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## **A General Mitigation for Disturbance-Driven Crimes? Psychic State, Personal Choice, and Normative Inquiries**

Paul H. Robinson\*

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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 punishment,<sup>1</sup> 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**

Current law allows a mitigation from murder to manslaughter for a provoked killing done in heat of passion. Should an emotion mitigation be available more broadly? In what instances should it 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 her attacker as he is leaving the scene. The defendant kills his spouse, or her lover, or both, upon finding them in bed together. Upon hearing that his child was victimized, the defendant rushes off to kill the victimizer. In each case, one can argue 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:

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.<sup>2</sup> 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.<sup>3</sup>

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 Vaughn does nothing. She does not clean up the mess or touch the baby. Hours tick by and the baby is uncared for and unacknowledged. Before anyone else learns what has happened, the baby dies.<sup>4</sup> Vaughn's conduct is very wrong, of course, but is her degree of blameworthiness and deserved punishment the same as one who kills for greed or selfishness?

The Schaibles are extremely devoted to their belief that an all-powerful God is not to be doubted. When a son is born, they are delighted. When the infant becomes ill, they pray for his return to health. Reaching out to their religious community, all members join in praying earnestly for the child's recovery. The parents 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.<sup>5</sup>

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.<sup>6</sup>

These are just a few examples of a wide array of cases in which many people will see the emotion-driven offense as deserving of mitigation.<sup>7</sup> Yet, under most current law schemes, none of these offenders are entitled to a mitigation.<sup>8</sup> (We will discuss later whether it is adequate to leave such cases to the ad hoc discretionary judgment of individual sentencing judges.<sup>9</sup>) Many will be denied because the offense is driven by some emotion other than the “heat of passion.” In the examples above we can see the emotions of empathy, shame, religious fervor, and fear at work. (And where “heat of passion” is present it falls outside the requirements of the

traditional provocation mitigation. For example, Joseph Druce had not himself been victimized by pedophile priest Geoghan so was ineligible for the traditional mitigation.<sup>10</sup>)

And one can imagine a variety of other situations where some degree of mitigation might be appropriate for an offense driven by an emotion other than “heat of passion”: 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<sup>11</sup>), love (Brian Randolph robs a bank to get the money needed to pay for his daughter’s cancer treatments<sup>12</sup>), moral vigilante fervor (Angelo Parisi burns down an empty crack house to protect his neighborhood<sup>13</sup>), 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<sup>14</sup>), 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<sup>15</sup>). 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 too limiting in defining when mitigation is deserved. Consider the famous *Gounagias* case.<sup>16</sup> 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.

Even the 1962 Model Penal Code drafters, citing the *Gounagias* case as an example,<sup>17</sup> 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.”<sup>18</sup> Under this broader formulation, 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.”<sup>19</sup> Unfortunately, only ten of the fifty-two American criminal codes have adopted this broader formulation.<sup>20</sup> The overwhelming majority continue to follow some form of the traditional provocation mitigation.<sup>21</sup>

It is argued here that even the Model Penal Code's extreme emotional disturbance mitigation is too narrow in some respects and that the principle of blameworthiness-punishment proportionality demands a more universal disturbance-based mitigation.

## **2. Should a disturbance-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.<sup>22</sup> 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,<sup>23</sup> carrying the same penalty as manslaughter. If the same mitigating circumstances exist, why shouldn't a comparable mitigation in punishment to the next lower offense grade 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 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 scheme, one could create a universal mitigation by providing, for example, a twenty-five percent reduction in maximum sentence, or some other percentage reduction.

Thus, a general disturbance-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 a disturbance-based mitigation.

## **II. OPERATING PRINCIPLES**

The common wisdom reflected in the popular press as well as some of the legal case law suggests that a disturbance-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."<sup>24</sup>

In reality, persons acting even in a state of extreme mental or emotional disturbance 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.”<sup>25</sup>

However, conceding that an offense committed in a state of severe mental or emotional disturbance is still the responsibility of the offender does not necessarily undermine the arguments for giving a disturbance-based mitigation. Yes, the offender has a moral obligation to control his actions and yes, the offender remains morally responsible for what he does, but that only explains why it is that his extremely disturbed state (properly) does not give rise to a complete defense. It is still accurate to say that an actor under mental or emotional disturbance may find it *more difficult* to remain law-abiding than a person who commits the identical offense without suffering any sort of mental or 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 mental or emotional disturbance caused the offender to be “out of control” at the time of the offense but rather whether the disturbance at the time of the offense makes the offender *noticeably less blameworthy than an offender committing the same offense without the disturbance*. Gounagias flies into a rage after being publicly taunted about his earlier sodomy victimization. His humiliation and resulting anger 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 provoked disturbance.

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

It turns out that this is a significantly more nuanced issue than the apparently simple question of whether the offender acted in the “heat of passion.” Indeed, it is more nuanced even than 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.”<sup>26</sup>

It is suggested here that there are at least three distinct inquiries that must be made in deciding whether an offender is entitled to a mitigation. As shorthand, they might be referred to as the *psychic state* inquiry – to what extent was the offender acting under the influence of mental or emotional disturbance at the time the offense? – the *personal choice* inquiry – given the offender’s circumstances and capacities, to what extent could we have expected the offender to have resisted committing the offense? – and the *normative* inquiry – to what extent would giving the offender a mitigation specially undermine community norms?

