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A General Mitigation for Crimes Driven by Emotion?
Physiological, Personal Choice, and Normative Inquiries

Paul H. Robinson*

Current law recognizes a mitigation from murder to manslaughter for a killing done in the heat of passion on provocation by the victim. But the doctrine at common law and in most modern formulations is highly restrictive. It is argued here that in a modern world increasingly concerned with adhering to proportionality between personal blameworthiness and deserved punishment,¹ the restrictions inherent in the provocation mitigation are anachronistic. Mitigation of liability ought to be available in a wide variety of cases beyond the rules of traditional provocation and even beyond the offense of murder or the emotion of “heat of passion.”

I. AVAILABILITY OF THE MITIGATION

Should an emotion mitigation be available more broadly than in current law that allows a mitigation from murder to manslaughter for a provoked killing done in heat of passion? In what instances should an emotion mitigation be available?

1. Should a murder mitigation be limited to cases of provoked “heat of passion”?

In the classic provocation case, the defendant flies into a rage because he or she feels wronged in some way and kills the person who has provoked the rage. A rape victim kills his or her attacker as the attacker is leaving the scene. The defendant kills his or her spouse, or the spouse’s lover, or both, upon finding them in bed together. Upon hearing that his child has been victimized, the defendant rushes off to kill the victimizer. In each case, there are good arguments that while the killing is blameworthy and deserves punishment, it is importantly less blameworthy than the same killing done in the absence of the provoking incident.

Yet, it seems clear that mitigating circumstances of emotion-driven offenses can go well beyond instances of provoked “heat of passion.” Consider some examples:

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¹ See, e.g., Model Penal Code §1.02 (as amended May 16, 2007, emphasis added), which sets desert as the dominant distributive principle that can never be violated:

(2) The general purposes of the provisions governing the sentencing and corrections, to be discharged by the many official actors within the sentencing and corrections system, are:
   (a) in decisions affecting the sentencing and correction of individual offenders:
      (i) to render punishment within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;
      (ii) when possible with realistic prospect of success, to serve goals of offender rehabilitation, general deterrence, incapacitation of dangerous offenders, and restoration of crime victims and communities, provided that these goals are pursued within the boundaries of sentence severity permitted in subsection (a)(i); and
      (iii) to render sentences no more severe than necessary to achieve the applicable purposes from subsections (a)(i) and (ii); . . .
With his brain-dead infant son on life-support after an accident, Rodolfo Linares is haunted by what he sees as the baby's coming lifetime of suffering and loneliness in a warehouse facility. He goes to the hospital, removes the child from the life-support machines, sits on the floor cuddling the baby while it expires, while holding the staff at bay with a gun. He then gives himself up to hospital security. Are we to say that the emotions that drove the killing are to be ignored because they are not heat of passion provocation?

Joseph Druce, a victim of childhood sexual abuse, is in prison with John Geoghan, a convicted pedophile priest. When Druce learns that Geoghan is to be released and plans to move to South America to gain access to new victims, Druce kills the priest. Gertrude Vaughn, a teenager, goes through her entire pregnancy refusing to admit to herself or others that she is expecting. Panicked, alone, and overwhelmed by shame, she gives birth alone at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home. The infant lays on the floor where born and Vaug does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and at home.


The Schaibles are extremely devoted to their belief that an all-powerful God is not to be doubted. When a son is born to them they are delighted. The infant becomes ill and they pray for his return to health. Reaching out to their religious community and their extended family, everyone prays earnestly for the child’s recovery. They feel they cannot take him to a doctor because it would be questioning God’s plan. For several nights they nurse the baby until he dies of a treatable pneumonia.5

Judy Norman has been abused by her alcoholic husband for years. On this night he tells her that she must sleep on the floor and that he plans to slit her throat, then he goes to bed. While he sleeps, Judy shoots him three times in the back of the head. A jury concludes that while she might have honestly believed her killing was necessary to defend herself, it was not a reasonable belief and therefore she has no right of self-defense to kill him as he slept.6

These are just a few examples of a wide array of cases.7 Are we to assume that in each of these cases the emotional driver is irrelevant to the offender’s blameworthiness and


6 One might hope that such a defendant would have some kind of a mitigation based upon mistaken self-defense. Unfortunately, most jurisdictions adopt an all or nothing formulation with regard to mistaken justification: a complete defense is available for a reasonable mistake but no defense or mitigation of any kind is available for an honest but unreasonable mistake. (Only eight states take the "sliding-scale" approach of allowing a mitigation for an honest but unreasonable mistake. See Robinson & Williams, Mapping American Criminal Law: Variations across the 50 States, chapter 15 text at notes 4 and 5, page 143 (2018).)

