St. John's Law Review

Volume 95
Number 1 *Volume 95, Spring 2022, Number 1*

Article 7

The Curious Absence of Provocation Affirmative Defenses in Assault Cases

Michael S. Dauber

THE CURIOUS ABSENCE OF PROVOCATION AFFIRMATIVE DEFENSES IN ASSAULT CASES

MICHAEL S. DAUBER[†]

INTRODUCTION

Kent Davis returned home on February 22, 2008, took his toddler into the bedroom, fed her a bottle, and sat down to watch some television.[1] His wife, Rachel, noticed that their daughter had spilled her bottle, and the two began to argue.[2] During the argument, Rachel opened the window and yelled for the police; she also spat on Davis.[3] When she tried to call the police, Davis grabbed her cell phone and "snapped it in half."[4] Davis then took a knife from the kitchen and assaulted Rachel, punching her and stabbing her in the shoulder and neck until he finally called the police himself, saying, " 'I did it.' "[5] Davis was arrested and "charged with attempted murder in the second degree, assault in the first degree, and child endangerment."[6]

At trial, Davis admitted to stabbing Rachel, but claimed that he only grabbed the knife intending to "scare her and stop her from yelling," not to kill her.[7] However, everything "went a blur," and he "snapped" and "blacked out" during the assault.[8] Davis was convicted of assault and child endangerment, and sentenced

---

[†] Senior Staffer, *St. John's Law Review*, J.D. Candidate, 2021, St. John's University School of Law; M.A., 2016, New York University College of Global Public Health; B.A., 2015, Fordham University. I wish to sincerely thank Professor Jennifer Baum, Professor Anna Roberts, and Dean Michael A. Simons for their advice and contributions to this Note.

[1] Davis v. Perez, No. 13-CV-4950, 2015 WL 13707517, at *1 (S.D.N.Y. Sept. 4, 2015), report and recommendation adopted, No. 13-CIV-4950, 2018 WL 1773135 (S.D.N.Y. Apr. 11, 2018).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

to 11 years in prison.[9] On appeal,[10] and in a subsequent petition for habeas corpus, Davis argued, among other things, that he should have been entitled to mitigation of his assault charge due to extreme emotional disturbance ("EED").[11] The federal habeas court held, however, that this defense could not have succeeded because "EED is not available to a defendant charged with assault" in New York.[12]

The *Davis* case illustrates a profound and longstanding paradox in criminal law: the mitigating EED and adequate provocation[13] defenses are often available for homicide but not for assault, even though the same physical acts and same mitigating factors may be present in both types of cases.[14] Put another way, mitigation by affirmative defense is available when a defendant intends to *kill* someone, but not where a defendant merely intends to cause someone physical injury, even though the defendant may have been just as emotionally disturbed in the latter case as in the former. Further, a defendant charged with both assault and attempted homicide could receive a mitigating jury instruction on the attempted homicide charge but not the assault, despite the fact that the jury is asked to evaluate the defendant's intentions on the exact same criminal act.[15]

This Note argues that the EED and common law adequate provocation defenses should be extended to intentional assault offenses[16] in all states, as a matter of fairness and conceptual

---

[9] *Id.* at *3.

[10] *See generally* People v. Davis, 90 A.D.3d 461 (1st Dep't 2011).

[11] *Davis*, 2015 WL 13707517, at *1, *5.

[12] *Id.* at *11 n.13 (citing People v. Charles, 13 Misc.3d 985, 987 (Sup. Ct. Kings Cnty. Oct. 3, 2006); Rooplall v. Griffin, No. 12-CV-1542, 2013 WL 2455951, at *8 (E.D.N.Y. June 6, 2013)).

[13] For the purposes of this Note, the term "adequate provocation" is synonymous with "heat of passion."

[14] Only four states recognize an affirmative defense or statutory reduction in the classification of assault for adequate provocation, extreme emotional disturbance, or heat of passion: Colorado (COLO. REV. STAT. ANN. § 18-3-202(2)(a)–(b) (West 2016)), Kentucky (KY. REV. STAT. ANN. § 508.040 (West 1984)), Missouri (MO. ANN. STAT. § 565.052(1)(1) (West 2017)), and Ohio (OHIO REV. CODE ANN. § 2903.12(A)–(B) (West 2019)). Virginia recognizes mitigation for "malicious wounding." Williams v. Commonwealth, 767 S.E.2d 252, 256 (Va. Ct. App. 2015) (recognizing mitigation under VA. CODE ANN. § 18.2–51 (West 1975)).

[15] *See Rooplall*, 2013 WL 2455951, at *8 n.4.