### **3. The Psychic State Inquiry: To what extent was the offender acting under the influence of mental or emotional disturbance at the time the offense?**

It is easy enough to see that there is a continuum of the extent to which an offender may be disturbed or upset at the time of the offense. He may be in an extreme rage that may

seem to an outsider as if he is “out-of-control.” Or, the offender may be seriously disturbed, albeit something short of a wild rage. Or, the offender may seem simply upset; that is, he may seem thoughtful and rational yet his internal upset may seem to be motivating him to commit an offense that he otherwise would not commit.

Consider some examples of these contrasting levels of mental or emotional disturbance – enraged, disturbed, and upset. 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.<sup>27</sup> Jackson seems to have snapped, into an out-of-control *rage*.

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.<sup>28</sup> Clearly, Stack is frustrated and angry. But at 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,<sup>29</sup> whose religious family fears that their infant faces a life of suffering and loneliness while being kept alive in a distant warehouse facility. He 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 a particularly disturbed state. He has a plan and calmly carries it out. The empathetic emotions that drive the offense certainly have *upset* him but seem to operate simply by providing an internal 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 upset cases would not be.<sup>30</sup> 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 Joe Stack case above. And one can imagine a variety of other disturbance cases (short of rage) that might also deserve mitigation:

Recall the case of Joseph Druce,<sup>31</sup> 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 fifty 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.<sup>32</sup> Neither of these are “rage” cases; but both seem to involve “disturbance” that might deserve mitigation.

It is an interesting question as to whether a mitigation ought to be available even in some cases of simple upset – that is, cases where the effect of the upset is simply to provide a motivation for the criminal conduct, without any significant outward sign of *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 gas and burns down the local crack house.<sup>33</sup> Also, recall the case of the Schaibles,<sup>34</sup> 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 extent of the disturbance or upset, the greater the chance of a mitigation depending upon the additional factors (discussed below): the personal choice inquiry and the normative inquiry.

#### **4. The Personal Choice Inquiry: Given the offender's situation and capacities, to what extent can one understand why the offender failed to restrain him or herself from committing the offense?**

Not every disturbance-driven act, even if done in a state of extreme rage, will reduce the actor's blameworthiness. That blameworthiness judgment requires an assessment of whether, given the offender's circumstances and capacities, his reaction to the situation makes sense or was at least understandable. Or, alternatively, whether we think the offender's reaction was extreme or inexplicable – she just “let herself go” in a way that showed inexcusable indifference to the wrong she was committing. Do we think the offender should have made some greater effort to restrain himself against committing the offense, to such an extent that she deserves no mitigation?

We can't require that the offender have acted as the “reasonable person” would have acted in the situation, for if that were the case, the offender would seem to be entitled to a complete excuse. Instead, the inquiry here is more modest. Even if the psychic state is genuine and dramatic – the offender really is feeling driven to commit the offense (the feeling is not fake or pretend) – if the offender's reaction is silly or absurd, if ordinary people simply wouldn't act that way even in the actor's difficult situation, then the offender may be ineligible for a mitigation. In such cases, 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 offense as a product of a selfish choice rather than an understandable (if disappointing) reaction to a difficult situation.

Instances of reactions that seem excessive in degree appear in the context of all types of emotions. Mary Konye is *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.<sup>35</sup> Jane Andrews feels *humiliated* when her dreams of an upper-class life are dashed because her socially-prominent boyfriend decides to call off their wedding. She bludgeons him to death.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> It seems doubtful that any of these actors deserve a mitigation for their emotion-driven crimes. A fair assessment of the understandability of the 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.

It may also be important to take account of the nature of the stimulus. For example, as a psychologist might explain, there is a difference between what might be called fast and slow emotions. A fast emotion, such as fear, operates almost instantly and may involve almost exclusively the autonomic nervous system. A slow emotion, such as love, can involve a good deal of cognitive processing. The resulting effect of the emotion may be the same, in terms of rage versus disturbance versus upset, but whether the emotion in the case is one that acts fast or slow may make a difference to the personal choice inquiry. People may have less expectation that a person can successfully resist acting on a fast emotion, such as fear, yet have greater expectation that a person should be more able to resist acting on a slow emotion, such as love.

In other words, there is not only a continuum of the degree of disturbance to be taken into account as part of the psychic state inquiry – rage versus disturbance versus upset – but also a continuum of the understandability of the offender’s reaction to the situation as part of the personal choice inquiry.

The Model Code requires in its mitigation of murder to manslaughter that the killing is done under the influence of “extreme mental or emotional disturbance for which there is reasonable explanation or excuse.” That is, the Code requires a reasonable explanation *for having the mental or emotional disturbance*. But that is not the relevant issue. The important question is whether, given the extent of the disturbance and given the offender’s circumstances and capacities, how we judge the offender’s *failure to resist committing the offense*?

The Model Code’s formulation conflates the psychic state inquiry and the personal choice inquiry, in ways that are at once both too broad and too narrow. By limiting the mitigation to “extreme mental or emotional disturbance” it would seem to provide too narrow mitigation by excluding all cases where the offense is driven by disturbance or upset that is not “extreme.”

