# ARTICLE

# MITIGATIONS: THE FORGOTTEN SIDE OF THE PROPORTIONALITY PRINCIPLE

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ABSTRACT

*In the first change to the Model Penal Code since its promulgation in 1962, the American Law Institute in 2017 set blameworthiness proportionality as the dominant distributive principle for criminal punishment. Empirical studies suggest that this is in fact the principle that ordinary people use in assessing proper punishment. Its adoption as the governing distributive principle makes good sense because it promotes not only the classic desert retributivism of moral philosophers, but also crime-control utilitarianism. It accomplishes the latter by enhancing the criminal law's moral credibility with the community and thereby promoting deference, compliance, acquiescence, and internalization of its norms, rather than suffering the resistance and subversion that is provoked by perceived violations of blameworthiness proportionality.*

*Such a principle has been commonly used as the basis for criticizing improper aggravations, such as the doctrines of felony murder and "three strikes," but the principle also logically requires recognizing a full range of deserved mitigations, not as a matter of grace or forgiveness but as a matter of entitlement. And given ordinary people's nuanced judgments about blameworthiness proportionality, maintaining moral credibility with the community requires that the criminal law adopt an equally nuanced system of mitigations.*

*Such a nuanced system ideally would include reform of a wide variety of current law doctrines and, especially in the absence of such specific reforms, adoption of a general mitigation provision that aims for blameworthiness proportionality in all cases. Such a general mitigation ought not be limited to cases of "heat of passion" or murder, as today's liability rules commonly provide. Rather, it ought to be available whenever the offense circumstances and the offender's situation and capacities meaningfully reduce the offender's blameworthiness, as long as giving the mitigation does not specially undermine community norms.*



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## I. Introduction

In 2017, the American Law Institute ("ALI") introduced its first amendment to the Model Penal Code since its promulgation in 1962—dropping the laundry list of alternative distributive principles for punishment in favor of a provision that gives clear dominance to desert, which requires punishment in proportion to an actor's moral blameworthiness. This desert assessment is meant to take into account a rich array of factors including the seriousness of the offense, the actor's culpable state of mind at the time of the offense, as well as his or her objective situation and personal capacities. In assessing punishments under the new provision, officials must render punishment "proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[1] Alternative distributive principles, such as those of general deterrence and incapacitation of the

[1] Model Penal Code § 1.02 (Am. Law Inst., Proposed Final Draft 2017) sets desert as the dominant distributive principle that can never be violated:

dangerous, are given an inferior status: they may be relied upon in determining the method of punishment, for example, but can never be used in a way that violates the dominant principle of blameworthiness proportionality. Such non-desert goals may be pursued only "within the boundaries of proportionality in subsection (a)(i) [quoted above]."

Criminal law scholarship has commonly seen discussions of the value of a "proportionality" principle, but frequently, the principle has been taken to mean punishment in proportion to the *seriousness of the offense* rather than the overall *blameworthiness of the offender*. One famous writer, for example, describes "the principle of proportionality—that is, the requirement that sanctions be proportionate in their severity to the seriousness of offenses."[2] Under the Model Penal Code amendment, however, reference to the "proportionality" principle is understood as a reference to blameworthiness proportionality rather than to harm proportionality.

This dramatic shift in the Model Penal Code's distributive principle for punishment makes good sense. It appeals to traditional retributivists, who see justice as a value in itself that requires no additional utilitarian justification. (But notice that the Model Penal Code's language specifically rejects the view of those retributivists who would give no significance to resulting harm.)[3]

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> (2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:
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> (a) in decisions affecting the sentencing of individual offenders:
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> (i) to render sentences in all cases within a range of severity *proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders*;
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> (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, and restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued *within the boundaries of proportionality in subsection (a)(i)*; . . . .

(emphasis added).

[2] Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 56 (1992); *see also* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 135 (2003) ("Penal proportionality, as orthodoxly understood, is a relation between the seriousness of the crime and the severity of the punishment."); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 169 (1985) ("Penalties should comport with the seriousness of crimes, so that the reprobation visited on the offender through his penalty fairly reflects the blameworthiness of his conduct."); Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS 79, 83 (1990) ("A corollary of the 'just deserts' theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense.").

[3] *E.g.*, JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 33 (1970); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 423 (1979); Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262, 267–76 (1974); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 684–95 (1994); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). In the view of such desert scholars, resulting harm does not alter an actor's blameworthiness; it is principally his culpability and capacities that determine his blame. By having the provision explicitly reference not only the offender's blameworthiness, but also the

But, the amendment giving dominance to desert also appeals to many crime-control utilitarians who have seen increasing evidence that committing the criminal law to a principle of just punishment, no more and no less, effectively fights crime. A criminal law that is careful to do justice and avoid injustice will build the law's moral credibility with the community and thereby enable it to harness the powerful forces of social influence and the internalization of the law's norms.[4] Social psychologists have confirmed the anecdotal evidence with controlled studies: a criminal justice system seen as regularly tolerating injustice and failures of justice is a system that will inspire resistance and subversion, while a system that earns moral credibility with the community is more likely to generate deference, compliance, and the internalization of the criminal law's norms.[5]

Part II gives more detail on the blameworthiness proportionality principle, and Part III discusses its adoption in the recent Model Penal Code amendment. Current law's treatment of mitigations conflicts with blameworthiness proportionality in a variety of ways. Part IV provides a conceptual overview of these conflicts. To avoid them, the law should recognize a general mitigation doctrine, as argued in Part V. Part VI describes the underlying theory of such a general mitigation provision, and Part VII proposes specific codification language.

## II. Blameworthiness Proportionality and Deserved Mitigation

The long-running scholarship on retributivist desert has continuously made clear how nuanced blameworthiness analysis can be. More recently, empirical studies have demonstrated that it is not just desert theorists who think in nuanced desert terms, but also ordinary people. People's shared judgments of justice—what has been called "empirical desert," as compared to the "deontological desert" of moral philosophers—are also terribly nuanced and complex.[6] And yet, enormous agreement persists on the basic principles of justice across demographics.[7] The studies show that people's judgments of proper punishment track a principle of desert,[8] in particular the

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gravity and harm of the offense, the language of the Model Penal Code's amendment forecloses the debate on whether resulting harm is to be given significance.

[4] Paul H. Robinson, Distributive Principles of Criminal Law: Who Should be Punished and How Much 175–89 (2008) [hereinafter Distributive Principles]; Paul H. Robinson, Intuitions of Justice and the Utility of Desert 152–63 (2013) [hereinafter IJUD].

[5] *See* Distributive Principles, *supra* note 4, at 175–89; IJUD, *supra* note 4, at 152–63.

[6] For some examples of how nuanced people's judgments of justice are on a very wide range of criminal liability and punishment issues, see IJUD, *supra* note 4, at 239–400.

[7] Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 Minn. L. Rev. 1829, 1848–65 (2007) [hereinafter *Concordance*].

[8] Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. Personality & Soc. Psychol. 284, 288–95 (2002); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 Law & Hum. Behav. 659, 676–79 (2000).

principle of blameworthiness proportionality, in which cases of greater blameworthiness deserve more punishment than cases of lesser blameworthiness. This rank-ordering demand of blameworthiness proportionality generates hundreds, if not thousands, of importantly different degrees of blameworthiness and, hence, differences in deserved punishment.[9]

Given the enormous amount of nuance in both empirical and deontological desert for blameworthiness proportionality, it follows that the proportionality principle requires that legal rules reflect not only deserved aggravations, but also deserved mitigations. That is, the principle of blameworthiness proportionality can be as easily offended by the system's failure to give a deserved mitigation as it is offended by the system failing to give a deserved aggravation. A criminal law that seeks to do justice and to be seen as doing justice must be as careful to provide appropriate mitigations as aggravations, and not as a matter of grace or forgiveness but as a matter of entitlement.

If the criminal law is to earn moral credibility with the community, it must recognize a set of mitigations that is as nuanced as the community's judgments. That will require a good deal of doctrinal sophistication. The empirical studies make clear that people's judgments of justice are not just vague feelings but rather specific demands. Indeed, the number of meaningfully different degrees of blameworthiness exceeds the number of meaningfully different punishment amounts along the punishment continuum. This comes from the fact that the number of meaningfully different punishments on the punishment continuum is considerably fewer than one might think. As the amount of punishment increases, so too does the difference in punishment required to make two punishments meaningfully different. Punishments of five days and seven days are meaningfully different from one another, but punishments of a year and a year and two days are not.[10]

While the principle of blameworthiness proportionality operates as an ordinal-ranking mechanism, it ultimately generates a specific amount of punishment for each case. It is not that there is a special connection between the facts of a particular case and the resulting amount of punishment deserved. The specific amount of punishment deserved is that amount that puts the offender in his or her appropriate ordinal rank among all others. If the endpoint of the punishment continuum were changed, for example by shifting it from the death penalty to a maximum of twenty-five years imprisonment, then all cases would need to have their assigned punishments shifted down on the punishment continuum accordingly.[11]

This suggests, then, that criminal law doctrine requires the recognition of mitigations that will be at least as nuanced as its system of aggravations.

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[9] *See* IJUD, *supra* note 4, at 23–34.

[10] Paul H. Robinson & Sarah M. Robinson, Pirates, Prisoners & Lepers: Lessons from Life Outside the Law 100 (2015) [hereinafter Pirates]; IJUD, *supra* note 4, at 11.

[11] *See* Distributive Principles, *supra* note 4, at 141; Pirates, *supra* note 10, at 100.

That is, it ought to provide offense grade reductions for mitigations just as it provides offense grade increases for aggravations. And it ought to have some mechanism for more minor adjustments within an offense grade for less consequential mitigations just as it has more minor adjustments within an offense grade for less consequential aggravations, commonly through sentencing guidelines or other mechanisms for directing the exercise of discretion by sentencing judges.[12]

## III. The Ill-Fitting Legislative History: Limiting Retributivism

One might see the Model Penal Code amendment as a historic step forward, perhaps providing the basis for a truce in the long-running feud between desert retributivists and crime-control utilitarians. A criminal law built upon a distributive principle of desert, in particular empirical desert, can provide what may be the best practical approximation of deontological desert for retributivists and at the same time provide crime-control effectiveness for utilitarians by enhancing the criminal law's moral credibility with the community.[13]

But before there is too much celebration, one must deal with the somewhat problematic legislative history of the Model Penal Code amendment. In their work on the amendment, the drafters were influenced by the notion of "limiting retributivism," which saw desert as only excluding certain extremes of excessive or insufficient punishment.[14] This apparent legislative history is complicating because this variation on retributivism does not support a principle of blameworthiness proportionality.

"Morris [the champion of limiting retributivism] freely admits that his theory allows equally blameworthy defendants to receive unequal degrees of severity and thus permits the more blameworthy to receive less punishment."[15] This would seem to violate the very point of the Model Penal Code amendment, which on its face expressly requires proportionality and seeks to

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[12] For example, the general mitigation provision proposed in Part VI.A. gives a jury the power to direct the sentencing judge to provide a mitigation (that has an effect less than a reduction of an offense grade).

[13] A criminal law that conflicts with community views will provoke resistance and subversion, while a criminal law that tracks community views will inspire deference, compliance, and internalization of its norms. *See* IJUD, *supra* note 4, at 141–75.

[14] Model Penal Code § 1.02(a) (Am. Law Inst., Proposed Final Draft 2017).

[15] Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 Crime & Just. 363, 385 (1997). Frase goes on to argue on Morris's behalf that "such 'failures' of ordinal proportionality are not necessarily either substantial in degree or routine." *Id.* For a contrary view—that ordinal-ranking failures are substantial and routine under limiting retributivism—see Andrew von Hirsch, *Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards*, *in* The Politics of Sentencing Reform 149, 163–64 (Rod Morgan & Chris Clarkson eds., 1995); Andrew von Hirsch, *Equality, 'Anisonomy,' and Justice: A Review of Madness and the Criminal Law*, 82 Mich. L. Rev. 1093, 1102–03 (1984); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Just. 55, 76 (1992); Andrew von Hirsch, *Sentencing Guidelines and Penal Aims in Minnesota*, 13 Crim. Just. Ethics 39, 45 (1994).

prohibit the doing of injustice to advance some general deterrence or incapacitation purpose.

A further unfortunate implication of reliance upon the limiting retributivist conception of desert is that it would be at best indifferent to recognizing a full system of deserved mitigations. If one were to follow limiting retributivism's demand that we concern ourselves only with instances of gross disproportionality, we would have every reason to ignore issues of deserved mitigation. Mitigations simply do not concern the issue of liability-vs-no-liability, but instead relate only to adjustments to the degrees of punishment. And these adjustments often concern only whether liability should be reduced an offense grade or less. While a blameworthiness proportionality principle seeks to carefully match the degree of punishment to the degree of blameworthiness, limiting retributivism is only interested in avoiding instances of gross disproportionality.[16]

Also problematic is the fact that limiting retributivism simply does not match the principles of justice held by ordinary people. The empirical studies make clear that people are committed to a principle of blameworthiness proportionality.[17] Their judgments of justice do not simply concern avoiding gross disproportionality, but rather are nuanced and sophisticated across the entire continuum of punishment.[18] While Norval Morris might be willing to tolerate greater punishment for the less blameworthy, ordinary people would not. They would see this as an injustice that would undermine the criminal law's moral credibility and reduce their willingness to comply, defer, acquiesce, and internalize the criminal law's norms.[19]

The good news is that the drafters' interest in limiting retributivism does not show on the face of the amendment. Indeed, the amendment explicitly insists on "proportionality" rather than simply "avoiding gross disproportionality." Nor does the amendment suggest that the desert ranges be broad. If the provision had used the term "desert," for example, one might argue that this term should be given the somewhat contorted meaning of limiting retributivism. But, there is nothing in the provision's terms of "blameworthiness" or "proportionality" that leaves room for any such ambiguity. The drafters' discussion of their interest in limiting retributivism may be interesting intellectual history that perhaps explains what initially piqued their interest in desert as a distributive principle. That said, the amendment they have

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[16] *See* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 151 (1982) (suggesting that the proportionality ranges under limiting retributivism have to be broad).

[17] *See* Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295–97 (2002); John Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659, 676-79 (2000); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1961–67 (2010) [hereinafter *The Disutility of Injustice*].

[18] *See Concordance*, *supra* note 7, at 1832–46; *The Disutility of Injustice*, *supra* note 17, at 1989.

[19] *See The Disutility of Injustice*, *supra* note 17, at 1995–97.

adopted is unambiguous in its commitment to blameworthiness proportionality and in its failure to carry forward the anti-proportionality and anti-mitigation aspects of limiting retributivism.[20]

## IV. Points of Law-Community Conflict on Deserved Mitigations and the Reactions They Inspire

To what extent does current law deviate from the principle of blameworthiness proportionality? The literature about the rules and doctrines that violate the blameworthiness principle through improper aggravation of liability and punishment is enormous. Indeed, these are often the favorite topics of modern criminal law academics: the felony murder rule, three-strikes habitual offender statutes, the criminalization of regulatory offenses, the use of strict liability, high penalties for drug offenses, and others.[21]

Less systematically studied, however, is the general failure of current criminal law to take seriously its obligation to recognize mitigations that reduce the offense grade of liability and the extent of punishment. The principle of blameworthiness proportionality requires not only that the legal rules reflect deserved aggravations, but just as importantly, that they reflect deserved mitigations, and not as a matter of grace or forgiveness but as a matter of entitlement.