7 Consider some other examples:

Jay Maynor’s daughter is sexually abused by her grandfather from the age of four to eight. The girl appears to be too traumatized by the events to become normal functioning. Upon conviction for the abuse, the older man serves less than two years in prison. Maynor feels the only way to relieve his daughter’s continued suffering is to kill her abuser, which he does. He makes little effort to hide that he is the killer and when it comes to trial he forbids his daughter from testifying, even though her testimony about the impact of the abuse and her continuing trauma would be highly relevant to understanding his offense. (Andrews, Travis M. “Ala. man sentenced for murdering daughter’s sexual abuser 13 years after his prison release. Thousands support him.” The Washington Post. 17 Nov 2016. https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/ala-man-sentenced-for-murdering-daughters-sexual-abuser-13-years-after-his-prison-release-thousands-support-him/?utm_term=.34aa692ce7d6; Moore, Trent. Associated Press. “Investigation continues into Berlin murder.” The Cullman Times. 11 June 2014. http://www.cullmantimes.com/investigation-continues-into-berlin-murder/article_ea04257e-ba14-5532-a8cf-36f19f30cc43.html; Weed, Alexis. “Dad provoked into killing daughter’s molester?” HLN TV. 14 June 2014. http://www.hlntv.com/article/2014/06/13/drop-murder-charge-father-shot-sex-offender/)

Vladimir Sotelo-Urena is living on the streets where crime and drugs are rampant. Just two weeks ago he was stabbed. Earlier this night he saw a man use a large amount of meth and that man is now coming towards him. Sotelo-Urena thinks it may be the man who stabbed him earlier. Too afraid to flee, when the man gets close Sotelo-Urena stabs him and the man dies. A jury concludes that his mistaken belief that there was a threat to his safety was an honest but unreasonable belief. (People v. Sotelo-Urena, 4 Cal. App. 5th 732, 209 Cal. Rptr. 3d 259, 2016 Cal. App. https://caselaw.findlaw.com/ca-court-of-appeal/1752031.html).

Frank Stack has devoted his life to his two seriously disabled children. Now in his 80’s and with his health failing, fearing that their lives will be miserable from lack of love and care after his death, Stack kills them and then shoots himself. (Himmelman, Jeff. “Four Bodies in Elmhurst.” The New York Times. 2 Dec 2015.)
deserved punishment? Under most current law schemes, none of these offenders are entitled to a mitigation.\(^8\) (We will discuss later whether it is adequate to leave such cases to the ad hoc discretionary judgment of individual sentencing judges.\(^9\))

The cases above involve a wide range of emotions, including empathy, shame, religious fervor, and fear, as well as flashes of rage that might in some sense be provoked “heat of passion” but which fall outside of the requirements of the legal provocation mitigation. (For example, Joseph Druce had not himself been victimized by pedophile priest Geoghan, so could make no provocation claim.\(^10\))

And one can imagine a variety of other situations where some degree of mitigation might be appropriate for an offense driven by a different emotion, such as love (Brian Randolph robs a bank to get the money needed to pay for his daughter’s cancer treatments\(^11\)), despair (Frank Stack knows he is getting too old to care for his disabled adult children, so he kills them and attempts to kill himself\(^12\)), humiliation (recall Gounagias who killed the man who sodomized him and continues to taunt him\(^13\)), moral vigilante fervor (Angelo Parisi burns down

See also the cases of Ronald King: “One armed Pensioner Shot Wife With Dementia to end Suffering,”

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\(^8\) The prosecutors, judges, and juries involved in these cases no doubt intuitively understand that a mitigation is appropriate, so they often look for ways to avoid the laws failings, either through the exercise of discretion through jury nullification or no prosecution decision, or through trying to distort the law ought to avoid the obviously unjust result. For example, the trial court in the Judy Norman case agreed to give a jury instruction on voluntary manslaughter, although the Supreme Court of North Carolina later confirmed that there was no legal basis for such instruction (defendant Norman did not even qualify for the doctrine of imperfect self-defense). *State v. Norman*, 378 S.E.2d 8, 324 N.C. 253 (1989).

\(^9\) See Part III below (Questions 6 and 7).

\(^10\) See note 2 supra.


\(^13\) *State v. Gounagias*, 88 Wash. 304, 153 P. 9, 1915 Wash. LEXIS 1122. https://advance.lexis.com/search/?pdmfid=1000516&crid=a13ff749-d8a7-4007-812f-
an empty crack house to protect his neighborhood\textsuperscript{14}, frustration (after seeing him smirking in court and hearing during a break that he will probably be set free, Ellie Nessler shoots dead the man charged with molesting her son and for other boys\textsuperscript{15}, loyalty (out of loyalty to her husband, reinforced by her religious beliefs in such a duty of loyalty, Gisele Albertelli helps her husband with his book-making operation), and fear (having recently been attacked and stabbed, homeless Vladimir Sotelo-Urena stabs a man high on drugs who approaches him, mistakenly believing he is going to be attacked again\textsuperscript{16}). Yet current law recognizes a mitigation only for the narrow band of cases that qualify as provoked “heat of passion.”

