courts are supposedly powerless to recognize new excuses and justifications as well as to create new forms of liability by enacting new Definitions.⁴⁴ The impact of this dogma on the development of excusing conditions is not particularly severe, for courts often recognize unlegislated excuses by treating them as claims denying the required *mens rea*.⁴⁵ Yet justificatory claims do

⁴² For example, in *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), the California Supreme Court held that the term "human being" in the definition of murder did not encompass a fetus, even one who was maliciously killed, contrary to the wishes of the pregnant mother. In reasoning about the requirement that "some statute, ordinance or regulation prior in time to the commission of the act, must denounce it . . .", the court argued that criteria of justification and excuse should be treated like the Definition of the offense. *Id.* at 632, 470 P.2d at 624-25, 87 Cal. Rptr. at 488-89.

⁴³ The *Keeler* case is a good, well-reasoned example. See note 42 *supra*. The new state codifications apparently all adopt the principles of legislative supremacy. Cf., e.g., MODEL PENAL CODE § 1.05(1) (Proposed Official Draft 1962); WISC. STAT. ANNOT. § 939.10 (West 1958); ILL. ANNOT. STAT. ch. 38, §§ 1-3 (West 1972).

⁴⁴ See note 42 *supra*.

⁴⁵ See, e.g., *Rex v. Steane*, [1947] 1 K.B. 997 (C.C.A.) (excuse of duress held to negate the required intent "to assist the enemy"); *Hopps v. People*, 31 Ill. 385, 394 (1863) (insanity viewed as a denial of "criminal intention"); *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (reason-

not negate any of the required elements of the prosecutor's case.⁴⁶ Therefore, in this arena, deference to legislative supremacy inhibits the development of new defenses. No common law court, so far as I know, has ever explicitly recognized the necessity of lesser evils as a defense implicit in the common law. The defense percolates through cases recognizing constitutional rights to protect property⁴⁷ or children⁴⁸ or contractual rights permitting mutiny at sea.⁴⁹ Yet the courts do not see it as their province to face the problem of necessity frontally. They are intimidated by the positivist principle that if the legislature has not recognized the defense, it does not exist.

Compared with their common law counterparts, West German courts are at least as committed to the principle of *nullum crimen sine lege*.⁵⁰ No West German court would legislate a new Definition of an offense as the House of Lords did in *Shaw v. Director of Public Prosecutions*.⁵¹ Yet the German view is that the principle of legislative supremacy extends only to the Definition of offenses. It does not include questions of justification. Dramatic testimony to this position may be found in a decision by the German Supreme Court in 1927, in which the court recognized a new unlegislated defense of lesser evils.⁵² The specific case was one of an abortion committed to ward off the risk of suicide by a pregnant mother. Yet the defense that emerged was a general privilege of acting in an emergency to further the greater good. The defense has finally received statutory embodiment in the new 1975 German Criminal Code.⁵³ For generations, the defense went by the name of "extra-statutory necessity."⁵⁴

The reasons for the common law reluctance to limit legislative

able mistake of fact as to age of girl in statutory rape prosecution treated as denial of the required "criminal intent").

⁴⁶ The reason for this is the Anglo-American conception of crime does not require proof of a general element of wrongdoing or illegality. Compare the German system, as described in Fletcher, *supra* note 35, at 913-17.

⁴⁷ See *Cross v. State*, 370 P.2d 371 (Wyo. 1962) (constitutional right to protect property from marauding moose).

⁴⁸ See *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902) (natural right to protect one's children and thus to keep them out of school when ill).

⁴⁹ *United States v. Ashton*, 24 F. Cas. 873, 874 (No. 14,470) (C.C.D. Mass. 1834) (seamen "contract only to do their duty and meet ordinary perils, and to obey reasonable orders").

⁵⁰ The principle is recognized in the West German constitution. GRUNDGESETZ art. 103(II) (1949 W. Ger.).

⁵¹ [1962] A.C. 220 (1961) (affirming a conviction based on a newly "discovered" common law crime of conspiracy to corrupt public morals).

⁵² Judgment of Mar. 11, 1927, 61 RGSt. 242.

⁵³ StGB § 34 (Lackner 1975).