There exists a wide variety of cases in which criminal law's liability and punishment rules generate results that conflict with deserved mitigation. The conflicts occur in both directions: the law frequently fails to provide a mitigation that is deserved and occasionally provides a mitigation that is not deserved.[22]

### *A. Deserved Mitigation Conflict Points*

As the quadrant graphic below suggests, the community might think that a significant mitigation is appropriate, yet the law gives little or none (upper left-hand quadrant); thus, the case is seen as an instance of unjust punishment. Or, less commonly, the community may see no basis for a mitigation, yet the law gives one anyway (lower right-hand quadrant), a case that

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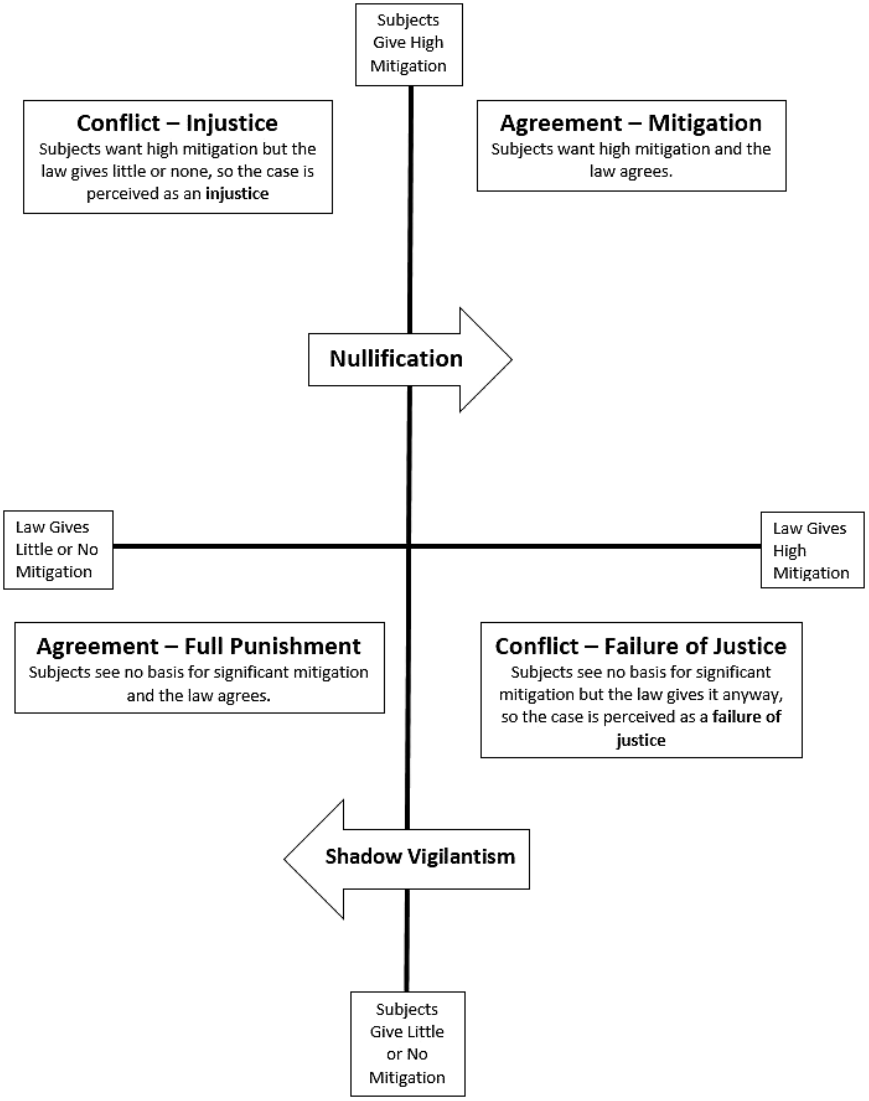
[20] As I have argued elsewhere, in practice, the Report's proposal will operate like a classic desert distributive principle. *See* Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other Than Pure Desert?*, 7 Buff. Crim. L. Rev. 3, 12–13 (2003). The only open issue is whether the resulting distribution of punishment is more likely to match deontological desert or empirical desert.

[21] For empirical confirmation that these crime-control doctrines conflict with ordinary people's judgments of justice, see, for example, IJUD, *supra* note 4, at 120–28.

[22] This Part provides many illustrative cases in part because these same cases are commonly used in later Parts of this Article to develop and test various aspects of a proposed general mitigation provision. Such a provision ought to provide a mitigation in situations where empirical desert supports a mitigation and ought to deny a mitigation where empirical desert does not.

is seen as a failure of justice. Of course, the community and the law can sometimes agree that a significant mitigation is appropriate (upper right-hand quadrant) or that no mitigation is appropriate (lower left-hand quadrant).

GRAPHIC 1. MITIGATION CONFLICT POINTS



### *1. Conflict Cases: Instances of Injustice*

Instances of Conflict-Injustice (upper-left hand quadrant) include cases like that of John Gounagias. In a small predominantly Greek community, the defendant, while immobilized in a drunken state, is forcibly sodomized by a companion who then spreads news of the rape in order to humiliate Gounagias. He is then mercilessly taunted within the tight community and becomes increasingly angry and desperate. After one particularly humiliating public taunting at 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 a heat of passion provoked by the conduct of the person he shoots, no provocation mitigation is available to him. The forcible rape and taunting are ignored—not even admissible at trial—and Gounagias's killing is treated as indistinguishable from the standard intentional killing without provocation. He is convicted of murder in the first degree, sentenced to fifteen-years-to-life at hard labor, and dies in prison.[23]

This is not an unusual case by a rogue judge, but rather a standard application of the common law provocation rules. Gounagias is ineligible for the mitigation from murder to manslaughter because "cooling time" has passed since the original rape and because the immediate trigger, the latest taunting at the local pub, is legally ineligible as a basis for the provocation mitigation.[24] Clearly Gounagias deserves punishment for what he has done, but is the earlier rape irrelevant in assessing the proper degree of his punishment?

Brian Randolph is a twenty-three-year-old father of a baby daughter who has cancer. The cancer treatments are going well, and there appears to be a future for the little girl. But then Randolph's insurance runs out. Seeing no other way to get his daughter treatment, Randolph robs a bank by passing a note with no display of a weapon. With the proceeds from the robbery, the baby is soon back on her treatments. Randolph is charged with bank robbery and, getting no mitigation, is sentenced to a maximum of twenty-five years.[25]

While there is no issue of provocation of course, the case might arguably be one in which the actor performed the offense under "extreme mental

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[23] State v. Gounagias, 88 Wash. 304, 305–07, 316–19 (1915).

[24] *See id.* at 315–19; PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 538 (2d ed. 2012).

[25] Dave Bartkowiak Jr., *Man Who Says He Robbed Bank to Pay for Daughter's Cancer Treatment Sent to Prison*, CLICK 2 HOUS. (Mar. 10, 2016), https://www.click2houston.com/news/man-who-robbed-bank-to-help-pay-for-daughters-cancer-treatment-faces-sentencing [https://perma.cc/S7ZA-E45S]; Laurie Hanna, *Detroit Man Accused of Robbing Bank Says He Was Desperate for Cash to Pay for Daughter's Chemotherapy Treatment,* N.Y. DAILY NEWS (Aug. 27, 2015), http://www.nydailynews.com/news/national/man-tells-police-robbed-bank-pay-daughter-chemo-therapy-article-1.2338826 [https://perma.cc/68GB-2TGZ]; Elahe Izadi, *Bank Robbery Suspect Said He Stole to Pay for Daughter's Cancer Treatments*, WASH. POST (Aug. 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://perma.cc/K5VM-QH42].

or emotional disturbance," which can be a basis for mitigation under the Model Penal Code's broader version of the common law provocation mitigation. But that broader formulation only applies to murder, not to bank robbery. Further, the Model Penal Code's extreme emotional disturbance mitigation has been rejected by most jurisdictions, even those otherwise adopting the Model Penal Code.[26] Isn't Randolph's motive at least relevant in assessing his degree of blameworthiness for the bank robbery?

Keshia Dixon and her three daughters live with her boyfriend, Thomas Wright, a convicted felon. When Dixon baulks at buying guns for Wright—she is ineligible because she is currently under indictment for passing a bad check—Wright threatens her daughters, and she ultimately agrees to make the purchase. On the second occasion she buys weapons for Wright, Dixon is arrested.

It may be that Dixon does not qualify for a full duress defense, but a blameworthiness proportionality principle would insist that cases of "near excuse" or "partial excuse" be given some acknowledgment. Coercion and its effects exist on a continuum. To get the full defense of duress, the actor must suffer coercion of a sort that "a person of reasonable firmness . . . would have been unable to resist."[27] In a case where the extent of coercion falls just short of that complete-defense point, are we to assume that the coercive circumstances are irrelevant to assessing blameworthiness? Obviously not. Rather, an offender committing an offense under near-duress—or any other disability near-excuse—ought to be seen as deserving a degree of mitigation that matches the extent of the coercion. Instead, Dixon is sentenced to almost three years in prison, the standard guideline sentence.[28]

Chad Gurney strangles his girlfriend, Zoe Sarnacki, and sets her body on fire. When firefighters are called to an apartment fire, they find her charred body lying on a bed surrounded by several items including a crucifix, as if part of some ritual. When he was younger, Gurney was in an accident that left him with severe head injuries. After more than a dozen brain surgeries and a dramatic shift in personality, he remains under the care of a psychia-

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[26] PAUL H. ROBINSON & TYLER S. WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES 45–52 (2018) [hereinafter MAPPING].

[27] MODEL PENAL CODE § 2.09(1) (AM. LAW INST. 2019).

[28] Dixon v. United States, 548 U.S. 1 (2006); United States v. Wright, No. 16-11010, 688 Fed. App'x. 262 (5th Cir. Apr. 27, 2017); United States v. Dixon, 413 F.3d 520, 522 (5th Cir. 2005); Brief for the United States at 2, Dixon v. United States, 548 U.S. 1 (2006) (No. 05-7053); Note, *Firearms Regulation—Defense of Duress*, 120 HARV. L. REV. 322 (2006); Lyle Denniston, *Court to Hear Criminal Case on Duress Issue*, SCOTUSBLOG (Jan. 13, 2006), http://www.scotusblog.com/2006/01/court-to-hear-criminal-case-on-duress-issue. [https://perma.cc/2AZG-SVKR]; Gina Holland, *Justices Weigh Abuse in Woman's Defense*, BALT. SUN (Apr. 25, 2006), http://www.ncdsv.org/images/JusticesWeighAbuseinWomanDefense.pdf [https://perma.cc/2MS5-WHVM]; *Supreme Court to Hear Domestic Violence Case*, FAM. VIOLENCE PREVENTION FUND: SPEAKING UP (Feb. 12, 2006), http://www.ncdsv.org/images/SupremeCourtHearDVCase.pdf [https://perma.cc/9QDZ-8CT2]; *Top Court Sides with Gov't in Duress Case*, FOX NEWS (June 22, 2006), https://www.foxnews.com/printer_friendly_wires/2006Jun22/0,4675,ScotusDomesticAbuse,00.html [https://perma.cc/QQ3H-RM6N].

trist and has a history of delusional episodes. He had not taken his medication on the day of the killing. In the prosecutor's view, "People with mental illness can appreciate right from wrong. They do all the time."[29] Gurney is denied an insanity defense but also denied any mitigation and, upon conviction for murder and arson, sentenced to sixty years.[30]

Given the many limitations on the insanity defense in the various states,[31] an offender like Gurney will commonly be denied a complete defense. But, to the extent his mental illness played some significant role in the commission of the offense, it would often tend to reduce his blameworthiness as compared to a person committing the same offense with no such mental illness. Yet, Gurney's mental illness seems to be ignored in assessing his degree of blameworthiness. If the court thought him dangerous, he could have been civilly committed, but it is hard to see how the sentence takes full account of the circumstances affecting his desert.

Shimeek Gridine, fourteen, is hanging out with a twelve-year-old friend when they discover a small shotgun. A moment later, he asks a man walking by to hand over his wallet. As the man just walks away, Gridine shoots at him, and he is lightly wounded. Feeling remorseful, the boy goes to authorities to confess to the shooting. Gridine is found guilty of premeditated attempted murder and attempted armed robbery and sentenced to seventy and twenty-five years, respectively, for the two offenses.[32]

In the United States, jurisdictions typically provide an immaturity defense if and only if an offender is below a certain chronological age. And the chronological age is trending lower.[33] A side effect of this chronological-age-cut-off approach is that a young adult tried in the adult criminal justice

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[29] Clarke Canfield, *Appeal Rejected for Man Convicted of Decapitating Girlfriend, Setting Her on Fire*, BANGOR DAILY NEWS (Feb. 7, 2012), https://bangordailynews.com/2012/02/07/news/portland/appeal-rejected-for-man-convicted-of-decapitating-girlfriend-setting-her-on-fire/ [https://perma.cc/E5DD-JY4R]; *Crucifix Around Body, Chilling Details Suggest Ritual in Portland Murder*, FOSTERS (Sept. 25, 2009), https://www.fosters.com/article/20090925/NEWS0104/909259986, [https://perma.cc/7ZVW-BPG5]; *Slaying of Zoe Sarnacki: Chad Gurney Told Police 'A Monster' Took Over*, BANGOR DAILY NEWS (Jan. 12, 2011), https://bangordailynews.com/2011/01/12/news/slaying-of-zoe-sarnacki-chad-gurney-told-police-a-monster-took-over/ [https://perma.cc/EY78-FTNK].

[30] State v. Gurney, 36 A.3d 893 (Me. 2012); Canfield, *supra* note 29.

[31] *See* MAPPING, *supra* note 26, 159–70.

[32] OFF. OF JUV. JUST. AND DELINQ. PREVENTION, U.S. DEP'T OF JUST., ALL STATES ALLOW JUVENILES TO BE TRIED AS ADULTS IN CRIMINAL COURT UNDER CERTAIN CIRCUMSTANCES (June 2003), https://www.ncjrs.gov/html/ojjdp/195420/page4.html [https://perma.cc/5WLS-YEW5]; Erik Eckholm, *Juveniles Facing Lifelong Terms Despite Rulings*, N.Y. TIMES (Jan. 19, 2014), https://www.nytimes.com/2014/01/20/us/juveniles-facing-lifelong-terms-despite-rulings.html [https://perma.cc/S4YE-QG8D]; Clara McLaughlin, *Boy 15, Gets 70 Years for Attempted Murder*, FLA. STAR ONLINE (May 16, 2010), http://www.thefloridastar.com/boy-15-gets-70-years-for-attempted-murder/ [https://perma.cc/4MZV-2JSR]. The Florida Supreme Court subsequently held that the seventy-year sentence is like a life term without parole, which cannot constitutionally be imposed upon a juvenile for a nonhomicide offense, thus requiring that he be resentenced to something less than what would be effectively life without parole. Gridine v. State, 175 So. 3d 672, 674–75 (Fla. 2015).

[33] *See* MAPPING, *supra* note 26, at 171–78.

system has no legal ability to raise a defense of immaturity or to assure that a court will take account of his youthfulness. In other words, this is another example of current law's failure to recognize the need to take account of "near excuses" by providing a mitigation where immaturity reduces but does not extinguish blameworthiness, as the blameworthiness proportionality principle requires.