At the same time, the formulation may be too broad and would seem to allow mitigation whenever there is “a reasonable explanation or excuse” *for the extreme mental or emotional disturbance*. We may well understand why the offender is extremely disturbed yet nonetheless feel that the offense contemplated was so serious that, under the circumstances, the offender should have made a more serious effort to resist it. Many of the cases *undeserving* of mitigations, such as those listed immediately above,<sup>39</sup> are cases in which we can understand *why the offender is extremely disturbed* (as the Model Code requires) but nonetheless feel that, even given that disturbance, the offender should have done more to have resisted committing the offense and thus is not entitled to mitigation.

It is entirely understandable that Mary Konye is outraged by her friend’s regular insults, but throwing acid in her friend’s face is something that she nonetheless should have restrained herself from doing. It makes perfect sense that Jane Andrews feels humiliated when her socially-prominent boyfriend cancels their wedding, but we think that she nonetheless should have resisted bludgeoning him to death. It is entirely believable that Amy Bishop is outraged at having been denied tenure, but we think she nonetheless should have resisted shooting her six colleagues.

It seems likely that our judgments about what should be expected of a disturbed or upset offender will vary according to the seriousness of the offense contemplated. The more

serious the offense, the more we would expect even an enraged offender to get himself under control to avoid the offense. For example, we may have some hesitation about giving Lenkerd a mitigation when out of disgust she shoots at a young man trying to have sex with the neighbor's dog but we might be less concerned if instead of shooting she threw a rolling pin or a frying pan.<sup>40</sup>

The larger point is that the Model Penal Code formulation simply does not recognize that two separate inquiries – the psychic state inquiry and the personal choice inquiry – must be separately investigated and satisfied. This failure to recognize these distinct inquiries results in a formulation so open-ended that it may well account for why the Model Code's formulation was rejected by the vast majority of jurisdictions. Its unpopularity also may stem from its failure to appreciate the need to investigate a third factor, the normative inquiry.

**5. The Normative Inquiry: To what extent would giving the offender a mitigation specially undermine community norms? Or, is giving the mitigation something that would reinforce positive community norms?**

Even if the offender is seriously enraged and even if that reaction is understandable given the offender, his circumstances, and his capacities, the availability of a mitigation ought to still take into account community norms. If giving a mitigation to the offender would be taken as legitimizing or approving a norm that the community finds abhorrent, then it may be appropriate to deny the mitigation. No matter how sympathetic one might be in judging the offender strictly by the terms of his own worldview, that sympathy can be lost when the community finds his worldview offensive. (And, in any case, such a mitigation would be regularly blocked by a decision-maker reflecting community norms through any of the path of nullification action.)

A strong and predictable rage based upon racial hatred or homophobia, for example, could not earn a mitigation without seeming to give some legitimacy to those hateful attitudes. 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.<sup>41</sup>

There is the danger that this factor – the extent to which giving a mitigation to the offender would undermine community norms – could be interpreted too broadly if not properly qualified. That is, every mitigation and defense may undercut the community norm that condemns the conduct *constituting the offense at hand*. Linares has admittedly committed aggravated assault by pointing his gun at the hospital staff. Giving him a mitigation could, it might be argued, undermine the community norm against aggravated assault. But the focus of this factor ought to be much more narrow: would the *reason for giving the mitigation* undermine community norms? In the *Linares* case, the father's *empathy* for his brain-dead son leads him to hold the hospital staff at bay with a gun while he disconnects disconnect the life-support equipment then surrender to police.<sup>42</sup> The reason for giving the mitigation – Linares' empathy for his brain-dead child – would not undermine community norms.

At the other end of the spectrum, some positive emotions seem so appealing that one might be tempted to give them some special accommodation – perhaps allowing a particularly positive emotion to provide a mitigation when a more neutral emotion in the same situation would not. The Linares case, above, is an example. Or consider Jose Ferreira, who when he is 17

accidentally kills a 16 year-old girl. Some 30 years later, overwhelmed by his sense of *remorse*, he turns himself in.<sup>43</sup> Giving a mitigation for genuine and heartfelt remorse would not undermine community norms.

It may be that the normative assessment of the offender's actions can create 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 emotions may be given less leeway.<sup>44</sup>

### III. IMPLEMENTATION

To summarize, then, perhaps the principles that ought to govern a disturbance-based mitigation include an assessment of the extent of the disturbance or upset pushing toward the offense (the psychic state inquiry), the extent to which we can understand, given the offender's circumstances and capacities, why she did not resist committing the offense (the personal choice inquiry), and the extent to which granting a mitigation would specially undermine community norms (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 simply deferring to the discretion of individual sentencing judges. Mental or emotional disturbance involve issues on which most people have some kind of intuitive judgment but, 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 factors. 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 and offender 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 scheme<sup>45</sup> 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 discretionary judgments might provide could have satisfied an earlier era but are inadequate today.

Third, a disturbance-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, if the primary goal of the criminal justice system is to do justice (rather than primarily to preventively detain 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.<sup>46</sup> Further, jury decision-making on these issues will improve the system's reputation with the community for being just, and such increased moral credibility can have significant crime-control benefits.<sup>47</sup>

Fourth, there are good constitutional 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,"<sup>48</sup> and the Court has carried forward this view in other cases.<sup>49</sup>

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 at hand, 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, what kind of statutory codification would best guide jurors and judges in assessing criminal liability and punishment?**

A draft provision might look something like the following:

*Mitigation for a Disturbance-Driven Offense*

(1) An offender is entitled to a mitigation in liability and punishment if the offense circumstances and the offender's situation meaningfully reduce the offender's blameworthiness for the violation.