Even for the classic provoked “heat of passion” cases, it seems clear that the traditional rules are much too limiting in defining when mitigation is deserved. Consider the famous \textit{Gounagias} case.\textsuperscript{17} In a small predominantly Greek community, the defendant, while immobilized in a drunken state, is forcibly sodomized by a companion who then spreads the report of Gounagias’ humiliation. Gounagias is mercilessly taunted about his victimization and becomes increasingly angry and desperate. After one particularly humiliating public taunting in the local bar, Gounagias goes home, gets his gun, storms to his victimizer’s house and shoots him dead. Despite the fact that his killing is clearly in heat of passion provoked by the conduct of others, no provocation mitigation is available to him. The forcible rape and taunting are ignored – not even admissible at trial – and Gounagias’ killing is to be treated as indistinguishable from the standard murder.

The circumstances triggering the killing are held to be legally irrelevant because they fail to meet several of the requirements for the traditional mitigation. First, a period of time passed between the sodomy and the killing that disqualifies Gounagias because the legal mitigation requires an immediate killing in response to the provocation without any “cooling time.” Further, the immediate provoking incident – the public taunting at the local bar (which is not barred by the “cooling time” rule) disqualifies him because he does not kill the provokers (those taunting him). Gounagias is given a sentence of life imprisonment at hard labor and dies in prison.

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\textsuperscript{16} See note 6 supra.

\textsuperscript{17} See note 12 supra.
Even the 1962 Model Penal Code drafters, citing the Gounagias case as an example,\(^\text{18}\) saw the injustice of the provocation mitigation limitations and recommended a broader formulation. Their mitigation from murder to manslaughter was available without regard to “cooling time” nor limited to killings of the immediate provoker, nor even limited to cases of “heat of passion.” Instead, the mitigation was broadened to be available whenever an offender killed “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”\(^\text{19}\) Under this broader formulation, all that is required is that the murder be committed under extreme emotional disturbance for which there is a reasonable explanation or excuse and the “reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”\(^\text{20}\) Unfortunately, only 10 of the 51 American criminal codes have adopted this broader formulation.\(^\text{21}\) The overwhelming majority continue to follow some form of the traditional provocation mitigation.\(^\text{22}\)

But it is argued here that even the Model Penal Code’s extreme emotional disturbance mitigation is too narrow and that the principle of blameworthiness-punishment proportionality demands a more universal emotion-based mitigation.

2. Should an emotion-based mitigation be limited to cases of murder?

Clearly, the effect of the provocation mitigation (and the broader “extreme emotional disturbance” mitigation) is substantial. Under the Model Penal Code, downgrading murder to manslaughter may be the difference between life (or death) and imprisonment for 10 to 15 years.\(^\text{23}\) But if emotional disturbance can so dramatically mitigate criminal liability in homicide cases why shouldn’t the code recognize a parallel mitigation for other serious offenses. For example, in any case in which the offender would be eligible for a provocation mitigation if the victim dies but where, luckily, the victim does not die, why shouldn’t a mitigation still be available? Aggravated assault is a serious offense with a serious penalty. Under the Model Code, for example, it is a second-degree felony,\(^\text{24}\) carrying the same penalty as manslaughter. If the same mitigating circumstances exist, why shouldn’t a comparable mitigation in punishment be available in cases where the victim does not die?

Before the advent of modern criminal codes, one might have argued that there were practical challenges to broadening a mitigation beyond the most serious offense of murder. Criminal code offense grading categories reflected only broad punishment differences, too large to capture the sometimes minor adjustment called for by an emotion-based mitigation. But nearly all modern codes today use a scheme of offense grading categories significantly more nuanced than the three degrees the felony and one degree of misdemeanor plus petty misdemeanor found in the Model Penal Code. Most modern codes have more than a dozen

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\(^\text{18}\) Model Penal Code §210.3 comment at p. 59 (1980).
\(^\text{19}\) Model Penal Code Section 210.3(1)(b).
\(^\text{20}\) Id.
\(^\text{21}\) See authorities collected at Robinson & Williams, Mapping American Criminal Law: Variations across the 50 States, Chapter 5 (2018).
\(^\text{22}\) For a discussion of the variations among those states, see id.
\(^\text{23}\) Under the Model Penal Code, for example, murder is a first degree felony punishable with a maximum sentence of not more than 20 years or life, while manslaughter is a second-degree felony with a maximum sentence of not more than 10 years. Model Penal Code section 6.06.
\(^\text{24}\) Model Penal Code section 211.1(2)(a).
offense grading categories. (The offense grading categories are usually defined exponentially, so an increase in one grade doubles the maximum punishment while a decrease in one grade halves the maximum punishment.)