Finally, consider the case of Dawn and Tony Shearer, who are divorced but continue to live together in Ohio. There is a long history of domestic abuse in their relationship. On this day, Tony is angry because Dawn intends to go out. He chokes her unconscious. When Dawn regains consciousness, she sees Tony's gun on the table in front of her, which she assumes is there because Tony intends to shoot her, so she picks up the weapon and shoots Tony dead with a single shot. The prosecutor suggests that Dawn could have done a variety of other things to avoid any further attack, including leaving the house. Shearer is convicted of murder and sentenced to fifteen-years-to-life. Even if she honestly believed that she needed to shoot him, her belief, under the existing circumstances, was not a reasonable belief. In other words, she is treated as if she killed in a situation that involved no claim of justification.[34]

Under the governing Ohio law, a defendant can get a complete justification defense only for a *reasonable* belief that her conduct is justified. If her belief is honest but unreasonable in any way, she gets no defense or mitigation at all.[35] The Model Penal Code proposes a sliding-scale approach that would provide at least a mitigation in liability where the defendant honestly believes in the necessity for the defensive conduct but where that belief

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[34] State v. Shearer, 2018-Ohio-1688, No. CA 2017-07-102, 2018 WL 2041565 (Ohio Ct. App. Apr. 30, 2018); Associated Press, '*I Think I Shot Him in The Head' Ohio Woman Held in Ex-Husband's Slaying*, CantonRep (Feb. 7, 2017), https://www.cantonrep.com/news/20170207/i-think-i-shot-him-in-head-ohio-woman-held-in-ex-husbands-slaying [https://perma.cc/4NWP-LLG2]; Larry Davis, *Middletown Woman Charged with Murder Told 911 'I Just Shot My Ex-husband'*, Local 12 (Feb. 7, 2017), https://local12.com/news/local/one-person-shot-inside-home-in-middletown [https://perma.cc/NNB4-CPQ2]; Lauren Peck, *Middletown Woman Convicted of Murder in Ex-Husband's Death*, J.-News (June 23, 2017), https://www.journal-news.com/news/middletown-woman-convicted-murder-husband-death/s3sB94eqY1cBGm0SyQBUDN/ [https://perma.cc/QN3U-J6QB]; Lauren Peck, *Middletown Woman Indicted for Murder in Shooting Death of Ex-Husband*, J.-News (Apr. 5, 2017), https://www.journal-news.com/news/local/middletown-woman-indicted-for-murder-shooting-death-husband/ti2TWGkrE4gvgPiSVrkF3M/ [https://perma.cc/C8YB-UH9F].

[35] State v. Thomas, 673 N.E.2d 1339, 1345 (Ohio 1997) ("The trial court's instructions correctly emphasized to the jury that the second element of self-defense is a combined subjective and objective test. As this court established in *State v. Sheets* (1926), 115 Ohio St. 308, 310, 152 N.E. 664, self-defense 'is placed on the grounds of the *bona fides* of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties.' "); *see also State v. Ludt*, 180 Ohio App. 2d 672, 2009-Ohio-416, 906 N.E.2d 1182, at ¶22 ("Self-defense has both objective and subjective elements. The defendant's fear of immediate death or great bodily harm must be objectively reasonable. In addition, 'Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self-defense. The defendant's state of mind is crucial to this defense.' *State v. Koss*, 49 Ohio St.3d 213, 215, 551 N.E.2d 970 (1990).").

is unreasonable (reckless or negligent).[36] Under this approach, an honest but reckless mistake would provide a mitigation to manslaughter; an honest but negligent mistake would provide a mitigation to negligent homicide. Unfortunately, most states, even those otherwise adopting the Model Penal Code, reject this sliding-scale approach in favor of the all-or-nothing approach,[37] like Ohio's, thereby denying even a mitigation in liability for an honest but unreasonable mistake.[38]

These are just some examples of the specific doctrines that can conflict with the blameworthiness proportionality principle by denying a deserved mitigation. Other aspects of current law also produce such conflicts.[39] Such conflicts can also arise because of unique situations and circumstances rather than flawed doctrines.[40]

### 2. *Conflict Cases: Instances of Failure of Justice*

While they are less common, the criminal justice system sometimes adopts rules or procedures that routinely give a mitigation that is not deserved. Such instances of Conflict-Failure of Justice (lower right-hand quadrant) include cases like that of Willie Bosket. By his own count, he has committed thousands of crimes, including the rape of a fellow juvenile. At age 15, he goes on an armed robbery spree. Two of his robbery attempts end in the murder of the victims. While in custody awaiting his hearing, Bosket stabs another boy with a fork, hits a counselor in the face, and chokes a psychiatrist. Because he is a juvenile, he is ineligible for prosecution as an

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[36] MODEL PENAL CODE § 3.09(2) (AM. LAW INST. 2019).

[37] *See, e.g.*, MAPPING, *supra* note 26, at 152. Only five states adopt the sliding-scale approach. On the other hand, the majority of the states, twenty-nine in number, adopt an all-or-nothing approach, under which the defense can be obtained only if the defendant's belief in the necessity of her conduct was reasonable. The remaining seventeen states drafted their defense in purely objective terms, yet they provide a mistake as to justification defense but in a separate mistake excuse provision.

[38] The last case in the text above, *Shearer*, raises the doctrinal issue of mistake as to justification. This is conceptually distinct from the previous cases, which all concern instances of partial disability excuses as opposed to a partial mistake excuse. *See* Paul H. Robinson, *A System of Excuses: How Criminal Law's Excuse Defenses Do, and Don't, Work Together to Exculpate Blameless (and Only Blameless) Offenders*, 42 TEX. TECH L. REV. 259, 262–68 (2009). As with the disability mitigations, this mistake mitigation might best be fixed with a change to the specific doctrine—here, defining mistake as to justification using the sliding-scale approach. However, absent that, even though mistake mitigations are conceptually distinct from disability mitigations, one can define a general mitigation provision in broad enough terms to cover both. *See infra* Part VII.A.

[39] Consider, for example, the refusal of most jurisdictions to partially individualize the objective standard used in the definition of recklessness and negligence. *See, e.g.*, MODEL PENAL CODE §§ 2.02(2)(c)&(d) (AM. LAW INST. 2019). This failure also infects every reliance upon the term "reasonable" in the criminal code because "reasonable" is generally defined as nonnegligent. *See, e.g.*, *id.* § 1.13(16)).

[40] *See infra* text accompanying notes 44–50.

adult, no matter the seriousness of his crimes, and can only be detained in a juvenile facility for 5.5 years,[41] until he reaches the age of 21.[42]

Brian Varela, age twenty, is alone with an eighteen-year-old woman in his bedroom who is using drugs that he has provided when the woman passes out. When it becomes clear that she is suffering an overdose, Valera begins posting photos of the women's partially nude body to co-workers and then sexually assaults her. When she is dead, he breaks her legs in order to stuff her into a crate to hide the body. To keep suspicion away, he uses the dead woman's thumb to unlock her phone and sends text-messages to her family. When caught, Varela enters a plea to second-degree manslaughter, third-degree rape, and unlawful disposal of remains and is sentenced to thirty-four months in prison,[43] the highest sentence that he can be given under the state's sentencing guidelines because he is a first-time offender.[44]

Darla Jackson has a history of anger management issues, including having her license suspended for having tried to run someone over. As she is driving on a California freeway, a man on a Ducati motorcycle gets in front of her. She aggressively engages the man, tailgating him and 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, accelerates her car to ninety-three miles per hour, and rams into him. Despite the fact that the

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[41] Katherine Ramsland, *Willie Bosket*, Crime Library, http://www.egov.ufsc.br/portal/sites/default/files/anexos/10437-10437-1-PB.htm [https://perma.cc/S8J8-RCYR]; Fox Butterfield, *A Boy Who Killed Coldly Is Now a Prison 'Monster'*, N.Y. Times (Mar. 22, 1989), http://www.nytimes.com/1989/03/22/nyregion/a-boy-who-killed-coldly-is-now-a-prison-monster.html?pagewanted=all&mcubz=1 [https://perma.cc/S44Z-HP7E]; John P. Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 Fordham Urb. L.J. 1 (1980).

[42] Under "the Juvenile Justice Reform Act of 1976, under which 14- and 15-year-olds who commit serious crimes such as murder, kidnapping and rape . . . can be held in confinement under what is called 'restrictive placement' in a state facility and be placed under supervision until they are 21." Tom Goldstein, *New York's Juvenile Justice System Is Under Challenge*, N.Y. Times (May 30, 1978), https://www.nytimes.com/1978/05/30/archives/new-yorks-juvenile-justice-system-is-under-challenge-news-analysis.html [https://perma.cc/CP48-RRYN].

[43] Lea van der Merwe, *Brian Varela Sentenced To Less Than 3 Years In Prison For Raping Teen Dying, Of Overdose, Sharing Nude Pictures*, Inquisitor (Nov. 16, 2018), https://www.inquisitr.com/5166450/brian-varela-sentenced-raping-teen-overdose-sharing-nudes/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+google%2FyDYq+%28The+Inquisitr+-+News%29 [https://perma.cc/5R58-453N]; Jill Sederstrom, *Man Gets Less Than 3 Years For Raping Teen As She Lay Dying Of Drug Overdose 'To Pass The Time'*, Oxygen (Nov. 19, 2018), https://www.oxygen.com/crime-time/brian-varela-sentenced-less-than-3-years-raping-alyssa-noceda-as-she-died-drug-overdose [https://perma.cc/8SWB-Q72X].

[44] *See* Washington State Caseload Forecast Council, 2017 Washington State Adult Sentencing Guidelines Manual 394, 435 (2017) (For second-degree manslaughter, Varela's score is 1, since he has no criminal record and he is convicted in the same case of one nonviolent felony, the third-degree rape, which means his sentence must fall within the range of 26–34 months. For third-degree rape, his score is also 1, again since he has no criminal record and he is convicted of another felony, the second-degree manslaughter, and therefore his sentence must fall within the range of 12–14 months).

killing seems quite intentional, she is sentenced to six years and is eligible for early release.[45]

Many Conflict-Failure of Justice cases are the result not of said policies but rather of idiosyncratic judges exercising unchecked sentencing discretion. Consider a few examples.

Ronald Ebens is a supervisor at a Chrysler plant. He feels that recent lay-offs at Chrysler are the result of Japanese imports pushing the American auto industry into decline. While at a strip club, he spots Vincent Chin, who is having his bachelor party. Ebens believes Chin to be Japanese and he yells, "It's because of you motherfuckers that we're out of work." Some punches are thrown, and the bouncers eject everyone involved. Outside the club, Ebens gets a bat from his car and threatens Chin, who drives off with his friends. Ebens gets in his car and begins to hunt for Chin, and he pays others to help him with the hunt. When he finds the young man outside a McDonald's, he attacks him with the baseball bat, inflicting repeated strikes to Chin's head. Chin dies of his injuries. Ebens is allowed to plead to manslaughter and, citing his prior good character and lack of a criminal record, the judge sentences him to three years of probation and a fine.[46]

Ethan Couch is the only child of wealthy parents who give him every material advantage. While he is hosting a birthday party, he and seven other people pile into his truck to get supplies. Couch, who has a blood alcohol level of 0.24 with Valium and marijuana in his system, is driving dangerously when he loses control of his vehicle and crashes into another car, instantly killing four people. Dazed but still cocky, Couch turns to his friend and says, "I'm Ethan Couch, I'll get you out of this." Couch's defense is that his coddled upbringing impaired his ability to judge right from wrong. This

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[45] Monica Garske, *Driver in Road Rage Crash That Killed Service Member Sentenced*, NBC San Diego (Apr. 14, 2017), http://www.nbcsandiego.com/news/local/Darla-Jackson-Road-Rage-Sentencing-Zachary-Buob-Death-San-Diego-419478683.html [https://perma.cc/7X6A-VYZ9]; Monica Garske, *Road Rage Suspect Told Ex She'd Run Him Over*, NBC San Diego (June 2, 2015), http://www.nbcsandiego.com/news/local/Road-Rage-Murder-Suspect-Darla-Jackson-Ex-Boyfriends-Restraining-Orders-305908301.html [https://perma.cc/K6PZ-NACR]; Dana Littlefield, *Judge: Driver's Behavior 'Outrageously Reckless' In Road-Rage Crash That Killed Navy Man*, San Diego Union-Tribune (Apr. 14, 2017), http://www.sandiegouniontribune.com/news/courts/sd-me-jackson-sentence-20170413-story.html [https://perma.cc/GF3J-XV9U]; Samantha Tatro, *"As Long As It Gets Me Away From You": Darla Jackson's Ex Happy She Filed Restraining Order*, NBC San Diego (June 3, 2015), http://www.nbcsandiego.com/news/local/Darla-Jacksons-Ex-Happy-She-Filed-Restraining-Order-307607101.html [https://perma.cc/D7WF-7Y6N]; *Explanation of California Parole Law*, House California Law Group https://www.shouselaw.com/parolehub.html [https://perma.cc/Z8HX-8NTN] ("Due to budget cuts and overcrowding, California is allowing 'day for day' credit, which cuts all sentences in half, but if considered a violent offense she may have to serve 85%.").

[46] United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986); Ross Parker, *"It's Not Fair . . .," Vincent Chin's Last Words*, 14 Hist. Soc'y for U.S. Dist. Ct. for E. Dist. of Mich., no. 4, 2007, at 8–9.

"affluenza" defense gets him probation for ten years for the four counts of manslaughter.[47]

David Kravchenko and two of his friends attack a twenty-three-year-old man as he leaves a gay bar. Kravchenko repeatedly shouts, "You are going to die faggot," as he beats and stabs the stranger with a broken bottle. Kravchenko is charged with aggravated assault. Although the victim's wounds are serious, Kravchenko is sentenced to only 364 days, on reasoning by the judge that a sentence of a year or more would leave him, a native of Russia, vulnerable to deportation.[48]

Stacey Rambold, a forty-nine-year-old high school teacher, repeatedly coerces intercourse with a fourteen-year-old student. He is arrested, and the victim, overwhelmed by depression, kills herself. Rambold is given only thirty days in jail.[49] The judge feels that the humiliation, loss of job, and divorce that Rambold suffered as a result of his arrest is punishment enough

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[47] Sean Dooley & Lauren Effron, *'Affluenza' DUI Case: Never-Before-Seen Deposition Tapes Reveal New Details of Fatal Crash, Teen's Upbringing*, ABC NEWS (Oct. 16, 2015), https://abcnews.go.com/US/affluenza-dui-case-deposition-tapes-reveal-details-fatal/story?id=34505481 [https://perma.cc/GHN2-FPSG]; Rebecca Mead, *The Sad Lessons of the "Affluenza" Teen*, NEW YORKER (Dec. 31, 2015), https://www.newyorker.com/culture/cultural-comment/the-sad-lessons-of-the-affluenza-teen [https://perma.cc/N2G8-7B2U]; Michael J. Mooney, *The Worst Parents Ever*, D MAGAZINE (May 2015), https://www.dmagazine.com/publications/d-magazine/2015/may/affluenza-the-worst%20-parents-ever-ethan-couch/ [https://perma.cc/7B2X-TLB9]; Will Payne & Daniel Bates, *Sins of the 'Affluenza' Boy's Parents: Millionaire Father and Mother of Teen Let Off Despite Killing Four In DUI Crash Have Been Accused of More Than TWENTY Crimes and Traffic Violations*, DAILY MAIL (Dec. 18, 2015), http://www.dailymail.co.uk/news/article-2524872/Millionaire-parents-affluenza-teen-20-arrests-citations.html [https://perma.cc/9L7Q-EH5M]; Naheed Rajwani, *'Affluenza Teen' Ethan Couch Released From Jail Days Before His 21st Birthday*, Dallas News (Apr. 2, 2018), https://www.dallasnews.com/news/crime/2018/04/02/affluenza-teen-ethan-couch-released-jail-days-before-21st-birthday [https://perma.cc/S92B-H93R]; Tribune Wire Reports, *'Affluenza' Teen Ethan Couch Grew Up In Wealthy But Unstable Home*, CHI. TRIBUNE (Dec. 31, 2015), https://www.chicagotribune.com/news/nationworld/ct-ethan-couch-20151231-story.html [https://perma.cc/A7NC-SRRN]; Tribune News Servs., *Judge Orders 'Affluenza' Teen Ethan Couch to Nearly 2 years in Jail*, CHI. TRIBUNE (Apr. 13, 2016), https://www.chicagotribune.com/news/nationworld/ct-affluenza-ethan-couch-jail-20160413-story.html [https://perma.cc/Z3HG-PD2C]; Daniel Victor, *Ethan Couch, 'Affluenza Teen' Who Killed 4 While Driving Drunk, Is Freed*, N.Y. TIMES (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/ethan-couch-affluenza-jail.html [https://perma.cc/VA9R-W75Y]; CNN Wire, *Profile of Ethan Couch's Parents, Who Attorneys Argued Spoiled Him, Made Him Irresponsible*, FOX 4 NEWS (Dec. 21, 2015), https://fox4kc.com/2015/12/21/profile-of-ethan-couchs-parents-who-attorneys-argued-spoiled-him-made-him-irresponsible/ [https://perma.cc/Q4GR-QB9E];

[48] David Keenan, *The Difference a Day Makes: How Courts Circumvent Federal Immigration Law at Sentencing*, 31 SEATTLE U. L. REV. 139 (2007); Christopher Claridge, *2 Men Sentenced to Year for Assault*, SEATTLE TIMES (Apr. 23, 2005), https://www.seattletimes.com/seattle-news/2-men-sentenced-to-year-for-assault/ [https://perma.cc/ER6K-VATC]. He was sentenced to six months in prison for the deadly weapon enhancement, but the judge said that in his opinion it would not affect his immigration status.