⁵⁴ The German term was *übergesetzlicher Notstand*. Though the defense was extra-statutory only relative to the German system, the term acquired international currency. See 3 JIMÉNEZ DE ASÚA, TRATADO DE DERECHO PENAL 1069-71 (3d ed. 1965) (discussing *la justificación supralegal*).

supremacy to the Definition are profound, and we could not hope to do justice to the issue here. Using broad strokes, we might paint the problem as the difference between a positivist and a trans-positivist conception of law. As positivists, common law jurists are inclined to think that there is no law but that commanded by the legislature or found in the Constitution. Working in a tradition that is hostile to the limited perspective of positivism, German jurists still nourish the belief that there are enduring principles of law that are amenable to judicial discovery. The development of "extra-statutory necessity" was the working out of one of these enduring principles governing the determination of wrongful conduct.

V

We have attempted to establish that the distinction between Definition and justification is important not only because it captures an important moral difference between events that are innocuous and harm inflicted for good reasons, but because it is a useful distinction in confronting central problems of criminal justice. It provides a vehicle for distinguishing cases of troublesome vagueness from those that need not concern us; it also provides a useful distinction that may be invoked to limit legislative control over the criminal law. If the distinction now enjoys some conceptual force, we may return to the problem whether justification presupposes a justificatory intent.

My thesis is that whether we are inclined to see objective circumstances as precluding conviction is tied to whether we perceive the objective circumstances to be part of the Definition. The question of existing marriage is part of the Definition of bigamy; a prior valid divorce would preclude conviction regardless of the actor's intent. That one kill a "human being" is part of the definition of Murder. If the being killed is not a human being there is no homicide. These points can be summarized in the proposition that there is no crime unless the objective elements of the Definition are satisfied. The reason, as we argued earlier,⁵⁵ is that "crime" is an event in the external world, not in the mind. Yet not any act in the external world will satisfy the requirement of publicity in defining criminal conduct. If the conduct is to appear objectively criminal, then it must be objectively incompatible with the imperative underlying the Definition of the offense. It follows that all the elements of the Definition must be satisfied before one need consider the relevance of subjective states.

Thus we have derived a test for determining whether a single element of the offense, if objectively wanting, provides a sufficient

⁵⁵ See text accompanying notes 12-13 *supra*.

rationale for acquittal. It does—if the element adheres to the category of Definition. Whether it adheres to the category of Definition depends on whether its inclusion is necessary to formulate a coherent moral imperative in the core cases of the offense.

The requirement of the prior valid marriage satisfies this test in bigamy cases. And consent, it appears, should be treated in the same way. With regard to the taking of objects, the nonconsent of the owner seems to be an essential element of the imperative not to trespass against the objects of another. Without introducing the factor of nonconsent, it is not easy to formulate a coherent imperative against using objects that belong to others. The life of commerce consists precisely in the use of leased, pledged and deposited valuables. This appears to be routine, rather than exceptional and justified activity. It is not surprising, then, that common law discussions of larceny typically stress the element *invito domino* (against the will of the owner).⁵⁶ Without stressing the element of nonconsent, the imperative is far too inclusive to have moral force.

As a result of this perception of the issue, I find it plausible to treat objectively expressed, but uncommunicated consent as a full defense.⁵⁷ Yet we might not get the same result in cases of consent to bodily contact. A definition of assault might plausibly center on the imperative not to touch others. The simplicity of this rule may induce its survival even if its bite has mellowed over time. Some forms of aggressive touching (masochistic beatings, voluntary euthanasia) are not even amenable to consent as a defense.⁵⁸ This suggests that consent in cases of bodily contact is more questionable—more in the nature of an exception—than it is in the case of using objects belonging to others. It is possible that the issue of consent in cases of assault warrants different treatment from consent in cases of larceny.⁵⁹

Necessity, as we have seen, is typically a justification, but in cases of abortion there is often an impulse to treat the issue of non-necessity as an element of the Definition. Self-defense, on the other

⁵⁶ The classic common law definition of larceny, stemming from Bracton, is "the fraudulent mishandling of another's property without the owner's consent . . ." 2 BRACTON, ON THE LAW AND CUSTOMS OF ENGLAND 425 (S. Thorne ed. 1968); 1 M. HALE, PLEAS OF THE CROWN *504.

⁵⁷ The same conclusion is reached above, but on different grounds. See text accompanying notes 20-21 *supra*.

⁵⁸ MODEL PENAL CODE § 2.11(2)(a) (Proposed Official Draft 1962) (exempting "serious harm" from the scope of effective consent). For a thoughtful defense of this form of paternalism, see H.L.A. HART, LAW, LIBERTY AND MORALITY 30-34 (1963).