[16] For the purposes of this Note, the term "assault" refers to the intentional infliction of an injury on another person, absent the intent to kill (since assault with intent to kill would amount to attempted homicide, for which the EED and adequate provocation defenses are frequently available in states that refer to these offenses in

symmetry. As noted in the Introduction provided above, every justification given for these defenses in the homicide context applies *a fortiori* to assault charges, where a defendant is implicitly less culpable given the intention to merely injure, not kill, the victim. Part I provides a background history and conceptual framework for understanding the EED and adequate provocation defenses in the homicide context, as well as in the few states that allow mitigation for assault. Part II argues that such mitigation should be allowed for assault as well. Finally, Part III proposes model legislation for implementing the defense in every jurisdiction.

I. BACKGROUND

This section provides a basic doctrinal overview of the adequate provocation doctrine and the modern EED affirmative defense, including the way those doctrines have historically operated in homicide cases and the few jurisdictions that extend the defense to assault cases.[17] Section A provides an overview of the historical development of the "heat of passion" and "adequate provocation" doctrines, with a particular emphasis on the concepts of mens rea and criminal culpability. Section B discusses the advent of the modern common law versions of both doctrines and the Model Penal Code ("MPC") EED defense. Section C analyzes several possible criticisms of the defenses in theory and practice, with an eye toward how those objections would apply if the defense were permitted in assault cases. Finally, Section D sets out ways in which adequate provocation and EED operate in jurisdictions that currently allow the defense in assault cases, providing a roadmap for integrating the defense in jurisdictions that do not currently allow it.

A. Culpability and the History of the "Heat of Passion" and *"Adequate Provocation" Defense*

1. Culpability

Homicide is a crime in every jurisdiction of the United States, but a defendant can be found more or less criminally responsible—and thus face more or less severe punishment—

terms of attempted homicide rather than as assault offenses). *See, e.g.*, N.Y. PENAL LAW § 120.10 (McKinney 1996); *id.* § 125.25(1)(a)(i) (2019).

[17] *See infra* Section I.D.

based on a variety of factors. The most decisive factor in determining criminal responsibility is the concept of "culpability."[18] Culpability is the measure of how criminally responsible a defendant is for his or her action.[19] While all crimes require both an actus reus and mens rea, the actus reus of all homicides is substantially the same: one person unlawfully causes the death of another.[20] Within that broad category, however, are gradations of culpability that warrant more or less severe consequences, depending on the facts and circumstances of the crime.

Culpability is largely determined by measuring the mens rea, or mental state, of the defendant. Mens rea reflects the idea that the defendant has done something morally blameworthy[21] that deserves the moral scorn of the community,[22] accompanied by criminal sanctions. Mens rea largely refers to the particular blameworthy state of mind that the defendant possessed at the time of the crime.[23] The law commonly recognizes four general criminal mental states.[24] First, a defendant acts intentionally or willfully if he or she purposely engages in prohibited conduct or causes the prohibited result.[25] Second, a defendant acts knowingly if he or she is aware of the existence of certain facts that make the conduct a crime, or believes them to exist.[26] Third, a defendant acts recklessly if he or she is "aware of and consciously disregards a substantial and unjustifiable risk" that a criminal result will occur, where "[t]he risk [is] of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would

---

[18] *See* Morissette v. United States, 342 U.S. 246, 250–51 (1952).

[19] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 114–15 (8th ed. 2018).

[20] *Id.* at 473 (defining homicide).

[21] *See id.* at 114 (quoting Francis Bowes Sayre, *The Present Significance of "Mens Rea" in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 411–12 (1934) (describing mens rea as "a general immorality of motive")).

[22] *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–81 (Ferdinand Schoeman ed., 1987).

[23] *See* DRESSLER, *supra* note 19, at 115.

[24] *Id.* at 117, 123, 125–26. The term "malice" was also used at common law. *Id.* at 130.

[25] *Id.* at 117.

[26] *Id.* at 123; *see generally* N.Y. PENAL LAW § 15.05(2) (McKinney 2019); MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST. 2019).

observe in the situation."[27] Finally, a defendant acts negligently if he or she fails to recognize the risk that such a criminal result will occur.[28] Additionally, many jurisdictions recognize an extreme form of recklessness, often called "depraved indifference," by which a defendant acts recklessly "under circumstances manifesting extreme indifference to the value of human life," such that he or she can be thought to intend to cause the victim's death.[29]