[49] The sentence is reviewed by the Supreme Court of Montana and found to be below the statutory minimum. Rambold is re-sentenced and serves 2.5 years. Ashley Nerbovig, *Teacher Who Raped Student to be Paroled to California after less than 3 years in Prison*, BILLINGS GAZETTE (Mar. 10, 2017), https://billingsgazette.com/news/state-and-regional/crime-and-courts/teacher-who-raped-student-to-be-paroled-to-california-after/article_0e96cce1-e322-517e-9fcc-24ad8e4f7598.html [https://perma.cc/MP5Q-TSJF].

and that the victim is also to blame because there was not any "forcible beating up thing."[50]

In one final example, Brock Turner and a victim happen to attend the same fraternity party where they both are drinking. Later that night, Turner is caught sexually assaulting the unconscious victim. The victim is bleeding and has penetrating trauma wounds in her vaginal area. At trial, Turner blames the college party culture. He is convicted of three felony counts for sexually assaulting the unconscious woman. Fearing that a more serious sentence would have "a severe impact" and adverse collateral consequences on Turner's future, the judge sentences him to six months in county jail and three years of probation, far less than the six years prosecutors had asked for in line with the two-year minimum guideline for each of the three felony counts.[51]

### *B. Damaging Responses Inspired by Points of Conflict: Nullification and Shadow Vigilantism*

One may object on several different grounds to the law's treatment of these cases in which the law and the community hold conflicting views on mitigation. Retributivists may object on deontological grounds; crime-control utilitarians may object because they see such conflict cases as potentially undermining the criminal law's moral credibility with the community and thereby reducing its crime-control effectiveness.[52]

A related concern is that such conflicts will inspire people to undermine the system's operations or distort its processes so as to generate results closer to what the community sees as a just result. In the context of Conflict-Injustice cases, this means nullification activities of one kind or another: prosecutors choosing not to prosecute where the legal rules clearly provide for liability, grand jurors refusing to indict without regard to clear evidence, trial jurors acquitting despite the fact that the case has been clearly proven, sen-

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[50] John Bacon, *Judge Apologizes for Teen Rape Remarks, Not Sentence*, USA TODAY (Sept. 6, 2013), http://www.usatoday.com/story/news/nation/2013/08/28/teacher rape montana/2722817/ [https://perma.cc/QF47-5848]; Laura Collins, *Cherry Was Raped by Her Teacher at 14 and Shunned for Reporting It. Then She Shot Herself Dead in Her Mother's Bed. Now Her Mom Reveals Her Living Hell and Fury That Attacker Got Just 30 Days Jail*, DAILY MAIL (Aug. 28, 2013), https://www.dailymail.co.uk/news/article-2405280/Cherice-Moralez-case-Family-speak-living-hell-rape-Stacey-Rambold.html [https://perma.cc/QW9M-SVVJ]; Crimesider Staff, *Montana Rape Case Update: State Prosecutors Appeal 30-Day Sentence in Case of Teacher Who Raped Student, 14*, CBS NEWS (Sept. 4, 2013), https://www.cbsnews.com/news/montana-rape-case-update-state-prosecutors-appeal-30-day-sentence-in-case-of-teacher-who-raped-student-14/ [https://perma.cc/2XCC-6Z3J].

[51] Elle Hunt, *'20 Minutes of Action': Father Defends Stanford Student Son Convicted of Sexual Assault*, GUARDIAN (June 5, 2016), https://www.theguardian.com/us-news/2016/jun/06/father-stanford-university-student-brock-turner-sexual-assault-statement [https://perma.cc/2UDF-TN48]; Marina Korin, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/ [https://perma.cc/3CF3-AJ9T].

[52] *See supra* text accompanying note 4.

tencing judges giving reduced sentences that dramatically depart from the sentencing guidelines in cases that are not exceptional, and governors or presidents exercising their clemency or pardon power as a means of resentencing offenders (as opposed to taking account of special postconviction events). As discussed at the end of this Section, all of these nullification activities are seriously problematic: a criminal justice system ought to aim to satisfy blameworthiness proportionality through its normal operation rather than inviting reliance upon such damaging nullification activities.

Such nullification activities are commonly inspired by Conflict-Injustice cases in order to bring the punishment in line with deserved mitigation (upper right-hand quadrant). For example, Angelo Parisi, a landscaper who is upset to see his neighborhood falling into violence and despair brought on by crack cocaine, tries to get the police to deal with the problem, but nothing changes. When an abandoned building on the street becomes a crack house, Parisi and a friend take up a collection from the neighborhood to buy gasoline to burn it down. After ensuring that the house is vacant, they set the fire. No one is hurt by the blaze. Three weeks later, Parisi is charged with arson. If convicted of the charges, the sentence could be up to 20 years. Despite his having admitted to the arson and lacking any legal defense, the jury finds Parisi not guilty.[53]

The well-known case of Bernhard Goetz provides another example. With subway crime rates extremely high and having been previously injured by muggers, Goetz begins to carry a gun when he rides the subway. When four men confront him in a subway car demanding money, he shoots them, including one of the men who no longer presents an immediate threat. No one dies. The first grand jury refuses to indict him. After he is indicted by a second grand jury, the trial jury acquits him of all shooting offenses, holding him liable only on the gun charge.[54]

The refusal of the first Goetz grand jury to indict illustrates another avenue of nullification. In the case of Joe Horn, for example, Horn sees two men break into his neighbors' home. He calls police and gets his shotgun. He

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[53] Dan Chu & Maria Leonhauser, *Two Angry Neighbors Burn Out a Nest of Crack Dealers, but Now They're in Big Trouble Themselves*, PEOPLE MAGAZINE (Mar. 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/ [https://perma.cc/YAY4-WJN8]; Opinion, *Crack: A Disaster of Historic Dimension, Still Growing*, N.Y. TIMES (May 28, 1989), http://www.nytimes.com/1989/05/28/opinion/crack-a-disaster-of-historic-dimension-still-growing.html?pagewanted=all [https://perma.cc/GHK3-TQNE]; Isabel Wilkerson, *'Crack House' Fire: Justice or Vigilantism?*, N.Y. TIMES (Oct. 22, 1998), http://www.nytimes.com/1988/10/22/us/crack-house-fire-justice-or-vigilantism.html?pagewanted=all [https://perma.cc/H9T4-NS8T].

[54] On the gun charge, Goetz serves eight months in jail. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1990); *Bernhard Goetz Trial: 1987*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/law/law-magazines/bernhard-goetz-trial-1987 [https://perma.cc/Z7R7-QV97]; Bob Drogin, *Prosecutor Calls Goetz 'Vigilante,' Urges His Conviction*, L.A. TIMES (June 12, 1987) http://articles.latimes.com/1987-06-12/news/mn-3977_1_subway-gunman [https://perma.cc/XGF8-4RT5]; Richard Stengel, *A Troubled and Troubling Life*, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,141513,00.html [https://perma.cc/2QRR-WSSB].

stays on the line with the 9-1-1 operator and repeatedly expresses his frustration that crimes like this keep occurring, yet police do not seem willing or able to stop them. With the police still not on the scene, the burglars are getting ready to leave laden with their loot. Horn steps into the yard with his gun raised and tells them to stop or he will shoot. When the men ignore his warning and run off, Horn fires, and both men are killed. Murder charges are filed. After hearing two weeks of testimony, the grand jury refuses to indict.[55]

Even if there is no nullification action during the process, the occasional lucky defendant can escape punishment through executive commutation. Cyntoia Brown, sixteen years old, is living with her abusive pimp when she is sent to have sex with a 43-year-old man who has a room full of loaded guns. When the man becomes violent, she shoots him in what she claims is self-defense. Her self-defense claim is rejected at trial; Brown is convicted of murder and receives a sentence of 51-years-to-life. But, her sentence is later commuted by the Governor of Tennessee after public outcry that the sentence is excessive given that Brown was a victim of human trafficking.[56]

In some cases, both the trial jury and the governor may be provoked to nullify the normal application of the rules. Richard Jahnke is a sixteen-year-old with a father who has physically abused him for most of his life. The father becomes increasingly brutal and on the present occasion promises to "get rid of" Richard when he (the father) returns home. The father has also become sexually interested in his daughter. Fearing what is coming, Jahnke lays in wait and, upon his father's return, shoots his father as he stomps toward him. Jahnke is tried for murder and conspiracy. While, according to the Wyoming Supreme Court,[57] he does not meet the requirements of self-

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[55] Adam Ellick, *Grand Jury Clears Texan in the Killing of 2 Burglars*, N.Y. Times (July 1, 2008), https://www.nytimes.com/2008/07/01/us/01texas.html [https://perma.cc/H35W-AKBX]; Brian Rogers, *Joe Horn Cleared by Grand Jury in Pasadena Shootings*, Star Chron. (June 30, 2008), http://www.chron.com/neighborhood/pasadena-news/article/Joe-Horn-cleared-by-grand-jury-in-Pasadena-1587004.php [https://perma.cc/2WXA-D3PZ].

[56] Carl M. Cannon, *Cyntoia Brown and the Quality of Mercy*, Real Clear Pol. (Jan. 13, 2019), https://www.realclearpolitics.com/articles/2019/01/13/cyntoia_brown_and_the_quality_of_mercy_139161.html [https://perma.cc/8HMX-RH3Y]; Tamar Lapin, *Celebs Rally for Sex Trafficking Victim Who Got Life for Killing Her Abuser*, N.Y. Post (Nov. 22, 2017), https://nypost.com/2017/11/22/celebs-rally-for-sex-trafficking-victim-who-got-life-for-killing-her-abuser/ [https://perma.cc/JZ7V-JW74]; Adam Tamburin, *Cyntoia Brown's Professor Speaks As Clemency Decision Nears: 'She's Ready to Serve People'*, USA Today (Dec. 23, 2018), https://www.usatoday.com/story/news/politics/2018/12/23/cyntoia-brown-clemency-bill-haslam-tennessee-prison-reform/2402290002/ [https://perma.cc/EQB8-ML8W].

[57] According to the Supreme Court of Wyoming, Jahnke was not entitled to a provoked heat of passion mitigation to manslaughter: "The jury convicted appellant of killing his father voluntarily upon a sudden heat of passion. If lying in wait for one and one-half hours is a 'sudden heat of passion,' then appellant must have been frozen in time. This must have been the longest 'sudden' in history. . . . In his defense appellant employed the oldest, most common and most successful tactic in homicide cases. He put the deceased on trial. His strategy was largely successful as he was convicted of a lesser offense when the uncontradicted evidence and appellant's admission pointed only to murder." Jahnke v. State, 682 P.2d 991, 1010 (Wyo. 1984).

defense or a mitigation of provoked heat of passion, the jury nonetheless gives him the mitigation to voluntary manslaughter. He is sentenced to five-to-fifteen years, but the sentence is commuted by the Governor of Wyoming.[58]

Nullification is not limited to these major players in the criminal justice system. It might be found anywhere that a participant sees what he or she believes to be an injustice that needs to be avoided. 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, and sits on the floor cuddling the baby while the baby expires, holding the staff at bay with a gun. When the baby is dead, he gives himself up to hospital security.[59] The prosecutor seeks to charge Linares with murder. Despite the district attorney's efforts to prosecute, no murder charges can be effectively brought because the coroner refuses to put homicide as the cause of death. (Instead, he writes "lack of oxygen to the brain.") Eventually, Linares pleads guilty to unlawful use of a weapon and is directed by the court to get a year of counseling.[60]

Gertrude Vaughan, 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. As the newborn lays on the bathroom floor, emotionally disconnected Vaughan does nothing. She does not clean up the mess or touch the baby, who soon dies.[61] The teenager is convicted of first-degree murder. On appeal, the verdict is overturned because the jury was not given an option of lesser crimes, such as negligent homicide or manslaughter. Despite having already shown that they could obtain a first-degree murder conviction, the prosecution chooses not to retry Vaughan for any offense.[62]

In the context of the Conflict-Failure of Justice cases, the process is subverted in the reverse way, through what has been called "shadow vigilan-

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[58] *Id.*; Mark Bagne, *Richard Jahnke, a Teenager Who Killed the Father He . . .*, UPI (June 14, 1984), https://www.upi.com/Archives/1984/06/14/Richard-Jahnke-a-teenager-who-killed-the-father-he/5954456033600/ [https://perma.cc/DMT7-49YY]; Alan Prendergast, *It's You or Me, Dad*, Rolling Stone, (May 26, 1983), https://www.rollingstone.com/music/features/its-you-or-me-dad-19830526 [https://perma.cc/PML6-GFS8].

[59] *See, e.g.*, Associated Press, *Father Is Cleared in Ill Baby's Death*, N.Y. Times (May 19, 1989), http://www.nytimes.com/1989/05/19/us/father-is-cleared-in-ill-baby-s-death.html [https://perma.cc/CPJ8-8BFE]; Robert Blau & Jean Latz, *Father: Killed Son Because I Love Him*, Chi. Tribune (Apr. 27, 1989), http://articles.chicagotribune.com/1989-04-27/news/8904070827_1_respirator-samuel-comatose [https://perma.cc/Z7PW-YASJ].

[60] *Man Who Pulled Plug on Son Dies*, UPI (Dec. 21, 2005), http://www.upi.com/Man-who-pulled-plug-on-son-dies/83711135187240/ [https://perma.cc/WE59-E7UQ]; Matt O'Connor, *Father Tells How He Let His Baby Son Die*, Chi. Tribune (May 24, 1989), http://articles.chicagotribune.com/1989-05-24/news/8902030838_1_samuel-nurse-removed [https://perma.cc/52K6-62Z7].

[61] Vaughan v. Commonwealth, 376 S.E.2d 801, 802 (Va. App. 1989).

[62] *See id.* at 808.

tism."[63] This occurs when people distort the normal operation of the criminal justice system in order to fix the failure of deserved punishment that has arisen from the undeserved mitigation and to bring the case more in line with the punishment actually deserved (lower left-hand quadrant).