(2) In determining whether an offender is eligible for a mitigation and the extent of any such mitigation, the jury shall take into account:

(a) the extent to which the offender was acting under the influence of mental or emotional disturbance at the time the offense,

(b) given the offender's situation and capacities, the extent to which one can understand why the offender failed to restrain him or herself from committing the offense, and

(c) the extent to which giving the offender a mitigation would specially undermine community norms.

(3) 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.

(4) Nothing in this provision shall preclude the court from mitigating an

offender's punishment in any way authorized by law.

As section (4) confirms, the proposal as presented here is not one that takes away a sentencing judge's ability to provide a mitigation but rather one that creates an additional ability in the jury to insist that a mitigation be provided.<sup>50</sup> If after some 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 (4).

### **8. Is such a codified mitigation workable in practice and feasible politically?**

An objection one might make to such a mitigation for disturbance-driven offenses is that it seems to use quite open-ended criteria. The decision-maker is left to decide: (1) what was the extent of the offenders disturbance at the time of committing the offense, (2) how understandable was the offender's failure to resist committing the offense, given his circumstances and capacities, and (3) would giving the offender a mitigation specially undermine community norms 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 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,<sup>51</sup> 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 sophistication to make these judgments.

One might object to the formulation on the ground that the legality principle generally prefers more specific and objective liability and punishment criteria. However, as I have discussed elsewhere,<sup>52</sup> 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 is repeatedly shown even more dramatically in a variety of common modern criminal code formulations. 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 language is 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 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? How much disturbance is enough to satisfy the “*extreme* mental or emotional disturbance” requirement of the Model Penal Code’s mitigation of murder to manslaughter?

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 the situation.<sup>53</sup>

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.

Even if the mitigation proposal is workable in practice, one may wonder whether it is politically feasible. The Model Penal Code drafters had limited success in selling their extreme mental or emotional disturbance mitigation; it was adopted in only ten American jurisdictions. And the mitigation proposed above is noticeably broader in some respects in that it would apply beyond the offense of murder. Shouldn’t we assume, then, that it would be even less politically attractive than the Model Code’s murder mitigation?

While it is true that the proposal applies potentially to more offenses, it is in some respects more narrow than the Model Code’s “extreme mental or emotional disturbance” murder mitigation, for the proposed mitigation provides more guidance, and each of its three inquiries provides an independent basis for denying the mitigation to undeserving offenders.

Further, the areas in which the proposal is broader than the Model Code’s are the areas for which it is easy to see the need for such broadening. As discussed in Question 2 above, there is little rational reason for limiting such a mitigation to murder cases. Similarly, there are any number of cases in which there would be community support for mitigation even in the absence of “extreme mental or emotional disturbance.”<sup>54</sup>

It would be easy for critics to misunderstand the choice before them in deciding whether to adopt the proposed mitigation codification. They may assume that rejecting the provision would avoid mitigations of which they do not approve. But that is not the choice before them. Absent the mitigation codification, the current system will remain in place, in which sentencing judges have enormous discretion in deciding when and how much mitigation to give. The problem is, absent some guiding set of principles, such as those provided in the proposal, every individual sentencing judge is necessarily left to make ad hoc and unprincipled judgments.

The assumption that rejecting the mitigation codification will prevent mitigations also ignores the decision-making choices of trial jurors. As long as the criminal law ignores the presence of circumstances that jurors see as crying out for mitigation, some juries will feel morally justified in disrespecting the law and returning nullification verdicts. Indeed, the same kind of disobedience and disrespect can play out among a wide variety of players in the criminal justice process.<sup>55</sup>

One obvious problem with leaving deserved mitigations in the hands of such nullification activities is that they will fail to mitigate in a large percentage of cases that deserve mitigation. The sentencing judge may not happen to personally believe in the appropriateness of a mitigation. The jurors in the case may choose not to violate their trial oaths. And other participants in the process, such as witnesses and prosecutors, may not choose to undermine the normal legal process for the case at hand.

But a second kind of problem, equally troubling, is the arbitrariness and unjustified disparity inherent in relying upon a system of judicial discretion or other parties' nullification activities. Whether an offender gets the deserved mitigation will depend upon random events – such as who the decision-makers in the case are – that have nothing to do with the offense and its circumstances. Identically-situated offenders may receive significantly different punishments based upon pure chance.<sup>56</sup>

Such disparity and arbitrariness was something we once tolerated half a century ago, when criminal codes, such as the Model Penal Code, had four or five grading categories that left sentencing judges enormous discretion over the amount of punishment imposed. But those days have passed. As noted above, the march of progress has steadily moved decision-making to more the democratic forums of legislatures and juries and increasingly cabined judicial discretion: legislatures now sort offenses into a dozen or more different grading categories; sentencing commissions may further narrow sentencing ranges; and juries are increasingly involved in finding the facts and making the normative judgments that ultimately determine punishment.