Further, even without relying upon an offense grading schemes, one could create a universal mitigation by providing, for example, a 25 percent reduction in maximum sentence, or some other percentage reduction.

Thus, a general emotion-based mitigation that applies to all felonies, for example, is both necessary to satisfy the blameworthiness-punishment proportionality principle and is feasible using modern criminal code drafting techniques.

The challenge then is to sort out what principles ought to govern an emotion-based mitigation.

II. OPERATING PRINCIPLES

The common wisdom reflected in the popular press as well as some of the legal case law suggests that an emotion-based mitigation, such as provoked heat of passion, is given because at the time of the offense the defendant is “out-of-control.” As one writer explains, “Under the traditional view, emotions ‘happen’ to a person. They occur without being willed and tend to overwhelm all that we would will; they destroy rationality and responsibility.”

In reality, persons acting even in highly emotional states do continue to have control over their conduct. Even the person provoked by an outrageous situation and who kills in “heat of passion” retains the ability to simply swallow his anger and avoid the killing. “The traditional view . . . represents a fundamental misconception about emotion. Although there are significant obstacles to emotive self-control, self-control is possible.” However, conceding that an offense committed in a severe emotional state is still the responsibility of the offender does not necessarily undermine the arguments for giving an emotion-based mitigation. Yes, the offender has a moral obligation to control his actions and yes, the offender remains morally responsible for his offense conduct, but that only explains why it is that emotional states properly do not give rise to a complete defense. It is still accurate to say that an actor under extreme emotional disturbance finds it more difficult to remain law-abiding than a person who commits the identical offense without suffering any sort of emotional disturbance. The provocation mitigation serves to distinguish a special subset of intentional killings from the typical murder in the degree of blameworthiness of the offender.

The question then becomes not whether the emotion caused the offender to be “out of control” at the time of the offense but rather whether the emotional disturbance at the time of the offense makes the offender noticeably less blameworthy than an offender committing the same offense without the emotional disturbance. Gounagias flies into a rage after being publicly taunted about his earlier sodomy victimization. His anger and humiliation make him desperate to kill his victimizer. It is within his ability to exercise restraint, and we would certainly prefer that he does, but when he fails to do so his emotional state and the circumstances that caused it meaningfully distinguish him from the person who kills with no such provoking circumstance.

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26 Pillsbury, id.
What is it, then, that determines whether a particular emotional state at the time of a particular offense caused by a particular emotion-inducing situation will sufficiently distinguish an offender from other offenders committing the same offense without the emotional state, so as to merit giving this offender a mitigation?

It turns out that this is a significantly more complex and nuanced issue than the apparently simple question of whether the offender acted in the “heat of passion.” Indeed, it is more complex and nuanced even then the model Penal Code formulation under which an offender can get a mitigation to manslaughter if he killed “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” What constitutes a “reasonable explanation or excuse”?

It is suggested here that there are at least three distinct assessments that must be made in deciding whether an emotional offender is entitled to a mitigation. As shorthand, they might be referred to as the physiological inquiry – what is the offender feeling? – the personal choice inquiry – is his emotional reaction understandable given the situation and who he is? – and the normative inquiry – would giving him a mitigation seriously offend existing community norms?

3. The Physiological Inquiry: What was the extent of the emotion’s internal pressure on the offender to commit the offense, and was it sufficiently high that the offender might properly be eligible for a mitigation?

Talking about the degree of internal pressure is simply a way of talking about how difficult it would have been for the offender to have resisted the emotional push to commit the offense. It is difficult to judge such matters, of course, given their strictly internal nature, but when decision-makers seek to judge such things it would not be surprising to see them focus upon the apparent strength of the emotional disturbance. Does the offender seem to be in an apparently “out-of-control” rage where it might not even matter if there was a police officer watching him? Or, is the offender showing signs of extreme emotional disturbance driving his conduct but showing something less than an apparently out-of-control rage? Or, perhaps the effect of the emotion is not to create any external sign of disturbance at all but rather to simply create an internal motivation to commit the offense.

Consider some examples of these contrasting emotional states: rage, disturbance, and motivation. As Darla Jackson is driving on a California freeway, a man on a Ducati motorcycle gets in front of her. She aggressively engages the man, tailgating him then dangerously passing him. When traffic slows, he comes up next to her, and kicks her car. As the Ducati exits the highway, she follows him. She accelerates her car to 93 mph and drives into him, throwing him 300 feet to his death. Jackson seems to have snapped, into an out-of-control rage.