The classic vigilante takes the law into her own hands by unlawfully imposing the punishment she believes the offender deserves but that the system has failed to impose. In the case of William Malcolm, for example, a sadistic serial pedophile is released and re-victimizes some of the same children he had previously abused. When the courts decide that he cannot be put on trial for these new attacks because the victims could not testify about the current abuse without referring to prior abuses—precluding a fair trial in the court's view—he is sent back home yet again. The outraged neighborhood decides that something must be done. Someone knocks on Malcolm's door and, when he answers it, shoots him in the face.[64]

Another example of classic vigilantism is found in the case of Ken McElroy, a violent serial bully who for years has been terrorizing his neighbors in rural Missouri. The police are afraid of him, and on the rare occasions that he is brought up on charges, he has a stable of friends to provide false alibies. After shooting an elderly shopkeeper, he is again arrested and set free. Soon after being released on this last occasion, he is sitting in his truck in the middle of town and is surrounded by a large group. He is shot and killed by shots coming from six different people.[65]

The killers in both of these cases are classic vigilantes, but their successful escape from prosecution depends on other "shadow vigilantes," who do not themselves participate in the killing but who consciously choose to pervert the operation of the criminal justice system by refusing to identify who they know to be the killer or killers. During the investigation of McEl-

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[63] Shadow vigilantism is "a reaction of lawlessness short of the physical confrontation of classic vigilante action [that] occurs when ordinary people, instead of taking the law into their own hands by going into the street, seek to manipulate the operation of the criminal justice system in order to force from it the justice that it seems so reluctant to do on its own. . . . Shadow vigilantes can be ordinary people who seek to influence the operation of the criminal justice system whenever they have contact with it, as witnesses, as jurors, or even as voters shaping the system. But shadow vigilantism is also common among the official participants in the system who essentially conspire to undermine those rules and practices that they see as regularly frustrating justice. Thus, shadow vigilantes can be police officers, prosecutors, judges, and others." PAUL H. ROBINSON & SARAH M. ROBINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS 49 (2018).

[64] *See, e.g.*, *id.* at 147–50; NIGEL CAWTHORNE, UNDERWORLD UK: VIGILANTES: FIGHTING CRIME WITH CRIME (2010); Gary Jones & James Fletcher, *We'll Shed No Tears; Murdered Sex Fiend Who Lived in Shadow of Hatred*, DAILY MIRROR (Feb. 19, 2000), http://www.thefreelibrary.com/WE'LL+SHED+NO+TEARS%3B+Murdered+sex+fiend+who+lived+in+shadow+of+hatred.-a060292519 [https://perma.cc/V73R-UX8N]; *Witness Plea after Paedophile Killing*, BBC NEWS (Feb. 19, 2000), http://news.bbc.co.uk/2/hi/uk_news/648475.stm [https://perma.cc/R7XW-GJR8].

[65] HARRY N. MACLEAN, IN BROAD DAYLIGHT (1988); ROBINSON & ROBINSON, *supra* note 63, at 51–54; A. G. Sulzberger, *Town Mute for 30 Years about a Bully's Killing*, N.Y. TIMES (Dec. 15, 2010), https://www.nytimes.com/2010/12/16/us/16bully.html [https://perma.cc/76U4-5NXS].

roy's death, for example, the authorities find that dozens of people witnessed the shooting of McElroy, yet, in this town of 400 people, not a single person provides the authorities with information as to who any of the shooters might be.

Shadow vigilantes are not limited to disaffected citizens. They can include active participants in the criminal justice process. Consider, for example, the investigation of William Sheard. Soon after a brutal child rape and murder, police determine that the attacker lives in a particular building. When they knock on Sheard's door, they become suspicious because of the fresh scratches on his face that he cannot explain. They enter his apartment and find blood-stained clothing and other inculpatory evidence, evidence that would certainly have been destroyed if they had waited to get a search warrant. The police claim that Sheard invited them in and that the evidence was in plain view, but Sheard vehemently denies this, and there is good reason to believe the police are fudging—"testilying"—because they believe it is justified as the only means of bringing this child rapist murderer to justice.[66]

And, the shadow vigilante impulse of criminal justice system participants is not limited to police officers. It can be felt by anyone in the system who has a sense of justice. For example, it is not uncommon for trial juries to "cover" for classic vigilantes by providing an acquittal through jury nullification. Recall the vigilante cases discussed above where the offender was acquitted despite clear legal rules and evidence supporting liability: Parisi burning down a crack house, Goetz shooting robbers on the subway even when no longer under threat, and Horn shooting burglars fleeing his neighbor's house.[67]

The shadow vigilante impulse is also felt by judges. Consider, for example, the case of Ray Brent Marsh, who owns a crematorium in a rural area in which the furnace has broken and will be expensive to fix. To keep his business going, he takes in bodies for cremation but simply throws them in his large backyard. His conduct goes undiscovered for years and ends up involving nearly 300 bodies.[68]

The entire community is outraged by his offensive treatment of so many loved ones, so he must wear a bulletproof vest when transported to court for proceedings. The outraged families are even more offended when

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[66] *See* United States v. Sheard, 473 F.2d 139, 141–42 (D.C. Cir. 1972); Robinson & Robinson, *supra* note 63, at 186–88.

[67] *See supra* text accompanying notes 53–55.

[68] *See, e.g.*, David Firestone & Michael Moss, *More Corpses Are Discovered Near Crematory*, N.Y. Times (Feb. 18, 2002), https://www.nytimes.com/2002/02/18/us/more-corpses-are-discovered-near-crematory.html [https://perma.cc/P83X-FBMB]; Sara Rimer, *Crematory Owners' Family Asks Why*, N.Y. Times (Feb. 24, 2002), https://www.nytimes.com/2002/02/24/us/crematory-owners-family-asks-why.html [https://perma.cc/J2UJ-9QD7]; Sara Rimer, *Dazed by Crematory Scandal, Undertakers' Trust Is Shaken*, N.Y. Times (Feb. 21, 2002), https://www.nytimes.com/2002/02/21/us/dazed-by-crematory-scandal-undertakers-trust-is-shaken.html [https://perma.cc/8438-M52U].

they learn that, under existing Georgia law, Marsh cannot be convicted of any of his instances of abuse of corpses because the state statutory language does not strictly cover his conduct. He can only be convicted of a minor fraud offense for misrepresenting his services, an offense that would not normally bring prison time. Even his multiple violations would normally support only a minor sentence. It seems clear, however, that the judge takes the opportunity to give him some of the deserved punishment he has escaped when he sentences Marsh to twelve years in prison.

Similarly, Melvin Ignatow escapes conviction for a horrific rape, torture, and murder of a former girlfriend until the photographs he took of his deeds are discovered. Although he had previously obtained a false acquittal by perjuring himself at trial, double jeopardy bars his retrial.[69] But the judge sentencing him for his perjury takes the opportunity to punish him for the offenses for which he cannot be convicted, giving him seventeen years for his perjury.[70]

This same kind of shadow vigilantism by judges is evident in Conflict-Failure of Justice cases (lower right-hand quadrant), where an offender gets an undeserved mitigation, and the sentencing judge takes the opportunity at a later time to give a sentence well beyond what would normally be imposed in an effort to correct for the earlier failure of justice.

Robert Downey Jr. has a serious addiction problem. He is picked up by police many times for drug-related criminal behavior but is typically let go because he is a blockbuster film star who has brought pleasure and entertainment to thousands of people. On the rare occasions that he is charged and convicted, the judge always sends him to rehab, even though he never com-

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[69] *See* PAUL ROBINSON & MICHAEL CAHILL, LAW WITHOUT JUSTICE 117–36 (2005); ROBINSON & ROBINSON, *supra* note 63, at 82; Susan Craighead, *Attorney's Slip of the Tongue Led to Break in Schaefer Case*, COURIER-J., Mar. 1, 1990, at A1; Todd Murphy, *Ignatow Witness Pleads Guilty to Evidence Tampering*, COURIER-J., Dec. 3, 1991, at B1; Mary O'Doherty, *Threatening-Letter Trial Begins for Missing Woman's Boss*, COURIER-J., Aug. 9, 1989, at B1; Clay Ryce, *Schaefer's Boss is Charged in Threat Against Her Fiance*, COURIER-J., Mar. 26, 1989, at B1; Leslie Scanlon, *'I Did Not Kill Her'; Ignatow's Ex-Lover Admits Helping Dig Hole for Victim*, COURIER-J., Dec. 18, 1991, at A1; Leslie Scanlon, *Ignatow Confesses to Killing Schaefer*, COURIER-J., Oct. 3, 1992, at A1; Leslie Scanlon, *Ignatow's Lawyer Blames Shore-Inlow*, COURIER-J., Dec. 10, 1991, at A1; Leslie Scanlon, *No Evidence Links Ignatow with Murder, Jurors Say*, COURIER-J., Dec. 23, 1991, at A1; Cary B. Willis, *FBI Recorded Murder Suspect in Brenda Schaefer Case*, COURIER-J., Feb. 6, 1990, at A1; Cary B. Willis, *Ignatow Lawyer Says Release of Tape Should Rule Out Death*, COURIER-J., Feb. 7, 1990, at A1; Andrew Wolfson, *Finding Evidence in Home a Fluke*, COURIER-J., Oct. 3, 1992, at A1; Deborah Yetter, *Federal Grand Jury Indicts Ignatow on Perjury Charge,* COURIER-J., Jan. 9, 1992, at A1; Associated Press, *After Nearly Two Years in Prison, Ignatow, Cleared in Slaying, Free*, DAILY NEWS, Dec. 24, 1991, at 9A; Associated Press, *Man, Acquitted Once, Gets 8 Years in Death of Tortured Girlfriend*, SEATTLE TIMES (Nov. 14, 1992), http://community.seattletimes.nwsource.com/archive/?date=19921114&slug=1524598 [https://perma.cc/3Q4U-Z55A]; *see generally* BOB HILL, DOUBLE JEOPARDY: OBSESSION, MURDER, AND JUSTICE DENIED (1995); Elinor J. Brecher, *Brenda Schaefer: 'That Woman Who Disappeared'—How Could This Ordinary Person with No Apparent Enemies—a Doctor's Office Assistant Who Lived with Her Parents—Just Simply Vanish?*, COURIER-J., Mar. 5, 1989, at A4.

[70] Eight years from the federal system, followed by nine years from the state of Kentucky.

pletes the court-mandated program. Finally, however, a sentencing judge decides that Downey's repeated disregard of his obligations is cause for serious action and imposes a three-year prison sentence for probation violation.[71] The sentence is all the more unusual because California's Proposition 36 requires that treatment, not prison, be given to most non-violent offenders,[72] the probation report specifically recommends that Downey not go to prison,[73] and there is evidence to support the defense's claim that Downey is now actually "on the road to rehabilitation."[74]

Neville Wells, a forty-one-year-old party promoter is an alcoholic with a history of driving while drunk. Despite his two previous DUI convictions, he is still allowed to drive. With a blood alcohol level of .22, he runs his mini-van through red lights, hits a parked car, then continues to speed down the road and strikes a moving car. The force of the collision is so great that the other driver's heart explodes in her chest. Wells attempts to flee the scene. Driving deaths such as this are usually tried as vehicular homicide in New York and draw sentences of three years or less. But, in this instance, Wells is charged with second-degree murder.[75] The judge is not willing to listen to Wells's defense that he is an alcoholic. In the view of the judge, the "defendant's intoxication at the time of the collision, no matter how debilitating, is immaterial, as is his history of chronic alcoholism."[76] In a rare verdict, something that has happened only a handful of times in New York State, Wells is convicted of murder in the second degree and sentenced to seventeen-years-to-life in prison.[77]

The first kind of nullification cases discussed above—maneuvering to avoid injustice resulting from the denial of mitigation the offender deserves—is problematic for the criminal justice system, and the system ought to do whatever is necessary to avoid provoking such conduct. Such activi-

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[71] *See, e.g.*, Edward Boyer, *Robert Downey Jr. Released From Prison by Appeals Court Ruling*, L.A. Times (Aug. 3, 2000), http://articles.latimes.com/2000/aug/03/local/me-63699 [https://perma.cc/EMX9-MFHB]; Gatecrasher, *'Iron Man' Actor Robert Downey Jr. Tells Rolling Stone About Prison, Heroin, Cocaine and the Future*, N.Y. Daily News (Apr. 28, 2010), https://www.nydailynews.com/entertainment/gossip/iron-man-actor-robert-downey-jr-tells-rolling-stone-prison-heroin-cocaine-future-article-1.163247 [https://perma.cc/3DRU-68S5]; David K. Li, *He's Got Appeal: Downey Jr. Out of Jail*, N.Y. Post (Aug. 3, 2000), https://nypost.com/2000/08/03/hes-got-appeal-downey-jr-out-of-jail/ [https://perma.cc/CA8E-VVYK]; Monte Morin, *Robert Downey Jr. Gets 3 Years in Prison*, L.A. Times (Aug. 6, 1999), http://articles.latimes.com/1999/aug/06/local/me-63303 [https://perma.cc/54PA-9DQ9].

[72] Duncan Campbell, *Downey Admits to Cocaine Charge, but Avoids Prison*, Guardian (July 16, 2001), https://www.theguardian.com/world/2001/jul/17/filmnews.film [https://perma.cc/M2LN-ZH5S]

[73] *See* Morin, *supra* note 71.

[74] Li, *supra* note 71.

[75] People v. Wells, 862 N.Y.S.2d 20, 29 (App. Div. 2008); Hoda Kotb, *The Worst Kind of Drunk Driver*, NBC Nightline (July 19, 2013), http://www.nbcnews.com/id/13320570/ns/dateline_nbc/t/worst-kind-drunk-drivers/#.XD9OilxKg60 [http://perma.cc/77MA-G6NN].

[76] *Wells*, 862 N.Y.S.2d. at 28.

[77] On appeal, the court concludes that there is no reason that the trial judge cannot apply the standard "of depraved indifference to human life" to this case despite the fact that it has not been done before. *See id.*

ties, in which actors ignore the criminal justice system's rules and substitute their own, undermine the legislative prerogative and, in that sense, are undemocratic. Perhaps more importantly, such activities foster arbitrariness and unpredictability. The participants in one case may work up the courage to nullify, while those in an identical case may not. The result is a system that is neither transparent nor consistent. Further, where the law on the books is replaced with ad hoc nullification judgments, the system fails to provide fair notice of the governing criminal law rules. Finally, even where nullification activities avoid an injustice, they also take away the public disclosure of the criminal law's problem, as well as the resulting outrage that might serve to reform the system to avoid such injustices in the future.[78]

The second kind of nullification activity—shadow vigilantism—works in reverse: it perverts the normal operation of the system in order to impose deserved punishment that the system failed to provide. But, it creates the same kind of systemic problems as nullification of liability activities. Shadow-vigilante conduct undemocratically undermines the legislative prerogative. It fosters unpredictability and arbitrariness: participants may be provoked to act in one case, while participants in an identical case are not. As with nullification of liability, the resulting system is neither transparent nor consistent. While shadow-vigilante activities avoid objectionable failures of justice, they hide the system's failures and short-circuit resulting outrage that might prompt reforms that would help avoid such failures of justice in the future.[79]

By undermining the criminal justice system's reputation for transparency and consistency, both nullification of liability and shadow-vigilante activity can provoke their own backlash by those offended by their inconsistency, leading to a downward spiral of declining reputation and declining deference, which then further undermines the system's reputation.[80] The criminal law would do better to provide the mitigation deserved under the principle of blameworthiness proportionality, and thereby avoid the injustices that can provoke liability nullification as well as the failures of justice that can provoke shadow vigilantism.