Criminal offenses are typically separated out into degrees based on the culpability of the defendant. For instance, New York divides homicide offenses into several degrees based largely on the defendant's mental state and the attendant circumstances. Accordingly, first and second degree murder charges reflect intentional or depraved indifference murder (excluding felony murder, which is beyond the scope of this Note);[30] first degree manslaughter reflects intentional homicide under the influence of EED;[31] second degree manslaughter reflects reckless homicide;[32] and criminally negligent homicide reflects accidental homicides committed with negligence.[33]

2. Heat of Passion and Adequate Provocation

Before there were distinctions among homicide offenses, all defendants convicted of homicide were put to death, regardless of the type of killing at issue.[34] That changed in 1794, when Pennsylvania separated homicide offenses into degrees, such that only "particularly heinous" homicide convictions warranted the death penalty.[35] Subsequent statutes and reforms codified manslaughter, an intentional homicide in which the defendant killed the victim while operating under the heat of passion

---

[27] N.Y. PENAL LAW § 15.05(3) (McKinney 2019); *see also* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 2019) (virtually the same language).

[28] MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 2019).

[29] *Id.* § 210.2(1)(b) (AM. L. INST. 2019); *see* DRESSLER, *supra* note 19, at 486. Although "depraved indifference" may not be listed as a separate mental state, either in the MPC or in its state law analogs, courts have held that "depraved indifference to human life is a culpable mental state." People v. Feingold, 7 N.Y.3d 288, 294 (N.Y. 2006).

[30] N.Y. PENAL LAW § 125.27(1) (McKinney 2019); *id.* § 125.25(2).

[31] *Id.* § 125.20(2).

[32] *Id.* § 125.15(1).

[33] *Id.* § 125.10 (2020).

[34] *See* MODEL PENAL CODE AND COMMENTARIES, PART II, cmt. to § 210.2, at 13–16 (AM. L. INST. 1980) [hereinafter "ALI Commentary"].

[35] *Id.* at 16.

following adequate provocation,[36] without malice or premeditation.[37] A defendant acted under the heat of passion if he or she acted under the influence of a "[v]iolent, intense, highwrought, or enthusiastic emotion,"[38] or under an "intense or vehement emotional excitement of the kind prompting violent and aggressive action."[39]

Generally speaking, "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them."[40] The result is to mitigate the seriousness of the conviction and the subsequent sentence from murder to a lesser criminal offense, by acknowledging that a person operating under such an infirmity was in fact less culpable than one who deliberated and reflected on his or her actions before killing because of an unwillingness to control malicious desires.[41] "A defendant who pleads provocation [or EED] asks the community to mitigate his wrongful act of killing from murder to manslaughter, and to do so because another person provoked him into a rage that made it much more difficult to control his violent response."[42] The defendant who invokes the adequate provocation or EED defense "seeks to identify cases of intentional homicide where *the situation* is as much to blame as the actor."[43]

To mitigate a homicide offense from murder to manslaughter under the common law adequate provocation defense, a defendant typically had to show: (1) adequate provocation, (2) homicidal acts committed under the heat of passion, (3) that the defendant lacked a "reasonable opportunity for the passion to

---

[36] *Id.*; *See also* DRESSLER, *supra* note 19, at 501–02.

[37] *See* ALI Commentary, *supra* note 34, at 44.

[38] People v. Borchers, 325 P.2d 97, 102 (Cal. 1958) (citation omitted); *see also* DRESSLER, *supra* note 19, at 501.

[39] State v. Guebara, 696 P.2d 381, 385 (Kan. 1985).

[40] People v. Patterson, 39 N.Y.2d 288, 302 (N.Y. 1976), *aff'd sub nom*. Patterson v. New York, 432 U.S. 197 (1977).

[41] *See* Paul Litton, Commentary, *Is Psychological Research on Self-Control Relevant to Criminal Law?*, 11 OHIO ST. J. CRIM. L. 725, 729–30 (2014) ("Arguably, one reason the purposeful or knowing harm doer is more culpable than the reckless or negligent harm doer is that the former has more *control* over the consequences of her conduct.") (footnote omitted).

[42] Jonathan Witmer-Rich, *The Heat of Passion and Blameworthy Reasons to Be Angry*, 55 AM. CRIM. L. REV. 409, 414 (2018).