27 Model Penal Code Section 210.3(1)(b).
Joe Stack has had ongoing disputes with the IRS for more than twenty-years. His frustration builds with each audit. When it is clear that he is going to lose one more round with the IRS, he decides the only way to change the system is to up the “body-count.” He sets his own home on fire and then flies his personal plane into an IRS building, killing an IRS agent are killed.\(^{29}\) Clearly, Stack is frustrated and angry. But the time of the offense, after much brooding and planning, he seems more emotionally disturbed than in an out-of-control rage.

Recall the case of Rodolfo Linares,\(^{30}\) whose religious family fears that the infant faces a life of suffering and loneliness in a while being kept alive in a distant warehouse facility, holds hospital workers at bay with a gun after he disconnects life-support machines and cradles his baby while it expires, then surrenders to hospital security. There is no indication at the time of the offense that Linares is acting in an emotionally disturbed state. He has a plan and calmly carries it out. The empathetic emotions that drive the offense seem to operate simply by providing a motivation for his conduct.

If one followed the common law provocation heat of passion rule, only a rage case would be eligible for mitigation; disturbance and motivation cases would not be. (Jackson, the rage case above, would not even be ineligible for the common-law mitigation.\(^{31}\) On the other hand, the Model Penal Code drafters have made a good case for providing a mitigation to some disturbance cases, such as the Gounagias case discussed above,\(^{32}\) deserve mitigation. And one can imagine a variety of other disturbance cases (without rage) that might also deserve mitigation.

Recall the case of Joseph Druce,\(^{33}\) a victim of child sexual abuse, who overhears Father John Geoghan, a pedophile priest with scores of victims, on the phone planning how upon his release he will move to South America to regain access to young boys. Druce finds a way to kill the closely-guarded priest.

Ronald King has been happily married for 50 some years but must watch his beloved but demented wife diminish in a care facility. For the week of Christmas, King moves into the care facility to spend the holidays with her. He sees what her days are like. He sees a woman who is no longer his beloved wife, but a body where the wife once was. His anxiety over what he believes to be her enormous suffering consumes him. As it comes time for him to leave, he eats breakfast with her, then shoots her in the head. Shaking uncontrollably, he walks into the lobby to kill himself but is disarmed before he can do so.\(^{34}\)

It is an interesting open question as to whether a mitigation ought to be available even in some non-disturbance cases – that is, cases where the effect of the emotion is solely to provide a motivation for the criminal conduct, without the attendant emotional disturbance at the time of the offense. Angelo “Butch” Parisi lives in a Detroit neighborhood being ravaged by the crack epidemic. Despite repeated pleas from the neighborhood to the police to at least close the local crackhouse, nothing it is done. With money provided by his neighbors Parisi buys

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\(^{29}\) See note 6 supra.

\(^{30}\) See note 1 supra.

\(^{31}\) The provoking event by the motorcyclist is not on the list of factors that can trigger the mitigation.

\(^{32}\) See note 11 supra.

\(^{33}\) See note 2 supra.

\(^{34}\) See note 6 supra.
gas and burns down the local crack house.\textsuperscript{35} Also, recall the case of Rodolfo Linares,\textsuperscript{36} who held hospital staff at bay with a gun while he cradles his infant son as he expires. For another example, recall the case of the Schaibles,\textsuperscript{37} who desperately love their baby but because of their religious fervor allow him to die of treatable pneumonia, what they see is an earthly sacrifice they must make for God.

One might conclude that there is no fixed minimum level of rage or disturbance required for a mitigation but that the greater the offender’s difficulty in resisting the emotional push – rage versus disturbance versus motivation – the greater the chance of mitigation depending upon the additional factors discussed below (the personal choice inquiry and the normative inquiry).

4. The Personal Choice Inquiry: Was the offender’s emotional reaction to the situation understandable?

Not every emotion-driven act, even if done in a state of extreme rage, will reduce the actor’s blameworthiness. That blameworthiness judgment requires in addition some kind of assessment of whether the emotional reaction makes sense given the circumstances. Given who the offender is and the situation at hand, does his or her emotional reaction to the situation make sense, or does it seem extreme or inexplicable?

The Model Code requires in its mitigation of murder to manslaughter that there be “a reasonable explanation or excuse” for the emotional state. We can’t require that the “reasonable person” would have reacted to the situation as the offender did, for if that were the case, the offender would seem to be entitled to a complete excuse. Instead, the inquiry must be more modest. It must ask whether the emotional state, while perhaps genuine in that the offender really was feeling that way (it is not fake or pretend), may be a highly uncommon and even inexplicable reaction to the situation. If the offender’s emotional reaction is silly or absurd, if ordinary people simply don’t act that way, then the defendant’s emotional reaction may be ineligible for a mitigation. We would be inclined to say instead that the person “grossly overreacted” or “should have gotten their emotions under control” or some other assessment that treats the driving emotion as a product of a selfish choice rather than an understandable reaction.