### *C. Empirical Support for Deserved Mitigation Claims*

The characterization of the cases discussed above as being "conflict" cases of one sort or another is not based simply upon the personal judgment of the author, but supported by a simple empirical study in which a group of ordinary people were asked for their justice judgments about whether or not

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[78] *See, e.g.*, Roger Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243, 1274 (2011); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488, 512 (1976).

[79] Robinson & Robinson, *supra* note 63, at 195–97.

[80] *Id.* at 201–14.

mitigation was appropriate in each of the cases.[81] The results are reported below.[82]

Tables 1 and 2 below show the subjects' judgments about the extent of mitigation deserved, if any, in each case. The subjects were given four alternative answer options:

0: No mitigation of blame; 0% reduction in punishment.
1: Minor mitigation of blame; less than 10% reduction in punishment.
2: Medium mitigation of blame; 10-50% reduction in punishment.
3: Major mitigation of blame; greater than 50% reduction in punishment.

Because each higher offense grade commonly doubles the maximum punishment, the last option (mitigation of greater than 50%) essentially suggests at least a reduction of an offense grade. The mode for each case is reported in the two tables below. (Where the number of responses for the second most popular choice is close to the number for the most popular, both options are shown.) Both Table 1 and Table 2 show cases where the offender has failed to receive a deserved mitigation.[83]

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[81] There is no suggestion here that the cases discussed above are a random selection of cases. Rather, these cases were selected because they nicely illustrate the point that there do exist law-community disagreements on a wide variety of instances of mitigation. The study does not aim to explain or to map people's mitigation judgments but only to test the reliability of the author's characterization of each of these cases.

[82] Using the paid online survey service SurveyMonkey, 131 subjects read the instructions and scenarios reproduced in the Appendix and answered one question about the appropriate mitigation in each case. The modes of the responses obtained are reported in Tables 1–4 and in notes 123 and 130, *infra*. The mode (the most common response) rather than the mean is reported because a review of the data suggested that a number of respondents did not appear to be taking the survey in good faith and provided irrational, internally inconsistent, or apparently random answers to the survey, such as providing the same response for every question. It seems unlikely, for example, that a good-faith respondent would really believe that Rambold, who repeatedly coerced intercourse with his fourteen-year-old student and received only thirty days in jail, was "punished a lot more than deserved." (The bad-faith responses probably occurred in part because the survey, with twenty-eight scenarios, was overly ambitious. During in-person pretesting, it commonly took a good-faith respondent twenty-five minutes or more. The completion rate for the survey was only fifty-eight percent.) One could try to identify and exclude the apparently bad-faith respondents from the data, but it was thought prudent to avoid making such judgment calls and to simply report the modes instead. The means did track the expected results but were diluted by bad-faith responses; however, one can only speculate as to the location and extent of such dilution.

The 131 respondents had the following demographics:

Age: 39%, 18–29; 34%, 30–44; 24%, 45–60; 4% over 60.

Gender: 77% female; 23% male.

Income: largest income groups were 21%, $25,000–49,999; 21%, $50,000–74,999; and 18%, $75,000–99,999.

[83] For authorities in support of the facts and dispositions of the cases contained in the following four tables, see the footnotes accompanying the text where the cases are discussed: Table 1, *supra* text accompanying notes 23–34; Table 2, *supra* text accompanying notes 53–62; Table 3, *supra* text accompanying notes 41–51; Table 4, *supra* text accompanying notes 71–77.

TABLE 1. FAILS TO RECEIVE DESERVED MITIGATION
(UPPER LEFT-HAND QUADRANT)

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Gounagias | Sodomized by roommate. After weeks of taunting by his social group, the humiliated Gounagias kills his attacker while the man sleeps. | 2 | Murder, fifteen-years-to-life |
| Randolph | Randolph's daughter is responding well to chemotherapy when his insurance runs out. He robs a bank to pay for her continued treatment. | 2 | Bank robbery, must serve maximum twenty-five years |
| Dixon | Facing threats of violence to her children at the hands of her abusive boyfriend, Dixon illegally buys him weapons. | 2, 3 | Illegal gun purchase, nine concurrent three-year terms |
| Gurney | Having suffered a severe head trauma in an accident and after twenty-two surgeries, Gurney still has psychotic episodes and personality issues. After failing to take his medication, he kills his girlfriend in a brutal and bizarre ritual. | 1, 2 | Murder and arson, sixty years (ten of which are for the arson) |
| Gridine | Just after finding a small shotgun, fourteen-year-old Gridine asks a passing man for his wallet. As the man walks away, he shoots and lightly wounds him. | 2 | Attempted armed robbery, attempted murder, seventy years |
| Shearer | After her abusive ex-husband chokes her unconscious, Shearer awakens to find his gun next to her. Believing the gun is there so he can kill her, she picks it up and shoots him dead. | 2, 3 | Murder, fifteen-years-to-life |

TABLE 2. FAILS TO RECEIVE DESERVED MITIGATION—
BUT PROVIDED THROUGH NULLIFICATION ACTION
(UPPER RIGHT-HAND QUADRANT)

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Parisi | Out of concern for the damage that drugs are doing to his neighborhood, Parisi burns out a crack house which he knows to be vacant. | 2 | Freely admits to the act but is acquitted at trial (jury nullification) |

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Goetz | Goetz shoots and wounds four would-be muggers on the New York subway. | 2, 3 | Acquitted of assault, eight months on gun charge (jury nullification) |
| Horn | After a rash of burglaries, Horn shoots two burglars who refuse his warnings to stop as they flee a neighbor's house with loot. | 2 | Grand jury refuses to indict (grand jury nullification) |
| Brown | Pimped out by her violent boyfriend, sixteen-year-old Brown shoots a forty-three-year-old client who turns violent while his loaded guns are nearby. | 3 | Murder, sentenced to fifty-one years, commuted by Tennessee Governor |
| Jahnke | Sixteen-year-old Jahnke kills his abusive father who has promised to assault Jahnke upon the father's return. | 3 | Convicted of manslaughter, serves three years before commuted by North Dakota Governor |
| Linares | Wrought with worry about his child's ongoing suffering and isolation, young father Linares holds hospital staff at bay as he removes his brain-dead baby from life-support. | 2, 3 | Coroner will not put homicide as cause of death; sentenced to one year of counseling (coroner nullification) |
| Vaughan | Emotionally disconnected sixteen-year-old Vaughn delivers unacknowledged baby on the bathroom floor. The baby dies from neglect. | 2 | Guilty of murder, new trial ordered, no retrial (prosecutorial nullification) |

As is apparent from the modes in the third column of the tables, the subjects most commonly see these cases as deserving of mitigation. Yet, as the last column of Table 1 suggests, the legal rules commonly failed to provide the deserved mitigation, although it may sometimes be provided through some kind of nullification action, as noted in the last column of Table 2.

Tables 3 and 4 below show the subjects' judgments about whether the sentence imposed accurately reflects the extent of mitigation, if any, that the offender deserved. For each case, subjects were told of the circumstances of the offense and the sentence imposed and were given seven alternative options in answering this question:

Was the mitigation provided by the court too much, just right, or not enough?

-3: Mitigation provided was far too much (punished a lot less than deserved).
-2: Mitigation provided was too much.

-1: Mitigation provided was a little too much.
0: Mitigation provided was just right.
1: Should have received a little more mitigation.
2: Should have received more mitigation.
3: Should have received much more mitigation (punished a lot more than deserved).

TABLE 3. RECEIVES UNDESERVED MITIGATION (LOWER RIGHT-HAND QUADRANT)

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Jackson | Enraged because Jackson feels motorcyclist cut her off in traffic, she follows him off the highway and rams him at ninety miles per hour. | -3 | Plea bargain of voluntary manslaughter, six-year sentence |
| Varela | As a woman overdoses on his drugs, Varela rapes her and posts photos of the rape. When she dies, he attempts to cover up the crime. | -3 | Convicted of second degree manslaughter, third degree rape and unlawful disposal of human remains; receives thirty-six-month sentence, the maximum allowed for first-time offender |
| Bosket | By his own count, Bosket has committed thousands of crimes by the age of fourteen, including rape. At age fifteen, during an armed robbery spree, he kills two men in different events in the same week. | -3 | Due to youth, he can only be sentenced to 5.5 years in juvenile detention for the murders and the armed robberies |
| Ebens | Ebens, an auto plant supervisor who resents Japanese imports hunts down and beats a man to death for looking Japanese. | -3 | Guilty of manslaughter, three years of probation because judge feels that Ebens is normally an upstanding citizen |
| Couch | Sixteen-year-old Couch is driving drunk and high on drugs when he crashes into a disabled car, killing four and wounding others. | -3 | Guilty of four counts of intoxication manslaughter and two counts of intoxication assault causing serious bodily injury, ten years of probation, based on an affluenza defense |
| Kravchenko | While shouting anti-gay remarks, Kravchenko stabs with a broken bottle a stranger leaving a gay bar. | -3 | Misdemeanor assault, 364 days, so he will not be deported |

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Rambold | Rambold, a high-school teacher repeatedly coerces intercourse with his fourteen-year-old student. | -3 | Told to attend sexual offender classes, fails the class, and then given thirty days. Judge says he has suffered enough, and the victim was not physically beaten |
| Turner | While both Turner and his victim are drunk, he attempts to rape the unconscious woman. When two passersby intervene, he tries to escape. | -3 | Convicted of three sexual assault charges, three months because more would ruin his future |

TABLE 4. RECEIVES UNDESERVED MITIGATION—
BUT UNDERMINED BY SHADOW VIGILANTE ACTION
(LOWER LEFT-HAND QUADRANT)

| Case | Summary | Mode | Actual liability result |
|---|---|---|---|
| Downey | Downey, a long-time drug addict and a celebrity actor, is repeatedly arrested and sent to rehab. He is charged with a parole violation for continued drug use but argues he is an addict. | 0 | Probation violation, three years, court says he is manipulative, and that state is out of patience. No addiction defense allowed |
| Wells | Wells, a long-term alcoholic and repeat offender, gets in his car after fifteen drinks and kills a motorist. | 0 | Convicted of second degree murder, seventeen years. Denied alcoholic mitigation |

Again, the modes in the third column show the conflict with the legal rules in Table 3. But, as Table 4 suggests, shadow vigilantes may attempt to compensate for the undeserved mitigation given by the legal rules, and the study respondents approve of the results of this kind of compensating conduct.

These results are consistent with other related empirical studies.[84]

[84] *See, e.g.*, IJUD, *supra* note 4, at 239–400; Paul H. Robinson, Sean E. Jackowitz, & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012).

### *D. Summation of Law-Community Conflict*

It has been argued above that the system would be better off if the legal rules were constructed to recognize mitigations deserved under the principle of blameworthiness proportionality.[85] What legal reforms would that mean, and could such reforms be feasibly undertaken?

Even the brief review of illustrative cases above suggests a wide range of reforms to current doctrines that would better approximate deserved mitigations, including, for example, broadening of the traditional provoked heat of passion mitigation to murder, shifting from an all-or-nothing approach to a sliding-scale approach for mistake as to justification, recognizing a mitigation in cases of "near excuse," and a variety of other doctrinal reforms discussed above.[86]

Unfortunately, the political realities of American crime politics suggest that this kind of criminal code rewrite—providing reforms for a long list of specific doctrines—may not be feasible.[87] More importantly, even if this collection of reforms could be enacted, it would only fix the discrete subset of problematic cases affected by specific doctrines. It would not provide a general assurance that the system would recognize a deserved mitigation that might arise in any of a wide variety of cases, sometimes in unique or unexpected circumstances.

The law ought to, at the very least, provide a statutory general mitigation provision. Not only would it be more comprehensive in its coverage, but it also might be politically less threatening: as a general mitigation provision, it would be clear on its face that it did not provide an escape from criminal liability, but rather would affect only the degree of punishment to be imposed. Could such a general mitigation provision be constructed and, if so, could it be politically feasible?

## V. The Case for a General Mitigation

The notion of a statutory mitigation provision is not foreign to current law. As noted above, a mitigation from murder to manslaughter has long been commonly authorized for a provoked killing done in the heat of passion.[88] One might ask whether the logic and rationale of that doctrine necessarily calls for some broader statutory provision. It is argued here that in a modern world increasingly concerned with adhering to proportionality between personal blameworthiness and punishment,[89] the restrictions inherent in the provocation mitigation are anachronistic. Mitigation of liability ought

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[85] *See supra* text accompanying notes 6–12.

[86] *See supra* text accompanying notes 23–38.

[87] *See* Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 Hastings L.J. 633 (2005).

[88] *See supra* note 57 and accompanying text; *see also* Mapping, *supra* note 26, at 46–51.

[89] *See, e.g.*, the Model Code amendment discussed in *supra* note 1 and accompanying text.

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." If this is so, in what instances should a mitigation be available?

### *A. 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 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 rage induced by the provoking circumstances.

Yet, it seems clear that mitigating circumstances can go well beyond instances of current law's provoked "heat of passion." Many offenders who deserve mitigation will be denied because their offense is driven by something other than the provoked "heat of passion." Recall some of the cases of deserved mitigation discussed above: Linares, overwrought by his child's ongoing suffering and isolation, holds the hospital staff at bay while he removes his brain-dead baby from life-support.[90] Disconnected sixteen-year-old Vaughan delivers a baby on the bathroom floor and then simply ignores him.[91] Facing threats of violence to her children at the hands of her abusive boyfriend, Dixon illegally buys him weapons.[92] After finding a small shotgun, fourteen-year-old Gridine shoots and lightly wounds a man walking by (getting 70 years for attempted murder).[93]

None of these cases involve provoked heat-of-passion, but all are instances where the defendant, while acting improperly, does deserve some reduction in liability from that which would be appropriate in a case without the mitigating circumstances. Yet, under current legal schemes, none of these offenders are entitled to a mitigation in liability.[94] (Part VII.B. will discuss whether it is adequate to leave such cases to the ad hoc discretionary judgment of individual sentencing judges.)

Even for the classic provoked "heat of passion" cases, traditional rules are too limiting in defining when mitigation is deserved. Recall the *Gounagias* case, in which Gounagias, after being mercilessly taunted by others for having been forcibly sodomized earlier, boils over and shoots his

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[90] *See supra* note 59.
[91] *See* Vaughan v. Commonwealth, 376 S.E.2d 801, 802 (Va. App. 1989).
[92] *See supra* note 28.
[93] *See* State v. Gurney, 36 A.3d 893 (Me. 2012).
[94] *See supra* text accompanying notes 21–38.

original rapist.[95] 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 unprovoked murder. As noted previously,[96] under the traditional provocation rule, the circumstances that triggered the killing are held to be legally irrelevant because they fail to meet several of the traditional rule's requirements. A period of time passed between the rape and the killing that disqualifies Gounagias; 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 Gounagias 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,[97] 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."[98] 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."[99] Unfortunately, only ten of the fifty-two American criminal codes have adopted this broader formulation.[100] The overwhelming majority continue to follow some form of the traditional provocation rule.[101]

Even the Model Penal Code's extreme emotional disturbance mitigation is too narrow in some respects in that the blameworthiness proportionality principle demands a more universal mitigation provision: the mitigation should be available in cases beyond murder and in cases beyond those of emotional disturbance.