⁵⁹ *But cf.* Christopherson v. Bare, 116 Eng. Rep. 554 (1848) (the issue of consent could be raised on a general denial to a complaint of assault and battery; the implication is that the concept of assault and battery encompasses the issue of nonconsent).

hand, is more readily classified as a justification. The imperatives against assault and homicide are sufficiently strong that we need not qualify the Definition of these offenses by specifying: if not done in self-defense. From the test that we have been applying, it follows that the objective manifestations of self-defense are not sufficient to bar conviction.

Yet if claims of justification were merely negative elements of the Definition, it would follow that the objective criteria would be sufficient to preclude conviction. That is why it is so important to establish, as we have attempted to do, that claims of justification are structurally distinct from the Definition. What is true about the Definition need not be true about claims of justification. If a good intent is unnecessary for acquittal at one level of analysis, it does not follow that the role of intent is the same at another level.

To make out the argument that justificatory claims presuppose a proper intent, we need to be clearer about the concept of justified conduct. We noted earlier that justified conduct is harmful in the sense that harm typically associated with the Definition has occurred (death of a human being in a case of self-defense, involuntary deprivation of another's property in a case of larceny). Yet there are good reasons for inflicting that harm. The question is whether the actor must have those reasons for acting, or whether it is sufficient that someone in his situation might have had them.

It might be helpful to distinguish between *justified* acts and *just* events. It might be *just* for a would-be murderer to be killed by his intended victim (regardless of the defending victim's wicked intent at the time), but it does not follow that the act of killing is *justified*.⁶⁰ We use the term "just" to talk about people, events, exchanges and decisions; and the term "justified" to refer to conduct. A decision might be just, without being justified. Suppose that a judge takes a bribe to decide against the plaintiff in a law suit. Unbeknownst to him, the plaintiff had perjured himself and indeed did not have any legal support for his complaint. The decision to nonsuit the plaintiff would be just in the sense that the plaintiff got what he deserved. But one could hardly say that the decision, motivated as it was by a bribe, was justified under the law.

There appears to be a teleological element in justified conduct. Conduct is justified when we perceive it as being directed toward a goal that provides a justification. The goal might be self-defense, serving the greater good, or perhaps fulfilling the desires

⁶⁰ For some related comments on the distinction between "just" and "justified," see Feinberg, *On Being "Morally Speaking a Murderer,"* in J. FEINBERG, *DOING AND DESERVING* 44-46 (1970).

of another person. This teleological element is expressed in the reasons that the actor has for violating the imperative of the Definition. If he does not have good reasons, his conduct does not meet the criteria implicit in the concept of justification. He may bring about a just result, but his deed is not justified.

We have explored two distinct themes in our efforts to determine when objective criteria are sufficient to bar conviction, regardless of the actor's intent. The first line of attack focused our attention on the victim's conduct as a way of probing whether the requirement of "harm" was wanting in the case. The second approach required a theoretical refinement of the concepts of Definition and justification, and led to the view that all claims of justification presuppose a proper intent. These approaches overlap in explaining why consent in larceny cases should not have to be communicated in order to constitute a bar to conviction. Both approaches concur further in treating self-defense as a case in which a meritorious intent should be required.

The two perspectives diverge in analyzing cases B (FBI agents in the psychiatrist's office) and D (necessity) in the original set of four hypothetical cases. In case B, the indispensability of harm drew us toward the view that rectifying an illegal occupation of the office should constitute a defense, even if done for the wrong reasons. Yet it would be hard to classify that defense (protection of property) as an element of the Definition, and thus the second approach leads to the conclusion that the issue is one of justification and that the actor's reasons do matter. Conversely, analyzing the role of the victim led us to see necessity as a case of harm to an interest that was not waived or forfeited by the victim. Good reasons should be required to justify the invasion of a private interest, and therefore objective necessity is not enough to bar conviction. On the other hand, we also saw that non-necessity sometimes functions as an element of the Definition; and when it does, our second approach would lead to the conclusion that objective criteria should be sufficient to preclude conviction.

Though we have yet to reconcile these conflicting approaches, we have managed to demonstrate that the problem is more subtle than either the instrumentalist or the extreme objectivist would have it. Our intuitions about criminal liability are not borne out by the instrumentalist's insisting that objective criteria are irrelevant. Nor are they satisfied by the objectivist claim, advanced by Robinson, that objective criteria control issues of justification as well as elements of the Definition. The problem of drawing lines and distinctions remains with us. Here as elsewhere in the law, refining our intuitions and honing our distinctions are the surest means of doing justice in particular cases.