Instances of emotional reactions that seem excessive in degree appear in all types of emotions. Mary Konye is \textit{jealous} of her friend’s beauty. Her friend frequently insults Konye and preens her own better looks. After one insult too many, Konye reacts by throwing acid in her friend’s face.\textsuperscript{38} Jane Andrews feels \textit{humiliated} when her dreams of an upper-class life are

\begin{footnotes}
\item[35] See supra note 13 (Parisi is arrested and charged but, in an act of grand jury nullification, the grand jury refuses to indict him.)
\item[36] See note 1 supra.
\item[37] See note 4 supra.
\end{footnotes}
dashed because her socially-prominent boyfriend decides to call off their wedding. She bludgeons him to death.\cite{39} Charles Smith finds that he cannot perform sexually with his girlfriend Tonya Bundick. However, the pair find that they can relieve their enormous sexual frustration by becoming serial arsonists.\cite{40} Amy Bishop, a Harvard-trained researcher with a high opinion of her genius is denied tenure. She shoots six of her colleagues, three of whom die.\cite{41}

A fair assessment of the understandability of the emotional reaction may require an examination of more than the immediate situation. For example, it might include an assessment of the offender's history. A wife who has been regularly beaten by her drunken husband may be given much greater latitude in keeping control of her emotions that drive her to kill him. In contrast, a history of rage attacks may give another offender less latitude, and instead a much greater obligation to control his anger, on the theory that his prior conduct has put him on notice that some retraining and reform is required.

In other words, there is not only a continuum of the degree of disturbance to be taken into account, as discussed above – rage versus disturbance versus motivation – but also a continuum of the predictability or at least the understandability of the emotional state. Ultimately, a just assessment must include an inquiry into how well the defendant did in restraining himself or herself from acting upon the internal emotional pressure toward committing the offense, taking all relevant circumstances into account (the personal choice inquiry).

5. The Normative Inquiry: Would giving the offender a mitigation seriously undermine existing community values? Or is the emotion something that the community normally approves or at least accepts and tolerates?

Even if the offender’s emotional reaction created instant and enormous pressures to commit the offense and even if that reaction is not only understandable but even predictable for this offender in this situation, the availability of a mitigation will still depend upon community judgments about the propriety of such an emotional reaction. If the offender’s reaction offends community values, a mitigation would be inappropriate as it might tend to undermine the abhorrence that the community seeks to signal about such an emotional

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reaction. (And, in any case, such a mitigation would be blocked by a decision-maker reflecting community views as a matter of nullification if need be.) A genuinely strong and predictable emotional reaction based upon racial hatred or homophobia, for example, could not earn a mitigation without seeming to give some legitimacy to the hateful attitudes at the root of the emotional reaction. Jeremy Christian boards a commuter train and begins to harangue a pair of teen-aged girls wearing hijab. He spews hateful remarks at the girls and when some passengers come to the girls’ aid, Christian kills the men.42

On the other hand, some positive emotions seem so appealing that one might be tempted to give them special treatment – perhaps allowing these special positive emotions to provide a mitigation when more neutral emotions in the same situation might not. When he is 17, Jose Ferreira accidentally kills a 16 year-old girl. Some 30 years later, overwhelmed by his sense of remorse, he turns himself in.43 Brian Randolph’s baby daughter Brialynn requires medical treatment that Randolph can no longer afford. Out of love for his daughter, Randolph robs a bank so his baby’s needed treatment can continue.44 And recall the case of Rodolfo Linares, whose empathy for his brain-dead son leads him to disconnect the life-support equipment then surrender to police.45

That is, the normative assessment of the offender’s emotion can also operate on a sliding-scale, in which offenders driven by positive emotions, such as empathy or love or remorse, may be given some greater leeway in getting a mitigation while offenders driven by negative or more neutral emotions may be given less leeway. One might argue, for example, that some positive emotions might provide a mitigation in motivation-only cases, while allowing other more neutral motivations only for criminal conduct performed under extreme emotional disturbance or rage.46

44 See note 10 supra.
45 See note 1 supra.
46 Alternatively, or perhaps additionally, the valence of the emotion – whether it is negative, positive, or neutral – may affect our judgment about whether the emotion is an understandable reaction to the situation, whether the
III. IMPLEMENTATION

To summarize, then, perhaps the principles that ought to govern an emotion-based mitigation include an assessment of the extent of the internal disturbance pushing toward the offense (the physiological inquiry), the understandability of the offender’s emotional reaction to the situation (the personal choice inquiry), and the degree of community approval or disapproval of the emotion (the normative inquiry). How might a general mitigation based on these factors be implemented?