[43] Stuart M. Kirschner et al., *The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County*, 10 PSYCH. PUB. POL'Y AND L. 102, 103 (2004) (quoting ALI Commentary, *supra* note 34, at 71)) (emphasis added).

cool," and (4) a causal connection between the provocation, the passion, and the killing.[44] Historically, adequate provocation was recognized: (1) where one found his or her spouse in the act of adultery; (2) during mutual combat; (3) during a serious assault or battery; (4) where a defendant saw the victim inflict a serious injury on a close relative; or (5) during an unlawful arrest.[45] Provocation was inadequate if a defendant merely learned of their spouse's adultery, rather than catching and killing the victim during the adulterous act—*in flagrante delicto*.[46] Homicide in response to a less serious battery was also inadequate.[47] Perhaps most significantly, words alone, absent further circumstances, were never considered adequate provocation.[48]

B. Modern Common Law and the Model Penal Code

While the categorical approach to mitigation has the benefit of confining the provocation defense to particularly serious circumstances, limiting the defense to a set number of situations likely does not reflect every conceivable scenario in which a defendant is not as culpable for their actions as one who commits a premeditated murder. As a result, the modern common law approach is to allow a defendant to establish mitigation if the defendant's passion was reasonable under the circumstances: "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection."[49] And while many common law jurisdictions still hold that "words alone," without more, cannot serve as adequate provocation,[50] some jurisdictions do recognize provocation where the information conveyed in the

---

[44] Girouard v. State, 583 A.2d 718, 721 (Md. 1991) (quoting Cox v. State, 534 A.2d 1333 (Md. 1998)); DRESSLER, *supra* note 19, at 501.

[45] DRESSLER, *supra* note 19, at 502 & nn.192–96.

[46] *See* Holmes v. Director of Public Prosecutions, [1946] 31 Cr. App. 123 (HL) 127, 129–31.

[47] *See* Commonwealth v. Webb, 97 A. 189, 191–93 (Pa. 1916).

[48] *See Girouard*, 583 A.2d at 723 (holding that the defendant did not establish adequate provocation where his wife uttered offensive words and threatened to have him dishonorably discharged from the military); *see* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 93–94 (3d ed. 1982); DRESSLER, *supra* note 19, at 502.

[49] People v. Moye, 213 P.3d 652, 660 (Cal. 2009); *see also* People v. Beltran, 301 P.3d 1120, 1125 (Cal. 2013) (citations omitted).

[50] DRESSLER, *supra* note 19, at 503; *see also Girouard*, 538 A.2d at 722 (collecting cases).

words "inform[s] the listener of an incident . . . that might have constituted adequate provocation had it been observed contemporaneously."[51]

Jurisdictions following the MPC do not delineate specific categories of sufficient provocation—instead, they establish a statutory affirmative defense that allows mitigation where a defendant can prove, by a preponderance of the evidence, that he or she acted "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[52] The "reasonableness" of the disturbance is "determined from the viewpoint of a person in the actor's situation under the circumstances as [the defendant] believes them to be."[53] Note that the test is *not* whether the defendant's *actions*—in this context, homicide—were reasonable: the test is whether it was reasonable for the defendant to become extremely emotionally disturbed given his or her perception of the circumstances.[54]

Indeed, the requirement that the defendant's disturbance be reasonable cannot be understated. "In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[55] Even if the defendant was extremely emotionally disturbed at the time of the killing, the offense will not be mitigated from murder to manslaughter if the disturbance was not reasonable. A notable example is *People v. Casassa*, in which a defendant killed his former romantic partner after she broke up with him and began seeing other men.[56] On the night of the killing, Casassa tried to

---

[51] DRESSLER, *supra* note 19, at 503 n.210 (collecting cases). Note that Georgia specifically provides an affirmative defense to a charge of simple assault or simple battery when the victim provoked the defendant with "opprobrious or abusive language." GA. CODE ANN. § 16-5-25 (West 2019).

[52] *Compare* MODEL PENAL CODE § 210.3(b) (AM. L. INST. 2019), *with* N.Y. PENAL LAW § 125.25(1)(a)(i) (McKinney 2019) (virtually identical language).

[53] *Compare* MODEL PENAL CODE § 210.3(b) (AM. L. INST. 2019), *with* N.Y. PENAL LAW § 125.25(1)(a)(i) (McKinney 2019) (virtually identical language).

[54] *See* ALI Commentary, *supra* note 34, at 50 ("The ultimate test, however, is objective; there must be a 'reasonable' explanation or excuse for the actor's disturbance.").

[55] Kirschner et al., *supra* note 43, at 104 (quoting ALI commentary, *supra* note 34, at 63); *see also* People v. Casassa, 49 N.Y.2d 668, 680 (N.Y. 1980) (noting that the legislative purpose behind the affirmative defense "was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows.").