Criminal codes and sentencing guidelines have become increasingly meticulous in parsing the harms of each offense, as in the “telephone book” of the United States Sentencing Commission’s guidelines. Shouldn’t we have a similar ambition for parsing the nuances of culpability and blame? Given the expectations of today, the availability of mitigations ought to be subject to the guidance of principled codifications applied to the case at hand by jurors representing the community.

A separate reason to provide such a mitigation codification is to make trials less deceptive and fanciful. A jury will hear only that evidence presented at trial and, absent a disturbance-driven offense mitigation provision as part of the law, evidence relating to such mitigating circumstances commonly will be hidden from the jury. What jurors will

hear is a fantasy version of the case that simply does not represent what happened in the real world but rather some legally-distorted version of the truth.

Some prosecutors may be pleased by the situation but they ought not be, if they understood its long-term effects in undermining the criminal law's moral credibility with the community. Treating criminal adjudication as a game with rules to be manipulated to maximum advantage by each side, rather than a quest for truth and justice, inevitably undermines the criminal justice process as a reliable moral authority.<sup>57</sup> Over time, people come to understand that the system is not committed to doing justice but rather is simply playing out its game rules. That loss of credibility ultimately translates into a loss of crime-control effectiveness, reducing deference and compliance as well as the criminal law's ability to get people to internalize its norms.<sup>58</sup>

#### 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 mental or emotional disturbances, whenever the offender's situation and capacities meaningfully reduce the offender's blameworthiness for the violation. In determining eligibility for mitigation, the jury should take into account (a) the extent to which the offender was acting under the influence of mental or emotional disturbance (the psychic state inquiry), (b) given the offender's situation and capacities, the extent to which one can understand why the offender failed to restrain him or herself from committing the offense (the personal choice inquiry), and (c) the extent to which giving the offender a mitigation would specially undermine community norms (the normative inquiry). A codified general mitigation provision is proposed.

Some people will worry that such a universal mitigation provision may give too much mitigation. But there seems little doubt that the community's shared intuitions of justice support a wide range of mitigations, especially those that can satisfy the three factors made relevant by the proposed codification. The question is not whether such mitigations should be taken into account but rather whether they should be taken into account systematically and consistently by juries reflecting community views, instead of taken into account, as they are today, haphazardly and inconsistently by individual sentencing judges and nullification actors.

Recognition of such a universal mitigation for disturbance-driven offenses 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 of what would happen at trial, it can give the community some greater confidence that the criminal justice system is seriously committed to setting deserved punishment in strict proportion to an offender's blameworthiness. And such increased moral credibility can significantly increase the system's justness as well as its crime-control effectiveness.

## NOTES

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<sup>1</sup> 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 (emphasis added):

(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); . . .

<sup>2</sup> Blau, Robert and Latz, Jean, "Father: Killed Son Because I Love Him," *Chicago Tribune*, April 27, 1989, [http://articles.chicagotribune.com/1989-04-27/news/8904070827\\_1\\_respirator-samuel-comatose](http://articles.chicagotribune.com/1989-04-27/news/8904070827_1_respirator-samuel-comatose); "Father is Cleared in Ill Baby's Death," *The New York Times*, May 19, 1989, <http://www.nytimes.com/1989/05/19/us/father-is-cleared-in-ill-baby-s-death.html>; Green, Larry, "Grand Jury Rejects Murder Count: Teary Father Not Charged in Death of Comatose Boy," *Los Angeles Times*, May 19, 1989, [http://articles.latimes.com/1989-05-19/news/mn-114\\_1\\_grand-jury-comatose-boy-life-support](http://articles.latimes.com/1989-05-19/news/mn-114_1_grand-jury-comatose-boy-life-support); "Man who pulled plug on son dies," *United Press International*, December 21, 2005, <http://www.upi.com/Man-who-pulled-plug-on-son-dies/83711135187240/>; O'Connor, Matt, "Father Tells How He Let His Baby Son Die," *Chicago Tribune*, May 24, 1989, [http://articles.chicagotribune.com/1989-05-24/news/8902030838\\_1\\_samuel-nurse-removed](http://articles.chicagotribune.com/1989-05-24/news/8902030838_1_samuel-nurse-removed)