6. Should such a mitigation be decided by a judge in the exercise of broad sentencing discretion, or should it be codified to provide a common analytic structure for all decision-makers, including juries?

With the exception of the provocation mitigation from murder to manslaughter, any emotion-based mitigation today is typically decided by judges in the exercise of broad sentencing discretion. But that standard practice ought to be seen as problematic for a number of reasons.

First, a codified mitigation provision can provide greater uniformity in application than an uncodified principal left to the discretion of individual sentencing judges. Emotions are issues on which most people have some kind of intuitive judgments but, especially without the framework of some kind of analytic structure, different people’s intuitions may play out differently in a case if for no other reason than that different people may focus on different facts. Only a codified mitigation provision can set each decision-maker with the same task and orientation.

Second, our demands for greater nuance in matching the proportionality of the punishment to the blameworthiness of the offense has increased dramatically over the last half-century. The three degrees of felonies and one degree of misdemeanor plus petty misdemeanor reflected in the 1962 Model Penal Code grading scheme47 have been replaced with two or three times as many offense grades. And sentencing guidelines have gone even further, as with the fifty-two levels of the United States Sentencing Commission Guidelines. Thus, the gross approximations that an uncodified principal might provide could have satisfied an earlier era but are inadequate today.

Third, an emotion-based mitigation is the classic kind of normative judgment decision that requires a jury rather than an individual sentencing judge. As I have detailed elsewhere,48 if the primary goal of the criminal justice system is to do justice (rather than preventively detaining potential offenders), then a jury is better suited than a judge to perform this normative task because they better represent community judgments of justice and because groups tend to do better at decisions involving judgments or valuations and are better at taking multiple factors into account. Further, jury decision-making on these issues will improve the offender has done enough to control his or her emotion – the personal choice inquiry discussed above. That is, for negative emotions, we may create an absolute demand that people hold this emotion in check no matter what.

system’s reputation with the community for being just, and such increased moral credibility can have significant crime-control benefits.49

Fourth, there are good reasons to argue that any factor that can have a significant effect on punishment ought to be determined by a jury rather than by the discretionary judgment of a judge. Indeed, the strong trend is toward having more jury participation in determining the facts that affect punishment, not less. In Apprendi v. New Jersey the Supreme Court held that “every defendant has the right to insist that the prosecutor proved to a jury all facts legally essential to the punishment,”50 and the Court has carried forward this view in other cases.51

Finally, part of the value in having a codified provision is that it requires a principled analysis of what the contours of the mitigation should be. A collection of case opinions can provide a partial set of rules, but unlike an appellate judge dealing with the case before it, a code drafter must provide a universal rule that will apply to all cases, and that kind of drafting simply cannot be done without first elucidating the underlying governing principle. Development of such a principal is a significant and challenging analytic task, of course, well beyond what is realistic to expect of an individual sentencing judge or even a panel of appellate judges deciding an individual case.

7. If one were to accept the principles of mitigation proposed here for emotion-driven offenses, what kind of statutory codification would best guide jurors and judges in assessing criminal liability and punishment in such cases?

A draft provision might look something like the following:

**Mitigation for an Emotion-Driven Offense**

(1) An offender may be eligible for a mitigation in the degree of liability or punishment for an offense if:

   (a) at the time of the offense the offender’s emotional reaction to the situation:

      (i) made it [extremely] difficult for the offender to resist committing the offense, and

      (ii) was understandable given the situation and his or her capacity to deal with it, and

   (b) giving a mitigation would not undermine community values.

(2) Where the jury determines that a substantial mitigation is appropriate, it may reduce the grade of the offense by one grade. Otherwise, it may leave the extent of the mitigation to the judgement of the court.

(3) Nothing in this provision shall preclude the court from mitigating an offender's punishment in any way authorized by law.

As section (3) confirms, the proposal here is not one that takes away a sentencing judge’s ability to provide a mitigation but rather one that creates an

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additional ability in the jury to insist that a mitigation be provided.\footnote{For those concerned that such a system might give rise to too many jury compromise verdicts. Understand that this kind of compromise might be more attractive than the current system, which can force two unattractive choices on a jury that can make jury determination very unpredictable and unsatisfying. It is in both sides interests to have a system that allows the jury to best approximates the proper proportionality of criminal liability and punishment to the defendant’s blameworthiness.} If after some considerable experience with the codified mitigation, one came to have confidence that juries could reliably and consistently perform the mitigation assessment function, one could dispense with section (3).