[56] *Casassa*, 49 N.Y.2d at 672.

give the victim bottles of alcohol as gifts, which she rejected.[57] Casassa "produced a steak knife which he had brought with him" to the victim's residence, "stabbed [her] several times in the throat, dragged her body to the bathroom and submerged it in a bathtub full of water to 'make sure she was dead.' "[58] Although Casassa was certainly extremely emotionally disturbed at the time of the killing, New York's highest court affirmed the conviction without mitigation, holding that the disturbance must be objectively reasonable under the circumstances in order to qualify for mitigation.[59] The Court affirmed that Casassa's disturbance was "so peculiar to him that it was unworthy of mitigation."[60]

In sum, the current legal landscape allows a defendant to mitigate a homicide crime down from murder to manslaughter if he or she acted under the heat of passion or extreme emotional disturbance, depending on the jurisdiction. In a common law adequate provocation jurisdiction, the provocation must be such that the defendant's passion was reasonable. In an EED jurisdiction, the disturbance must be reasonable under the circumstances as the defendant believed them to be.

C. Criticisms of Adequate Provocation and EED as Mitigating Factors

Notwithstanding the advantages of grading homicide offenses by the defendant's level of culpability, the adequate provocation and EED defenses are not without their critics. For example, feminist writers have criticized the defense as unfair to women. Emily L. Miller wrote that "[v]oluntary manslaughter has never been a female-friendly doctrine" because it historically allowed husbands to receive reduced sentences for killing their wives.[61] Moreover, Miller observed that the MPC's expansion of the defense, beyond the historical situation in which a defendant caught his spouse in the act of sexual intercourse with another person, means that "violence by domestic partners that would have been labeled murder under the common law has been

---

[57] *Id.*

[58] *Id.*

[59] *Id.* at 679–81.

[60] *Id.* at 680.

[61] Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667 (2001).

labeled manslaughter under MPC-based statutory codes."[62] Moreover, the MPC version of the defense incorporates "the masculine assumptions of the common law of voluntary manslaughter[,]" given that "[e]ach element of the heat of passion defense originates in a masculine understanding of human behavior."[63] Similarly, Professor Victoria Nourse argues that the old common law provocation requirement offered more protection than the MPC defense because the former was only available where the defendant caught their spouse in the act of adultery.[64] Indeed, "reform has transformed passion from the classical adultery to the modern dating and moving and leaving."[65]

The defense has also been criticized because it has historically been used as a "gay panic" defense, in which a defendant kills a victim who made a nonthreatening homosexual advance on the defendant.[66] The problem is that "most courts believe that a jury could find reasonably that a [non-threatening homosexual advance] is sufficient provocation to incite the Reasonable Man to lose his self-control and kill in the heat of passion."[67]

The adequate provocation and EED defenses have also been criticized on the ground that the reasonable person standard is difficult to use consistently in practice. According to Jonathan Witmer-Rich, "[a] recurring problem with this formulation is the difficulty of how much to 'individualize' the reasonable person—how to determine which characteristics of the defendant . . . should be imported into this 'reasonable person.' "[68] Further, "psychological research on self-control does not shed light on the self-control strength of ordinary or reasonable persons in general, let alone their self-control strength in the face

---

[62] *Id.* at 666.

[63] *Id.* at 669 (citation omitted).

[64] Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1131, 1132–33 (1997); *see also* Kirschner et al., *supra* note 43, at 129–30.

[65] Nourse, *supra* note 64, at 1333.

[66] Joseph R. Williams, *"I Don't Like Gays, Okay?" Use of the "Gay Panic" Murder Defense in Modern American Courtrooms: The Ultimate Miscarriage of Justice*, 78 ALB. L. REV. 1129, 1131 (2015). *See generally* Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995).

[67] Dressler, *supra* note 66, at 730; *see generally* Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation,* 80 CAL. L. REV. 133 (1992).

[68] Witmer-Rich, *supra* note 42, at 411–12 (collecting cases).

of the kind of provocation at hand."[69] Difficulties also arise due to the lack of set guidance on the factors that are included in the relevant circumstances surrounding the defendant's actions.[70] For instance, the defendant in *People v. Goetz* argued that he acted in self-defense based on the age and race of the victims.[71] The U.S. Constitutional limits offer a baseline protection against a jury using race in its determination of relevant circumstances, but absent some other clarification or limitation specific to that case, nothing stops a jury from considering the race of a victim in its determination..[72] This opens the door to race-based mitigation decisions. Juries have significantly broad discretion in determining whether provocation is reasonable, which might allow mitigation in domestic violence cases or other situations that society should not treat as granting reasonable provocation as a matter of public policy.