<sup>3</sup> Commonwealth v. Druce, 453 Mass. 686, 905 N.E.2d 70, 2009 Mass. LEXIS 62. <https://advance.lexis.com/document/?pdmfid=1000516&crd=9fcc8774-2e44-4630-aa27-ecb5c12972ef&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A7VJY-3340-Y9NK-S2XY-00000-00&pddocid=urn%3AcontentItem%3A7VJY-3340-Y9NK-S2XY-00000-00&pdcontentcomponentid=7683&pdshepid=urn%3AcontentItem%3A7XX4-THP1-2NSD-K0S8-00000-00&pdteaserkey=sr0&pditab=allpods&ecomp=cfgck&earg=sr0&prid=614f8ce0-933d-477f-8d4c-8ca4f25f91d5>; Commonwealth v. Smiledge, 419 Mass. 156, 643 N.E.2d 41, 1994 Mass. LEXIS 669. <https://advance.lexis.com/document/?pdmfid=1000516&crd=a9a3be8d-d142-4ec5-bc69-ca67d9e24599&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3RX4-3450-003C-V1V3-00000-00&pddocid=urn%3AcontentItem%3A3RX4-3450-003C-V1V3-00000-00&pdcontentcomponentid=7683&pdshepid=urn%3AcontentItem%3A7XWS-5KK1-2NSD-R11R-00000-00&pdteaserkey=sr0&pditab=allpods&ecomp=cfgck&earg=sr0&prid=0b2b5058-3714-4df6-b0a9-c4b75dc2813a>; Murphy, Sean P. "'Keep the kids safe,' Druce shouts in court." *The Boston Globe*. 20 Sept 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/092003\\_druce.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/092003_druce.htm); McElhenny, John. "Suspect's '88 crime had similarities." *The Boston Globe*. 25 Aug 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/082503\\_suspect.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/082503_suspect.htm); Rosenwald, Michael S. and Kurkjian, Stephen. "Monthlong plot to kill Geoghan." *The Boston Globe*. 26 Aug 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/082603\\_attack.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/082603_attack.htm); Murphy, Sean P. "Letter says Druce was abused as boy." *The Boston Globe*. 13 Sept 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/091303\\_druce.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/091303_druce.htm); Murphy, Sean P. "Druce beaten as child, inquiry finds." *The Boston Globe*. 24 Sept 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/092403\\_druce.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/092403_druce.htm); McElhenny, John. "Alleged Geoghan killer led troubled life, records show." *The Boston Globe*. 26 Aug 2003. [http://archive.boston.com/globe/spotlight/abuse/stories5/082603\\_suspect.htm](http://archive.boston.com/globe/spotlight/abuse/stories5/082603_suspect.htm); Associated Press. "Inmate Testifies Why He Killed Molester Priest." *The New York Times*. 24 Jan 2006.

<sup>4</sup> Vaughan v. Commonwealth, 7 Va. App. 665, No. 1470-86-2, February 7, 1989.

<sup>5</sup> Dale, Maryclaire. (Associated Press) "Philadelphia parents Herbert, Catherine Schaible sentenced in son's 'prayer death.'" 6abc. 19 Feb 2014. <http://6abc.com/archive/9437462/>; Huber, Robert. "Why Did the Schaibles Let Their Children Die?" Philadelphia Magazine. 25 October 2013.

<https://www.phillymag.com/articles/2013/10/25/schaibles-let-children-die/3/>; Com. v. Schaible, C., 1003 EDA 2014 (Pa. Super. Ct. 2015) <https://www.courtlistener.com/opinion/2942647/com-v-schaible-c/>; Draznin, Haley. "Faith healing couple sentenced in baby's death for failing to get medical help." CNN. 20 Feb 2014. <https://www.cnn.com/2014/02/20/justice/pennsylvania-faith-healing-sentence/index.html>

<sup>6</sup> State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989); Battered wife gets six years for killing husband, UPI archives 6 March 87, <https://www.upi.com/Archives/1987/03/06/Battered-wife-gets-six-years-for-killing-husband/1230542005200/>; 366 S.E.2d 586 89 N.C.App. 384 STATE of North Carolina v. Judy Ann Laws NORMAN. No. 8729SC676. Court of Appeals of North Carolina. April 5, 1988.; Jeffrey M. Cutler, Criminal Law - Battered Woman Syndrome: The Killing of a Passive Victim - A Perfect Defense or a Perfect Crime? - State v. Norman, 11 Campbell L. Rev. 263 (1989).

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).)

<sup>7</sup> 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](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](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.hlnv.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.)

See also the cases of Ronald King: "One armed Pensioner Shot Wife With Dementia to end Suffering," *Telegraph*. 5 July 2016, <https://www.telegraph.co.uk/news/2016/07/05/one-armed-pensioner-shot-wife-with-dementia-to-end-suffering-cou/>; Joe Stack (Weisenthal, Joe, "The Insane Manifesto Of Austin Texas Crash Pilot Joseph Andrew Stack," *Business Insider*, February 18, 2010, <http://www.businessinsider.com/joseph-andrew-stacks-insane-manifesto-2010-2>; Price, Asher, "Suicide pilot Joe Stack had history of shutting doors on people," *Statesman*, March 7, 2010, <https://www.statesman.com/news/local/suicide-pilot-joe-stack-had-history-shutting-doors-people/RGW0xEI3NfBMJIhQGIPBLP/>; Brick, Michael, "For Texas Pilot, Rage Simmered With Few Hints," *The New York Times*, February 19, 2010, <https://www.nytimes.com/2010/02/20/us/20crash.html>; Brick, Michael, "Man Crashes Plane Into Texas I.R.S. Office," *The New York Times*, February 18, 2010, <https://www.nytimes.com/2010/02/19/us/19crash.html?hp>).

<sup>8</sup> 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).

<sup>9</sup> See Part III below (Questions 6 and 7).

<sup>10</sup> See note 3 *supra*.

<sup>11</sup> Himmelman, Jeff. "Four Bodies in Elmhurst." *The New York Times*. 2 Dec 2015.