An objection one might make to this formulation is that it seems to use quite open-ended criteria. The decision-maker is left to decide: (1) how difficult it was for the offender to resist committing the offense and how difficult is enough to make the offender eligible for mitigation, (2) how understandable the offender’s emotional reaction is to the situation and whether that reaction is understandable enough to make the offender eligible for mitigation, and (3) whether giving the mitigation would undermine community values and whether they would undermine them enough to render the offender ineligible for mitigation. And the decision-maker is then to take all three of these factors into account in ultimately deciding whether a mitigation is appropriate or not. Clearly, this decisional process relies heavily upon the decision-makers’ judgments of justice that may in many respects be largely intuitive rather than analytic.

However, the complexity of the justice judgment being requested here ought not be a concern. As I have demonstrated elsewhere,\footnote{See IJUD chs. 1 & 2.} ordinary people across demographics have very nuanced and sophisticated judgments of justice. Even small changes in facts can produce predictable changes in assessments of deserved liability and punishment. In other words, jurors do have the expertise to make these judgments.

One might object to the formulation on the grounds that the legality principle generally prefers more specific and objective liability and punishment criteria. However, as I have discussed elsewhere,\footnote{Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 University of Pennsylvania Law Review 335-398 (2005); Robinson, Structure and Function in Criminal xx Law, chs. 10 & 11 (Clarendon, Oxford 1997).} there are two kinds of legality and the drafting demands for the ex ante rules of conduct are quite different than those for the ex post adjudication of violations. If a criminal code is to have any hope of capturing our complex judgments about mitigation and excuse in the adjudication of violations, it must rely upon more subjective and complex standards rather than specific objective rules.

That truth is reflected in the old common-law formulations – what exactly constitutes “heat of passion”? – but even more dramatically is a staple of modern criminal codes. How much disturbance is enough to satisfy the “extreme emotional disturbance” requirement of the Model Penal Code’s mitigation of murder to manslaughter? How much loss of capacity is enough for an offender to meet the Model Code’s insanity requirement that the offender “lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law”? (The same open-ended languages used in the Model Code’s involuntary intoxication excuse.) The Model Code’s duress excuse is available if “a person of
reasonable firmness in [the actor’s] situation would have been unable to resist.” Or consider the Model Code’s de minimis infraction defense, which allows a dismissal if the defendant’s violation was “too trivial to warrant the condemnation of conviction.” How trivial is too trivial?

Even the culpability requirements that apply to every offense definition in the Special Part of the code depend upon the decision-maker’s complex judgments of justice. For example, a person is reckless with respect to a material element only if he disregards a “substantial risk” that the element exists or will result from his conduct. How substantial is substantial enough? Further, the risk must be of such a nature that its disregard involves “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” How much of a deviation is sufficiently gross to constitute recklessness, and how would a law-abiding person react to the actor’s situation? These and dozens of other code provisions present decision-makers with open-ended and complex judgments about what is just in that situation.55

In other words, it is simply impossible for a criminal code to avoid open-ended standards in judging an offender’s blameworthiness, and any code that attempts to do so is destined to perform that blameworthiness adjudication badly. What a criminal code can and should do is to tell the decision-maker the particular factors that he or she should focus upon and to provide a decisional structure that shows the interrelation among those factors – that gives the decision-maker a way to think about the complex issue. The formulation above provides that general guidance and avoids using specific objective criteria that could distort the decision-maker’s judgment of justice.

Further, notice that all of the above examples of existing statutory language that use open-ended standards concern higher stakes than the mitigation provision proposed here. In those examples the issue is commonly whether the defendant shall be held criminally liable at all. Under the proposed general mitigation provision, the only question is whether an offender held criminally liable shall be entitled to a mitigation of one offense grade or less.

IV. SUMMARY AND CONCLUSION

It has been argued here that the narrow provoked “heat of passion” mitigation available under current law ought to be significantly expanded to include not just murder but all felonies and not just “heat of passion” but potentially all emotions. The mitigation would be limited, however, to those instances in which the jury finds that a mitigation is deserved upon taking account of the extent of the internal pressure to commit the offense (the physiological inquiry), the extent of the offender’s efforts to resist that pressure (the personal choice inquiry), and the effect of giving such a mitigation on community values (the normative inquiry). The codified general mitigation provision is proposed. It would be applied by juries but would not from preempt any mitigation that a judge could otherwise lawfully give.

Recognition of such a general mitigation would play a fundamental role in building the criminal law’s moral credibility with the community it governs. Whether it is given by a trial jury or instead influences plea negotiations that track predictions about what would happen at trial, it can give the community some greater confidence that the criminal justice system is seriously

55 For other examples, see IJUD, ch. 6B (pp. 104-108).
committed to setting deserved punishment in strict proportion to an offender’s blameworthiness. And, as I have argued elsewhere,\textsuperscript{56} such increased moral credibility can significantly increase the system’s crime-control effectiveness.

\textsuperscript{56} See IJUD chapters 8 and 9.