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[95] *See* State v. Gounagias, 88 Wash. 304, 305–07, 316–19 (1915).
[96] *See supra* text accompanying notes 23–24.
[97] MODEL PENAL CODE § 210.3 cmt. at 59 (AM. LAW INST. 1980).
[98] *Id.* § 210.3(1)(b). (AM. LAW INST. 2019).
[99] *Id.*
[100] *See* MAPPING, *supra* note 26, at ch. 5 (2018).
[101] For a discussion of the variations among those states, see *id.*

### *B. 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, for example, downgrading murder to manslaughter may be the difference between life (or death) and imprisonment for a maximum of 10 years.[102] But if emotional disturbance can so dramatically mitigate criminal liability in homicide cases, why shouldn't the Model Penal 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 Penal Code, for example, it is a second-degree felony,[103] carrying the same penalty as manslaughter. If the same mitigating circumstances exist, why shouldn't they call for a comparable mitigation in punishment to the next lower offense grade in cases where the victim does not happen to 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 lesser adjustment called for by some mitigations. But nearly all modern codes today use a scheme of offense grading significantly more nuanced than the three degrees of 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.[104] (The offense grading categories are usually defined exponentially, so an increase in one grade may double the maximum punishment, while a decrease in one grade may halve the maximum punishment.[105]) Further, even without relying upon an offense grading scheme, one could create a universal mitigation by providing, for example, a certain percentage reduction.

Thus, to satisfy the blameworthiness proportionality principle, one might adopt a general mitigation provision that applies to all felonies, a task

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[102] 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 § 6.06 (AM. LAW INST. 2019).

[103] *Id.* § 211.1(2)(a). (AM. LAW INST. 2019).

[104] *See* REPORT ON OFFENSE GRADING IN NEW JERSEY, UNIV. OF PA. CRIM. L. RES. GROUP 9 (Jan. 2011), https://www.law.upenn.edu/live/files/183-nj-grading-report [https://perma.cc/X9BS-L6AE]. *See also* Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173 (2015).

[105] *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 106; Tex. Penal Code Ann. §§ 12.21–12.35.

made feasible by use of modern criminal code drafting techniques. (The text of such a provision is proposed in Part VII.A below.)

### *C. Should a General Mitigation Be Limited to Cases of Mental or Emotional Disturbance?*

There is good reason to argue that even an emotional-disturbance mitigation broadened to include all felonies may be too narrow. Why should the mitigation be limited to offenses committed during extreme mental or emotional disturbance? Consider the range of cases in which special mitigating circumstances may operate primarily to *motivate* the actor to commit the offense, rather than to create a mental or emotional *disturbance*: Parisi burns down his neighborhood's crack house out of frustration that the police are doing nothing to address the problem.[106] Randolph robs a bank to pay for his daughter's chemotherapy.[107] After a rash of burglaries, Horn shoots two burglars who refuse his warnings to stop as they flee with their loot from his neighbor's house.[108] Each of these offenders has acted improperly and deserves punishment, but it would be seriously unjust to treat them as if the empathetic circumstances that drove their offenses never existed. In other words, there is good reason to think that the blameworthiness proportionality principle requires a general mitigation provision of some considerable breadth.

On the other hand, the same principle requires that the mitigation provision also exclude cases that are not deserving of mitigation. Recall the wide range of cases in the two lower quadrants of the graphic, listed in Tables 3 and 4, for which the community is likely to see a mitigation as inappropriate. The challenge, then, is to sort out what operating principles ought to govern such a general mitigation provision.

## VI. Operating Principles for a General Mitigation Provision

The bedrock principle upon which a general mitigation provision should be based is relatively straightforward: An offender is entitled to a mitigation in liability and punishment if the offense circumstances and the offender's situation or capacities meaningfully reduce the offender's blameworthiness for the violation. This is simply an expression of the demands of the blameworthiness proportionality principle. Even ordinary people will intuitively understand the meaning of this principle and will be able to operationalize it in individual cases.

It would be useful, however, if a general mitigation statute could go further to suggest to jurors, for example, the kinds of issues that they ought

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[106] *See supra* note 53 and accompanying text.
[107] *See supra* note 25 and accompanying text.
[108] *See supra* note 55 and accompanying text.

to think about in making their deserved-mitigation judgments. It is suggested here that there are at least three distinct inquiries that ought to be included in assessing whether an offender is entitled to a mitigation. As shorthand, they might be referred to as (1) the *psychic state* inquiry: to what extent was the offender acting under the influence of mental or emotional disturbance or upset at the time of the offense?; (2) the *personal choice* inquiry: given the offender's circumstances and capacities, to what extent could we have expected the offender to have avoided committing the offense?; and (3) the *normative* inquiry: to what extent would giving the offender a mitigation specially undermine community norms?

### *A. The Psychic State Inquiry*

The common wisdom reflected in the popular press, as well as in 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."[109]

In reality, however, 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 who kills in a "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."[110]

However, conceding that an actor is still responsible for an offense committed in a state of mental or emotional disturbance does not necessarily undermine the arguments for providing a mitigation in liability. 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 or her disturbed state ought 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. Thus, the provocation mitigation, for example, serves to distinguish a special subset of intentional killings from the typical murder by 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,

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[109] Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 654, 677 (1989).

[110] Id.

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 rape victimization.[111] His humiliation and resulting anger make him desperate to kill his assailant. 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."[112]

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 thoughtful and rational, yet the circumstances are *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, or merely motivated. Recall the case of Darla Jackson. She is driving on a California freeway when she becomes enraged by a motorcyclist's driving. She accelerates her car into him at ninety-five miles per hour, throwing him to his death.[113] Jackson seems to have snapped into an out-of-control *rage*. Compare that to the case of 16-year-old Vaughan, who delivers her baby in her bathroom but, overwhelmed by the unexpected experience, allows the baby to die.[114] Vaughan is hardly in a rage at the time of her offense but clearly seems to be emotionally disturbed. Then compare these cases to that of Rodolfo Linares,[115] who holds hospital workers at bay with a gun after he disconnects life-support machines and cradles his baby while the baby expires, then surrenders to hospi-

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[111] *See supra* notes 23–24 and accompanying text.
[112] Model Penal Code § 210.3(1)(b) (Am. Law Inst. 2019).
[113] *See* supra note 45 and accompanying text.
[114] *See* Vaughan v. Commonwealth, 376 S.E.2d 801, 802 (Va. App. 1989).
[115] *See* supra note 59 and accompanying text.

tal 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. His empathetic emotions motivate the offense but do not render him out-of-control or even emotionally disturbed the time of the offense. He may be upset, but he is hardly mentally or emotionally disturbed.

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.[116] On the other hand, the Model Penal Code drafters have made a good case for providing a mitigation to some "disturbance" cases. But, as suggested previously, one can argue that a wide variety of motivation-only cases, such as Parisi,[117] Randolph,[118] and Horn,[119] deserve mitigation. Thus, one might conclude that there is no fixed minimum level of disturbance required to deserve a mitigation. However, it may also be the case that the greater the extent of the rage or disturbance, the greater the chance that a mitigation will be deserved—depending upon the additional factors discussed below: the personal choice inquiry and the normative inquiry.

### *B. The Personal Choice Inquiry*

Even an act done in extreme rage—an act seeming to be "out-of-control"—may not have an effect toward reducing an actor's blameworthiness for the offense. That blameworthiness judgment requires an assessment of whether, given the offender's circumstances and capacities, his or her reaction to the situation makes sense or was at least understandable. Some reactions will not be understandable, but rather the offender's reaction will be seen as extreme or inexplicable—she just "let herself go" in a way that showed inexcusable indifference to the wrong she was committing. That is, we may conclude that the offender should have made some greater effort to restrain herself from committing the offense, and her shortcoming in failing to exercise restraint was such that she deserves no mitigation for her offense.

We cannot condition mitigation on a requirement that the offender must have acted as a "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 feels 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 would not act that way even in the actor's difficult situation, then the offender may be ineligible for a mitigation. In

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[116] 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.

[117] *See* supra note 53 and accompanying text.

[118] *See* supra note 25 and accompanying text.

[119] *See* supra note 55 and accompanying text.

such cases, we would be inclined to say instead that the person "grossly overreacted" or "should have gotten his or her 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 inexplicably excessive in degree appear in the context of all types of emotions. Consider Mary Konye's jealousy of her friend's beauty. Her friend frequently insults Konye's looks and preens at her own. After one insult too many, Konye reacts by throwing acid in her friend's face.[120] Also consider Amy Bishop, a Harvard-trained researcher with a high opinion of her genius who is denied tenure. She shoots six of her colleagues, three of whom die.[121] In a final example, 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.[122] It seems doubtful that any of these actors deserve a mitigation for their emotion-driven crimes.[123]

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 greater latitude in keep-

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[120] Press Association, Mary Konye Jailed for 12 *Years* for Acid Attack on Former Friend in East London, GUARDIAN (Mar. 21, 2014), https://www.theguardian.com/uk-news/2014/mar/21/mary-konye-jailed-12-years-acid-attack-oni-friend-london [https://perma.cc/34UJ-NGQN]; Hayley Dixon, Jealous Student 'Ambushed Friend with Acid in Copycat Attack', TELEGRAPH (Jan. 7, 2014), http://www.telegraph.co.uk/news/uknews/crime/10555055/Jealous-student-ambushed-friend-with-acid-in-Katie-Piper-copycat-attack.html [https://perma.cc/876X-RRQ4]; Lizzie Parry, Jealous Friend Spent Years Obsessing over Naomi Oni's Looks and Tried to Steal *Her* Boyfriend Before Hurling Acid in *H*er Face, DAILY MAIL (Jan. 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 [https://perma.cc/22P3-CUJU].

[121] Shaila Dewan, Stephanie Saul, & Katie Zezima, *For Professor, Fury Just Beneath the Surface*, N.Y. TIMES (Feb. 20, 2010), https://www.nytimes.com/2010/02/21/us/21bishop.html [https://perma.cc/D2LV-8S7U]; Patrick Radden Keefe, *A Loaded Gun: A Mass Shooter's Tragic Past*, NEW YORKER (Feb. 11, 2013), https://www.newyorker.com/magazine/2013/02/11/a-loaded-gun [https://perma.cc/37C8-Q772]; Amy Wallace, *What Made This University Researcher Snap?*, WIRED (Feb. 28, 2011), https://www.wired.com/2011/02/ff_bishop/ [https://perma.cc/HB6J-AB5P]; Robin Wilson, *Amy Bishop Is Sentenced to Life in Prison, Bringing Legal Case to an End*, CHRON. OF HIGHER EDUC. (Sept. 24, 2012), https://www.chronicle.com/article/Amy-Bishop-Is-Sentenced-to/134624 [https://perma.cc/VU2L-UTDM].

[122] Richard Alleyne, *The Killer Who Could Not Take Rejection*, TELEGRAPH (May 17, 2001), https://www.telegraph.co.uk/news/uknews/1330515/The-killer-who-could-not-take-rejection.html [https://perma.cc/HR2G-VVGN]; Peter Stubley, *Jane Andrews: Naked Ambition*, COURT NEWS UK, http://courtnewsuk.co.uk/jane-andrews/ [https://perma.cc/5B6C-CZLJ]; *Was it Really Murder? Part I*, GUARDIAN (Aug. 29, 2003), https://www.theguardian.com/theguardian/2003/aug/30/weekend7.weekend1 [https://perma.cc/NX5Y-HBAD]; Michael Seamark & Richard Kay, *Former Royal Aide is Found Guilty of Love Rage Murder*, DAILY MAIL, http://www.dailymail.co.uk/news/article-46817/Former-royal-aide-guilty-love-rage-murder.html [https://perma.cc/2BM5-G98B].

[123] These cases were included in the empirical study reported in Part IV.C and all had modes of zero (no mitigation).

ing 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 social scientist might explain, there is a difference between what might be called fast and slow emotions.[124] 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 physiological processing.[125] The resulting effect of the emotion may be the same, in terms of rage versus disturbance versus motivation, but whether the emotion in the case is one that acts fast or slowly may make a difference to the personal choice inquiry. People may have less expectation that an actor successfully resist acting on a fast emotion, such as fear, yet have greater expectation that the same actor 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 emotional state to be taken into account (as part of the psychic state inquiry)—rage versus disturbance versus motivation—but also a continuum of the understandability of the offender's reaction to the situation (as part of the personal choice inquiry).

The Model Penal Code requires that for a judge to mitigate murder to manslaughter, the killing be must 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, given the extent of the disturbance and given the offender's circumstances and capacities, how understandable is the offender's *failure to resist committing the offense*?

The Model Penal 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 a mitigation by excluding all cases where the offense is driven by disturbance that is not "extreme," as well as by excluding motivation-only cases.

At the same time, the Model Penal Code's formulation is too broad in that it would 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

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[124] *See, e.g.*, DANIEL KAHNEMAN, THINKING FAST AND SLOW (Farrar, Straus, & Giroux eds., 1st ed. 2011).

[125] *Cf.* Robert W. Levenson, *Autonomic Nervous System Differences Among Emotions*, 3 PSYCHOL. SCI. 23–27 (1992) (describing physiological responses to anger, fear, sadness, and disgust).

offender should have made a more serious effort to resist it. Many cases *undeserving* of a mitigation, such as those of Konye, Bishop, and Andrews, noted immediately above,[126] are cases in which we can understand *why the offender is extremely disturbed* (as the Model Penal Code requires) but nonetheless feel that, even given that extreme disturbance, the offender should have done more to resist committing the offense and thus the offender is not entitled to a 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 may be 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 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 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. 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 Kerrie 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 somewhat less hesitant if instead of shooting at him she throws a glass of water or a tennis racket.[127]

The larger point is that the Model Penal Code's formulation simply does not recognize that the two separate inquiries—the psychic state inquiry and the personal choice inquiry—must be separately assessed. This failure results in a formulation so open-ended that it may help account for why the Model Penal 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.

### *C. The Normative Inquiry*

Even if the offender is seriously enraged and even if that reaction is understandable given the offender, his circumstances, and his capacities, the propriety of a mitigation ought to also take into account community norms.

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[126] *See supra* text accompanying notes 120–122.

[127] Steven Nelson, *Woman Charged for Pointing Gun at Teen Allegedly Raping Dog*, U.S. News & World Rep. (May 8, 2017, 4:54 PM), https://www.usnews.com/news/articles/2017-05-08/woman-who-pointed-gun-at-teen-accused-of-raping-dog-charged-with-aggravated-assault [https://perma.cc/CC4L-NAKV]; Jimmy Nsubuga, *Woman Arrested After 'Shooting at Boy, 14, Raping a Dog'*, Metro (May 6, 2017, 2:59 PM), https://metro.co.uk/2017/05/06/woman-arrested-after-shooting-at-boy-14-raping-a-dog-6619621/ [https://perma.cc/L277-URS3]; 5 News Web Staff, *Charges Dropped Against Woman Who Shot at Teen Trying to Allegedly Rape Neighbor's Dog*, 5 News (May 17, 2017, 2:15 PM), https://5newsonline.com/2017/05/16/charges-dropped-against-woman-who-shot-at-teen-trying-to-allegedly-rape-neighbors-dog/ [https://perma.cc/75S6-FDU8].

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.[128]

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 teenage girls wearing hijab. He spews hateful remarks at the girls, and when some passengers come to the girls' aid, Christian kills the men.[129] Even if we thought Christian was in a genuine rage, and even if some special circumstances in his life could make his rage seem understandable to us, we would want to reject any mitigation for him if it might be taken to legitimize his offensive views.[130]

As a final point, it should be noted that there is a danger that this third inquiry—the extent to which giving a mitigation to the offender would undermine community norms—could be interpreted too broadly. 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 third inquiry ought to be much more specific: would the *reason for giving the mitigation* undermine community norms? In the Linares context, the father's *empathy* for his brain-dead infant leads him to hold the hospital staff at bay with the gun.[131] The reason for giving the mitigation—Linares' empathy—would not undermine community norms.

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[128] And, in any case, such a mitigation would be regularly blocked by a decision-maker reflecting community norms, through any of the paths of nullification and shadow vigilantism discussed in Part IV.B.