<https://www.nytimes.com/2015/12/06/magazine/four-bodies-in-elmhurst.html>; Gutowski, Christy, Pratt, Gregory, and Manchir, Michelle. "Autopsy: Father kills wife, 2 disabled adult children in Elmhurst murder-suicide." *Chicago Tribune*. 31 Aug 2014. <http://www.chicagotribune.com/suburbs/elmhurst/chi-several-members-of-a-family-found-dead-in-elmhurst-home-20140830-story.html>; Eisenstadt, Todd. "From the archives: Cared for, then cut off." *Chicago Tribune*. 2 Sept 1987. <http://www.chicagotribune.com/chi-elmhurst-archive-story-stacks-20140831-story.html>

<sup>12</sup> Bartkowiak Jr., Dave, "Man who says he robbed bank to pay for daughter's cancer treatment sent to prison," *Click 2 Houston*, March 10, 2016, <https://www.click2houston.com/news/man-who-robbed-bank-to-help-pay-for-daughters-cancer-treatment-faces-sentencing>; Hanna, Laurie, "Detroit man accused of robbing bank says he was desperate for cash to pay for daughter's chemotherapy treatment," *New York Daily News*, August 27, 2015, <http://www.nydailynews.com/news/national/man-tells-police-robbed-bank-pay-daughter-chemo-therapy-article-1.2338826>; Izadi, Elahe, "Bank robbery suspect said he stole to pay for daughter's cancer treatments," *The Washington Post*, August 27, 2015, [https://www.washingtonpost.com/news/morning-mix/wp/2015/08/27/bank-robbery-suspect-said-he-stole-to-pay-for-daughters-cancer-treatments/?utm\\_term=.53d677cb1277](https://www.washingtonpost.com/news/morning-mix/wp/2015/08/27/bank-robbery-suspect-said-he-stole-to-pay-for-daughters-cancer-treatments/?utm_term=.53d677cb1277)

<sup>13</sup> Chu, Dan and Leonhauser, Maria, "Two Angry Neighbors Burn Out a Nest of Crack Dealers, but Now They're in Big Trouble Themselves," *People Magazine*, March 28, 1998, <http://people.com/archive/two-angry-neighbors-burn-out-a-nest-of-crack-dealers-but-now-theyre-in-big-trouble-themselves-vol-29-no-12/>; "Crack; A Disaster of Historic Dimension, Still Growing," *The New York Times*, May 28, 1989, <http://www.nytimes.com/1989/05/28/opinion/crack-a-disaster-of-historic-dimension-still-growing.html?pagewanted=all>; Swickard, Joe, "Parisi, insisting he threatened no one, testified that he had no ill-will toward the woman's family other than the son allegedly involved in the suspected crack house that was burned," *Detroit Free Press*, January 13, 1989, accessed from <https://www.newspapers.com/newspage/99674822/>

<sup>14</sup> *People v. Nesler*, No.S056082 (Cal., 1997) <https://law.justia.com/cases/california/supreme-court/4th/16/561.html>; Hewitt, Bill, "The Urge to Kill," *People*, April 19, 1993, <https://people.com/archive/the-urge-to-kill-vol-39-no-15/>; Thurber, Jon, "Ellie Nesler dies at 56; woman killed her son's accused molester in courtroom," *The Los Angeles Times*, December 30, 2008, <http://www.latimes.com/local/obituaries/la-me-nesler30-2008dec30-story.html>; King, Peter, "Ellie Nesler: Avenger in a Gray Hat," *The Los Angeles Times*, August 24, 1997, <http://articles.latimes.com/1997/aug/24/news/mn-25532>

<sup>15</sup> See note 6 *supra*.

<sup>16</sup> See note 12 *supra*.

<sup>17</sup> Model Penal Code §210.3 comment at p. 59 (1980).

<sup>18</sup> Model Penal Code Section 210.3(1)(b).

<sup>19</sup> *Id.*

<sup>20</sup> See authorities collected at Robinson & Williams, *Mapping American Criminal Law: Variations across the 50 States*, Chapter 5 (2018).

<sup>21</sup> For a discussion of the variations among those states, see *id.*

<sup>22</sup> 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.

<sup>23</sup> Model Penal Code section 211.1(2)(a).

<sup>24</sup> Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *Cornell Law Review* ?? (1989).

<sup>25</sup> Pillsbury, *id.*

<sup>26</sup> Model Penal Code Section 210.3(1)(b).

<sup>27</sup> Chen, Sharon and City News Service, "Woman gets 6 years for road rage crash that killed Navy officer," *Fox 5*, April 14, 2017, <http://fox5sandiego.com/2017/04/14/driver-gets-6-years-for-road-rage-crash-that-killed-navy-sailor/>; Collman, Ashley, "Mom, 25, sobs uncontrollably in court as she denies killing Navy sailor in road-rage crash

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<sup>28</sup> See note 6 supra.

<sup>29</sup> See note 1 supra.

<sup>30</sup> Even though it may involve rage, the Jackson case referred to in the text would not be eligible for the common-law mitigation because the provoking event by the motorcyclist is not on the list of factors that by law can trigger the mitigation.

<sup>31</sup> See note 2 supra.

<sup>32</sup> See note 6 supra.

<sup>33</sup> See supra note 13 (Parisi is arrested and charged but, in an act of grand jury nullification, the grand jury refuses to indict him.)

<sup>34</sup> See note 4 supra.