However, for all of the defense's flaws, some worries may be overblown. Some studies suggest that the defense is most successful when a defendant cannot prove insanity or self-defense, but can convince the jury that he or she was extremely emotionally disturbed and operating under the fear of harm to oneself or another.[73] For example, a survey of ten years of cases in New York County suggests that juries "are unreceptive to claims of EED when the defendant's prevailing emotion at the time of the crime was anger unmitigated by a reasonable . . . fear of physical harm" sufficient to invoke the defense.[74] While the classic scenario many individuals envision for the defense is one in which the defendant became extremely enraged, the actual cases suggest that EED serves as mitigation only where common sense suggests that a defendant acted in self-defense or was actually psychologically disturbed or insane despite the fact that he or she could not fit the technical requirements of other legal defenses. As a result, the potential flaws in the defense should

---

[69] Litton, *supra* note 41, at 733. However, this fact may not be decisive: "[T]hough duress and provocation may involve self-control failures, the self-control research cannot help us discern the right outcome in any particular case, and thereby does not give us reason to question current standards." *Id.* at 733–34.

[70] *Cf.* N.Y. PENAL LAW § 125.25(1)(a)(i) (McKinney 2019) (absence of factors).

[71] *See generally* 68 N.Y.2d 96 (N.Y. 1986).

[72] Stephen L. Carter, Comment, *When Victims Happen to Be Black*, 97 YALE L. J. 420, 422–23 (1988); *see also, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (recognizing that if a jury's decision to convict relied upon racial stereotypes or animus, the decision would violate the 6th Amendment of the U.S. Constitution).

[73] Kirschner et al., *supra* note 43, at 130–31.

[74] *Id.* at 130.

not preclude its expansion from homicide cases to assault cases if it continues to be recognized for homicide.

D. Adequate Provocation and EED As Applied to Assault in Minority Jurisdictions

Although most jurisdictions confine the adequate provocation and EED defenses to homicide offenses, some jurisdictions allow defendants charged with assault to establish mitigation if: (1) the defendant acted under the influence of EED or under the heat of passion, and (2) it was reasonable for them to become disturbed or for their passions to become inflamed.[75] In these jurisdictions, the defense mitigates the defendant's crime down a level of severity,[76] just as a defendant establishing mitigation against a homicide charge is convicted of a less serious offense.

For example, Kentucky allows a defendant to "establish in mitigation that he acted under the influence of extreme emotional disturbance" in any prosecution for a crime "in which intentionally causing physical injury or serious physical injury is an element of the offense."[77] Like jurisdictions that follow the MPC homicide statutes, whether the disturbance is reasonable "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."[78] The stated goal of the addition was "to provide the same type of mitigating, degree-reducing factor in the law of assault as exists in the law of homicide."[79] The defense is an affirmative defense that allows a defendant to be convicted of a less serious felony if established.[80] An instructive example is *Creamer v. Commonwealth*, in which the Court of Appeals of Kentucky held that a defendant was entitled to an EED

---

[75] *See, e.g.*, KY. REV. STAT. ANN. § 508.040 (West 2021); Dixon v. Commonwealth, No. 2018-CA-000616, 2019 WL 2068538, at *4 (Ky. Ct. App. May 10, 2019).

[76] *See, e.g.*, *Dixon*, 2019 WL 2068538, at *4.

[77] KY. REV. STAT. ANN. § 508.040.

[78] *Id.* § 507.020 (West 2021). Kentucky defines EED as "a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes." *Dixon*, 2019 WL 2068538, at *4 (quoting McClellan v. Commonwealth, 715 S.W.2d 464, 468–69 (Ky. 1986)).

[79] KY. REV. STAT. ANN. § 508.040 cmt. (West 1974) [hereinafter "LRC Commentary"].

[80] *Dixon*, 2019 WL 2068538, at *4 (stating that "first-degree assault committed under the influence of EED is a Class D felony whereas first-degree assault in the absence of EED or some other mitigating factor is [a] Class A felony.").

instruction where his mother had previously slapped him and removed his dog from the house, since a reasonable jury might have found the resulting emotional disturbance reasonable.[81]

Missouri also allows statutory mitigation for assault.[82] Although it does not recognize a separate affirmative defense, the defense is incorporated into the grading of the elements of assault. For instance, first degree assault occurs where a defendant "attempts to kill or knowingly causes or attempts to cause serious physical injury to another person,"[83] but a defendant commits second degree assault with the same conduct if the defendant acted "under the influence of sudden passion arising out of adequate cause."[84] One case in which this played out was *State v. Taylor*, where the Missouri Court of Appeals held that a jury instruction on mitigation could be appropriately applied to a drunken road rage incident, because such facts "could create rage, anger or fear so extreme as to cause [the] defendant's conduct . . . to be the product of passion, not reason."[85] Applying the instruction, the jury mitigated the defendant's conviction down from first degree assault to second degree assault.[86]

Some states also recognize adequate provocation as an offense-specific mitigating circumstance. For instance, Colorado allows a defendant to establish heat of passion as a circumstance that "reduce[s] the severity of the penalty attached to the offense."[87] Under Colorado law, a first degree assault committed under "a sudden heat of passion, caused by a serious and highly provoking act," that would "excite an irresistible passion in a reasonable person," is mitigated to a lower level offense for the

---

[81] 629 S.W.2d 324, 325 (Ky. Ct. App. 1981).