[129] State's Memorandum in Opposition to Defendant's Motion to Set Bail, State v. Christian, No. C 17CR34550 (Or. Cir. Ct. Multnomah Cty. Nov. 13, 2017); Maxine Bernstein, *Portland MAX Hero's Last Words: 'Tell Everyone on This Train I Love Them'*, OREGONIAN (May 29, 2017), http://www.Oregonlive.com/Portland/2017/05/Max_Heros_Last_words_tell_ever.html [https://perma.cc/KX7M-HU6M]; Carli Brosseau & Allan Brettman, *Jeremy Christian's Path From Troubled Youth to TriMet Stabbing Suspect*, OREGONIAN (Jan. 9, 2019), http://www.oregonlive.com/portland/index.ssf/June 11, 2017/06/jeremy_Christians_path_from_tr.html [https://perma.cc/3CB9-NELK]; Associated Press, *Suspect in Portland Stabbings Built Life Around Hate Speech*, L.A. DAILY NEWS (Aug. 28, 2017, 5:27 AM), https://www.dailynews.com/2017/06/04/suspect-in-portland-stabbings-built-life-around-hate-speech/ [https://perma.cc/X669-JHPT]; Jason Wilson, *Suspect in Portland Double Murder Posted White Supremacist Material Online*, GUARDIAN (May 28, 2017, 10:15 AM), https://www.theguardian.com/us-news/2017/may/27/portland-double-murder-white-supremacist-muslim-hate-speech [https://perma.cc/4RLD-FJ7M].

[130] In fact, ordinary people believe that Christian does not deserve mitigation. In the empirical study described in Part IV.C., for example, the statistical mode for Christian was zero (no mitigation).

[131] *See supra* text accompanying note 59.

One can imagine a spectrum of emotions from positive to negative. 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. When Jose Ferreira is seventeen, he accidentally kills a sixteen-year-old girl. Some thirty years later, overwhelmed by a sense of *remorse*, he turns himself in to incredulous police.[132] Giving a mitigation for genuine and heartfelt remorse would not undermine community norms, and indeed might strengthen them. Similarly, in the Linares context, the offender puts himself in legal jeopardy simply out of empathy for his brain-dead baby.[133] Providing a mitigation to Linares would seem to support the valuable societal norm in support of empathy.

It may be that the normative assessment of the offender's actions creates a sliding-scale in which offenders driven by a positive emotion, such as empathy or remorse,[134] may be given some greater leeway in getting a mitigation, while offenders driven by a negative emotion, such as hate or jealousy, may be given less leeway.[135]

These three distinct inquiries ought to be included in assessing whether an offender is entitled to a mitigation: the psychic state inquiry (to what extent was the offender acting under the influence of mental or emotional disturbance or upset at the time of the offense?), the personal choice inquiry (given the offender's circumstances and capacities, to what extent could we have expected the offender to have avoided committing the offense?), and the normative inquiry (to what extent would giving the offender a mitigation specially undermine community norms?).

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[132] David Lohr, *Man 'Haunted' By Schoolgirl's 1982 Death Accepts Plea Deal*, HUFFPOST (Jan. 19, 2017, 4:00 PM), https://www.huffingtonpost.com/entry/jose-ferreira-carrie-ann-jopek_us_58810ad7e4b096b4a2306517 [https://perma.cc/8K9N-PPY3]; David Lohr, *'Your Daughter's Haunting Me'*, HUFFPOST (Jan. 4, 2017), https://www.huffingtonpost.com/entry/jose-ferreira-carrie-ann-jopek_us_56254f64e4b0bce34701b57e?ncid=fcbklnkushpmg00000021 [https://perma.cc/V4BT-KR32]; Ivan Moreno, *Milwaukee Man Gets 7 Years in Prison After Confessing in Teen Girl's 1982 Death*, CHI. TRIBUNE (Mar. 18, 2017, 8:48 PM), http://www.chicagotribune.com/news/local/breaking/ct-milwaukee-cold-case-confession-sentence-20170318-story.html [https://perma.cc/HW72-UZWT].

[133] *See supra* text accompanying note 59.

[134] The remorse emotion operates somewhat differently than other emotions, of course. It typically drives an offender not to commit the offense but more frequently to turn himself in to authorities or engage in some other self-sacrificing conduct after commission of the offense.

[135] 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 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.

## VII. Implementation

To summarize, an offender ought to be entitled to a mitigation whenever the offense circumstances and the offender's situation and capacities meaningfully reduce the offender's blameworthiness for the offense. The process of making that judgment is one that ought to include at the very least an assessment of three factors: (1) the extent of the disturbance or upset, if any, pushing toward the offense (the psychic state inquiry); (2) the extent to which we can understand why, given her circumstances and capacities, she did not avoid committing the offense (the personal choice inquiry); and (3) 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?

### *A. A Proposed General Mitigation Provision*

A draft provision might look something like the following:

*General Mitigation*

(1) An offender is entitled to a mitigation in liability and punishment if the offense circumstances and the offender's situation and capacities 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 or was upset at the time of the offense;

(b) given the offender's situation and capacities, the extent to which one can understand why the offender failed to avoid 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) a substantial mitigation is appropriate, it may reduce the grade of the offense by one grade; or

(b) a lesser mitigation is appropriate, it may leave the extent of the mitigation to the judgment 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 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 for the jury to insist that a mitigation be

provided.[136] 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).

Notice that section (1) states the legally binding mitigation rule. Section (2) instructs the jury about the kind of things they should be sure to think about in assessing the blameworthiness proportionality called for in section (1). To give an example illustrating the importance of the difference between these two sections, consider cases of remorse, such as Ferreira, who reports himself to police thirty-five years after accidentally killing a female neighbor when he was a teenager. Section (2)'s factors all concern mitigating circumstances at work at the time of the offense. Remorse, of course, operates only after the offense is complete. However, there is nothing in the provision that would prevent a jury from providing a mitigation for Ferreira if it concludes that the case satisfies the requirements of section (1).

### *B. Should a General Mitigation Provision be Applied by a Sentencing Judge, or Should It Provide a Common Analytic Structure for All Decision-Makers, Including Juries?*

With the exception of the provocation mitigation from murder to manslaughter, any mitigation today is typically decided by judges in the exercise of 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. The understandability of an offender's failure to avoid committing the offense involves issues on which most people have some kind of intuitive justice judgment, but without the framework of some kind of analytic structure, different people's intuitions on a case may play out differently 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 offender has increased dramatically over the last half-century. The three degrees of felonies[137] and one degree of misdemeanor plus petty misdemeanor[138] reflected in the 1962 Model Penal Code grading scheme have been replaced with two or three

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[136] 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 approximate the proper proportionality of criminal liability and punishment to the defendant's blameworthiness.

[137] Model Penal Code § 6.01 (Am. Law Inst., Proposed Official Draft 1962).

[138] *Id.* § 6.08.

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 unguided discretionary judgments could have satisfied in an earlier era are inadequate today.

Third, a general 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. This is due to the jury better representing community judgments, and because groups tend to do better at decisions involving judgments or valuations and are better at taking multiple factors into account.[139] Further, jury decision-making on these issues will improve the system's reputation with the community for being just, and, as noted previously, such increased moral credibility can have significant crime-control benefits.[140]

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 single sentencing 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 prove to a jury all facts legally essential to the punishment,"[141] and the Court has carried forward this view in other cases.[142]

Finally, part of the value of having a codified provision is that it requires a principled analysis of what the contours of the mitigation doctrine 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 provision provides a universal rule that will apply to all cases, and that kind of drafting simply cannot be done without first elucidating the underlying governing principles. Development of such a principle is a significant and challenging analytic task, well beyond what is realistic to expect of an individual sentencing judge or even a panel of appellate judges deciding an individual case.

### *C. Is Such a Codified Mitigation Workable in Practice and Feasible Politically?*

An objection one might make to the proposed general mitigation is that it seems to use quite open-ended criteria. The decision-maker is asked to

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[139] Paul H. Robinson & Barbra A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1146 (2005).

[140] *See* IJUD, *supra* note 4, at 141–88.

[141] 530 U.S. 466, 483–84 (2000); *see also* Blakely v. Washington, 542 U.S. 296, 313 (2004) (articulating holding of *Apprendi*).

[142] *See Blakely*, 542 U.S. at 313; United States v. Booker, 543 U.S. 220 (2005).

judge whether the circumstances of the offense and offender suggest reduced blameworthiness. In making that decision, the decision-maker is asked to consider: (1) the extent of the offender's disturbance or upset at the time of committing the offense, if any; (2) how understandable the offender's failure to avoid committing the offense is, given his situation and capacities; and (3) whether giving the offender a mitigation would specially undermine community norms enough to render the offender ineligible for the mitigation. Clearly, this decisional process relies heavily upon the decision-maker's judgments of justice that may, in many respects, be largely intuitional rather than analytic.

However, the complexity of the justice judgment being requested here ought not be a matter of concern. As I have demonstrated elsewhere,[143] 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,[144] there are two kinds of legality, and the drafting demands for the ex ante rules of conduct are quite different from those for the ex post adjudication of violations, the latter being the issue here. If a criminal code is to have any hope of capturing our complex judgments about mitigation in the adjudication of violations, it must commonly rely upon subjective and complex standards rather than specific objective rules.

That truth is reflected in the old common-law formulations that openly rely upon complex judgments—what exactly constitutes "heat of passion"?—and is repeatedly shown even more dramatically in a wide variety of common modern code formulations. How much loss of capacity is enough for an offender to meet the Model Penal 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"?[145] (The same open-ended language is used in the Model Penal Code's involuntary intoxication excuse.) The Model Penal Code's duress excuse is available if "a person of *reasonabl*e firmness in [the actor's] situation would have been unable to resist."[146] 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."[147] How trivial is too trivial?

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[143] *See* IJUD, *supra* note 4, at 5–34.

[144] *Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 375–385 (2005); PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 185–209 (1997).

[145] MODEL PENAL CODE § 4.01(1) (AM. LAW INST. 2019) (emphasis added).

[146] *Id.* § 2.09(1) (emphasis added).

[147] *Id.* § 2.12(2).

In the Model Penal Code's mitigation of murder to manslaughter, how much disturbance is enough to satisfy the "*extreme* mental or emotional disturbance" requirement?[148]

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.[149] 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."[150] 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.[151]

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 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 provide a decisional structure that shows the interrelation among those factors. This gives the decision-maker a way to think about the complex issue. The formulation proposed 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 suggested here, the only question is whether an offender held criminally liable shall be entitled to a mitigation of an offense grade or less.

Even if the mitigation proposal is workable in practice, one may wonder whether it is politically feasible. As noted previously,[152] 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

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[148] *Id.* § 210.3(1)(b) (emphasis added).
[149] *Id.* § 2.02(2)(c).
[150] *Id.* § 2.02(2)(c), (d).
[151] For other examples see IJUD, *supra* note 4, at 104–108.
[152] *See supra* note 26.

assume, then, that it would be even less politically attractive than the Model Penal Code's murder mitigation?

While it is true that the proposal potentially applies to more offenses, it is in some respects narrower than the Model Penal 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 Penal Code are the areas for which it is easy to see the need for such broadening. As discussed above,[153] there is little rational justification for limiting a mitigation to murder cases. And there are any number of cases in which there is strong community support for a mitigation even in the absence of "extreme mental or emotional disturbance."[154]

Further, providing a jury with an opportunity to take account of what they think are mitigating circumstances can avoid their returning a verdict of acquittal when they are presented with what they see as two bad choices: convicting an offender for an offense that ignores important mitigating circumstances or acquitting an offender who deserves some degree of liability and punishment. For example, as noted previously,[155] most American jurisdictions adopt the all-or-nothing approach to mistake as to justification: a completely reasonable mistake will provide a defense, while even an honest but negligent mistake provides no defense or mitigation at all. (Under the sliding-scale approach of the Model Penal Code, in contrast, an honest but negligent mistake provides a reduced grade liability—that of a negligent offense.[156]) Thus, if a police officer shoots and kills a suspect because of an honest but negligent belief that his life is in danger, the all-or-nothing approach requires the jury to return either a verdict of unmitigated murder or a complete acquittal. Given what the jury sees as two bad choices, they will commonly provide an undeserved acquittal rather than provide an undeserved conviction for murder. But the general mitigation provision can avoid the undeserved acquittal by giving the jury an opportunity to impose liability in a mitigated form that they believe properly distinguishes the case from one of a straightforward murder.

Critics might easily 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 might 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 in

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[153] *See supra* text accompanying notes 95–98.
[154] *See, e.g.*, *supra* text accompanying notes 98–101.
[155] *See, e.g.*, *supra* text accompanying note 37.
[156] MODEL PENAL CODE § 3.09(2) (AM. LAW INST. 2019).

the proposed provision, 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 returning nullification verdicts. Indeed, as discussed previously, the same kind of disobedience and disrespect can play out among a wide variety of players in the criminal justice process.[157]

One obvious problem with leaving deserved mitigations in the hands of such nullification actors is that they will fail to mitigate in a large percentage of cases that deserve 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.[158]

Such disparity and arbitrariness were 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 the more democratic forums of legislatures and juries, increasingly cabining 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 and aggravations 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 blameworthiness and mitigation? Given today's expectations, the availability of miti-

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[157] See the discussion of this similar dynamic played out among variety of participants in the criminal justice system in ROBINSON & ROBINSON, *supra* note 63.

[158] We know from empirical studies that judges can have dramatically different views from one another on all manner of sentencing issues. *See generally* Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524 (1981); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1 (2010); Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime-Evidence from Booker*, 89 N.Y.U. L. REV. 1268 (2014).

gations 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 evidence presented at trial and, absent a codified general mitigation provision, 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 understand 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.[159] 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 have people internalize its norms.[160]

## VIII. Summary and Conclusion

It has been argued here that the Model Penal Code amendment setting blameworthiness proportionality as the dominant distributive principle for criminal punishment is a desirable and important development.[161] Empirical studies suggest that this is in fact the principle that ordinary people use in assessing proper punishment. Its adoption as the governing distributive principle for criminal liability and punishment makes good sense because it promotes not only the classic desert retributivism of moral philosophers but also crime-control utilitarianism by enhancing the criminal law's moral credibility with the community and thereby promoting deference, compliance, acquiescence, and internalization of its norms instead of suffering the resistance and subversion that is provoked by perceived violations of blameworthiness proportionality.

Such a principle has been commonly used as the basis for criticizing improper aggravations, such as the doctrines of felony murder and "three

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[159] 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. *See* Robinson, Jackowitz, & Bartels, *supra* note 84. See also various cases of sentencing discretion producing results in conflict with subjects' views: Gridine, *see supra* note 32; Kravchenko, *see supra* note 48; Rambold, *see supra* note 49–50.

[160] *See generally* IJUD, *supra* note 4, at 141–188.

[161] *See supra* text accompanying notes 1–5.

strikes." But the principle also logically requires recognizing a full range of deserved mitigations, not as a matter of grace or forgiveness but as a matter of entitlement. And, given ordinary people's nuanced judgments about blameworthiness proportionality, maintaining moral credibility with the community requires the criminal law to adopt an equally nuanced system of mitigations.

Such a nuanced system ideally would include reform of a wide variety of current law doctrines and, especially in the absence of such specific reforms, adoption of a general mitigation provision that aims for blameworthiness proportionality in all cases. Such a general mitigation ought not be limited to cases of "heat of passion" or murder as today's liability rules commonly provide. It ought to be available whenever the offense circumstances and the offender's situation and capacities meaningfully reduce the offender's blameworthiness, as long as giving the mitigation does not specially undermine community norms.

Adopting a codified general mitigation provision can provide blameworthiness proportionality more consistently, accurately, democratically, and transparently than leaving the mitigation to the unguided exercise of discretion by individual sentencing judges.