<sup>35</sup> Dixon, Hayley, “Jealous student ‘ambushed friend with acid in copycat attack,’” *The Telegraph*, January 7, 2014, <http://www.telegraph.co.uk/news/uknews/crime/10555055/Jealous-student-ambushed-friend-with-acid-in-Katie-Piper-copycat-attack.html>; “Mary Konye jailed for 12 years for acid attack on former friend in east London,” *The Guardian*, March 21, 2014, <https://www.theguardian.com/uk-news/2014/mar/21/mary-konye-jailed-12-years-acid-attack-oni-friend-london>; Parry, Lizzie, “Jealous friend spent years obsessing over Naomi Oni’s looks and tried to steal her boyfriend before hurling acid in her face,” *Daily Mail*, January 27, 2014, <http://www.dailymail.co.uk/news/article-2546518/Jealous-friend-spent-years-obsessing-Naomi-Onis-looks-tried-steal-boyfriend-hurling-acid-face.html>

<sup>36</sup> “The killer who could not take rejection.” *The Telegraph*. 17 May 2001.

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<sup>37</sup> Hesse, Monica. *American Fire: Love, Arson, and Life in a Vanishing Land*. Liveright Publishing Corporation, 2017; Cicoira, Linda, “Arsonist Sentenced to 17½ Years in Prison,” “Arson Accomplice Given Less Prison Time,” *Eastern Shore Post*, April 24, 2015, <http://www.easternshorepost.com/content/wp-content/uploads/2015/04/04.24.2015.pdf>

<sup>38</sup> Dewan, Shaila, Saul, Stephanie, and Zezima, Katie. “For Professor, Fury Just Beneath the Surface.” *The New York Times*. 20 Feb 2010. <https://www.nytimes.com/2010/02/21/us/21bishop.html>; Keefe, Patrick Radden. “A Loaded Gun: A mass shooter’s tragic past.” *The New Yorker*. 11 & 18 Feb 2013.

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<sup>39</sup> See text accompanying notes 38 to 41, supra.

<sup>40</sup> State of Arkansas vs. Kerrie Lenkerd, April 24, 2017, <https://www.scribd.com/document/347738629/Centerton-Dog-Assault>; “Charges Dropped Against Woman Who Shot at Teen Trying to Allegedly Rape Neighbor’s Dog,” 5 News, May 17, 2017, <http://5news.com/2017/05/16/charges-dropped-against-woman-who-shot-at-teen-trying-to-allegedly-rape-neighbors-dog/>; Nelson, Steven, “Woman Charged for Pointing Gun at Teen Allegedly Raping Dog,” US News, May 8, 2017, <https://www.usnews.com/news/articles/2017-05-08/woman-who-pointed-gun-at-teen-accused-of-raping-dog-charged-with-aggravated-assault>;

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<sup>43</sup> Lohr, David. "Man 'Haunted' By Schoolgirl's 1982 Death Accepts Plea Deal." *The Huffington Post*. 19 Jan 2017.

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<sup>44</sup> One might argue, for example, that some positive emotions might provide a mitigation in upset-only cases, while allowing other more neutral motivations only for offenses performed under rage or disturbance. 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 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.

<sup>45</sup> Model Penal Code Article 6.

<sup>46</sup> Robinson and Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 *Columbia Law Review* 1124, 1130, 1146-1148 (2005).

<sup>47</sup> Robinson, *Intuitions of Justice and the Utility of Desert* (Oxford 2013) (hereinafter IJUD), chapters 8 & 9.

<sup>48</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 483-84 (2000).

<sup>49</sup> See *Blakely v. Washington*, 124 S.Ct. 2531 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

<sup>50</sup> 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.

<sup>51</sup> See IJUD chs. 1 & 2.

<sup>52</sup> 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 Law*, chs. 10 & 11 (Clarendon, Oxford 1997).

<sup>53</sup> For other examples, see IJUD, ch. 6B (pp. 104-108).

<sup>54</sup> [INSERT INTO THE TEXT DISCUSSION OF THESE ILLUSTRATIVE CASES: 49B Randolph – cancer baby; 43B Linares – brain dead baby; 23 Ronald King – dementia wife; 44B Sotelo Urena – homeless stabbing; 54C Parisi – crackhouse.]

<sup>55</sup> See the discussion of this similar dynamic played out among variety of participants in the criminal justice system in Robinson & Robinson, *Shadow Vigilantes, How Distrust in the Justice System Breeds a New Kind of Lawlessness*. [INSERT IN THE TEXT 3 or 4 EXAMPLES OF SUCH NULLIFICATION FROM REAL-WORLD CASES, AND ADD THE REMAINING IN AN ACCOMPANYING FOOTNOTE.]

<sup>56</sup>We know from empirical studies that judges can have dramatically different views from one another on matters of mitigation. [CITE THE EMPIRICAL LITERATURE ON DISPARITY ON SUCH ISSUES.]

<sup>57</sup> The problem is not solved by reliance upon judicial discretion. The studies show that individual judges commonly have views on mitigation in individual cases that vary dramatically from the views of the community. [CITE THE XPF ARTICLE. ADD TO THE TEXT SOME EXAMPLES OF HOW DRAMATIC THIS CONFLICT CAN BE.]

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<sup>58</sup> See generally, Robinson, *Intuitions of Justice and the Utility of Desert*, chapters 8 and 9 (Oxford 2013).