[82] MO. ANN. STAT. § 565.052 (West 2017).

[83] *Id.* § 565.050(1).

[84] *Id.* § 565.052(1)(1). "Sudden passion" is defined as "passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." *Id.* § 565.002(15). The statute defines "adequate cause" as one "that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." *Id.* § 565.002(1).

[85] 770 S.W.2d 531, 534–35 (Mo. Ct. App. 1989) (indicating that the circumstances as a whole, including the defendant's intoxication, supported the fact that he may have acted under the heat of passion).

[86] *Id.*

[87] People v. Suazo, 867 P.2d 161, 166 (Colo. App. 1993).

purposes of sentencing.[88] Colorado's statute evolved in response to the perverse result that a defendant charged with a non-fatal assault who was acting under the heat of passion could potentially have served more time than a defendant convicted of manslaughter.[89] Although heat of passion is a sentencing mitigator[90] rather than an affirmative defense,[91] the burden shifts to the prosecution to disprove heat of passion beyond a reasonable doubt, and an appropriate jury instruction is given "once the issue of heat of passion provocation is injected into a case," based on the evidence.[92]

Ohio law contains a separate assault statute that allows mitigation for assaults committed with adequate provocation.[93] There, a felonious assault charge is mitigated to a lesser "aggravated" assault charge where the defendant commits a felonious assault "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the defendant into using deadly force . . . ."[94] Notably, "[i]n a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation (such that a jury could both reasonably acquit defendant of felonious assault and convict defendant of aggravated assault), an instruction on aggravated assault (as a different degree of felonious assault) *must* be given."[95] This is the case despite the fact that the offense as a

---

[88] COLO. REV. STAT. ANN. § 18-3-202(2)(a)–(b) (West 2016) (reducing the offense from a class 3 felony to a class 5 felony); *see also* Rowe v. People, 856 P.2d 486, 490 (Colo. 1993) (en banc).

[89] *See* People v. Montoya, 582 P.2d 673, 675 (Colo. 1978) ("Such an unreasonably structured legislative scheme is constitutionally infirm.").

[90] Several jurisdictions recognize provocation as a general sentencing factor applicable to any crime, including assault. *See, e.g.*, IND. CODE ANN. § 35-38-1-7.1(12)(b)(5) (West 2019); WASH. REV. CODE ANN. § 9.94A.535(1)(a) (West 2019). Similarly, Alaska allows a sentencing judge to recognize adequate provocation for assault by imposing a lesser sentence. ALASKA STAT. ANN. § 12.55.155(d)(6)–(7) (West 2019); *see also* Silvera v. State, 244 P.3d 1138, 1147 (Alaska Ct. App. 2010). However, this Note focuses on statutory affirmative defenses and mitigating factors to be submitted to the jury, rather than factors within the discretion of the trial court.

[91] *Rowe*, 856 P.2d at 490–91. Note that sentences are also mitigated for second degree assault committed under the heat of passion. *See* People v. Howard, 89 P.3d 441, 444 (Colo. App. 2003).

[92] People v. Villarreal, 131 P.3d 1119, 1127–28 (Colo. App. 2005), *aff'd*, 288 P.3d 125 (Colo. 2012) (citing People v. Garcia, 28 P.3d 340, 346 (Colo. 2001) (en banc)).

[93] OHIO REV. CODE ANN. § 2903.12 (West 2019).

[94] *Id.*

[95] State v. Deem, 533 N.E.2d 294, 299–300 (Ohio 1988) (emphasis in original).

whole is not a lesser included offense to felonious assault due to the specific statutory elements of the two offenses.[96]

Virginia does not recognize mitigation for assault.[97] However, Virginia does allow mitigation for a charge of "malicious wounding,"[98] in which the defendant attacks the victim "with the intent to maim, disfigure, disable, or kill."[99] According to Virginia law, "[t]he element in malicious wounding that distinguishes it from unlawful wounding is malice, expressed or implied, and malice, in its legal acceptation, means any wrongful act done willfully or purposefully."[100] Like common law mitigation for homicide charges, a charge of malicious wounding is mitigated to the lesser offense of unlawful wounding[101] where the defendant acted under the heat of passion, which negates a finding of malice.[102] An appropriate jury instruction is given where "there was more than a scintilla of evidence" that the defendant lacked malice as a result of passion.[103]

II. MITIGATION SHOULD BE ALLOWED FOR ASSAULT CHARGES

A defendant should be able to argue EED or adequate provocation as affirmative defenses to assault charges for four reasons. First, the same principles of reduced culpability are just as true where a defendant commits or attempts to commit assault while suffering EED or following adequate provocation as they are where a defendant commits or attempts to commit homicide. Second, allowing the defense to homicide, but not assault, seems to "reward" defendants for having the worse intent—that is, to kill rather than injure—at least with respect to the defenses available to them. Third, failing to allow the defenses where a defendant is charged with both attempted murder and assault leads to procedural oddities when juries are asked to evaluate both charges. Fourth, extending the defenses

---

[96] *Id.*

[97] VA. CODE ANN. § 18.2-57 (West 2019).

[98] Williams v. Commonwealth, 767 S.E.2d 252, 256–57 (Va. Ct. App. 2015) (collecting cases).

[99] VA. CODE ANN. § 18.2-51 (West 2019).

[100] Hernandez v. Commonwealth, 426 S.E.2d 137, 140 (Va. Ct. App. 1993) (citing Williamson v. Commonwealth, 23 S.E.2d 240, 241 (Va. 1942)).

[101] VA. CODE ANN. § 18.2-51. Malicious wounding is a Class 3 felony, while unlawful wounding is a Class 6 felony. *Id.*

[102] *Williams,* 767 S.E.2d at 256–58.

[103] *Id.* at 257–58.

would not be counter to public policy, as it would not spread beyond simple assault charges and likely would not succeed in most cases, as discussed in Section II.E.

A. Symmetrical Culpability

All of the traditional justifications given for allowing mitigation in the context of homicide apply *a fortiori* to a defendant who merely intends to cause physical injury under EED or following adequate provocation, as opposed to one who intends to cause death. As mentioned above, the purpose of EED or adequate provocation in the context of homicide is "to identify cases of intentional homicide where the situation is as much to blame as the actor,"[104] and thus to allow the jury the discretion to levy a lesser sanction because the defendant is less criminally culpable than he or she would otherwise have been had he or she acted with a cool and level head. The same rationale applies to individuals who commit an assault by causing physical injury to a victim while operating under the influence of extreme emotional disturbance or following adequate provocation.[105]

Consider the following case. Suppose *D* walks in on their spouse having sexual intercourse with *V*. Enraged, *D* takes out a gun and shoots *V* in the head, killing *V* instantly. At trial, *D* successfully argues extreme emotional disturbance and that the disturbance was reasonable under the circumstances (or adequate provocation in jurisdictions that use that terminology, standard, or language). Because *D* is less culpable due to reasonable rage, *D* is convicted of manslaughter instead of murder.

Now suppose *D* was just as enraged as before, but instead of killing *V*, *D* punches *V* in the face, causing serious physical injury. Despite the fact that *D* was just as enraged as in the prior case, in most states, *D* cannot invoke the EED or adequate provocation defenses, even though these exact facts are an

---

[104] Kirschner et al., *supra* note 43, at 103 (quoting ALI Commentary, *supra* note 34, at 71).

[105] State v. Butler, 634 N.W.2d 46, 61 (Neb. Ct. App. 2001) ("But the analysis of provocation which mitigates an intentional killing logically applies to assault cases as well, given that the core difference between the two crimes is generally whether the victim lives or dies."); Reid Griffith Fontaine, *On Passion's Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207, 231 (2009) (noting "an inconsistency in how blame is handled" in jurisdictions that recognize an affirmative defense to mitigate homicide offenses but only discretionary sentencing factors for assault offenses).

exemplar case for mitigation in either an EED or adequate provocation jurisdiction. *D*'s culpability is decreased just as much as before since the stimulus is the same. In fact, *D*'s culpability is *lower* because *D* actually intended the lesser of two possible results, despite being enraged. Yet in most states, the defense is unavailable, and *D* serves a full sentence despite an identical triggering stimulus.

Because this result would be unjust, states that do not currently allow a defendant to argue EED or mitigation defenses for assault crimes should recognize the defenses. The exact same justifications apply for both types of offenses, at least with respect to whether the defendant makes a fully rational, informed choice. Moreover, an emotional reaction does not become unreasonable simply because one merely intends to cause physical injury rather than death. The example above highlights the absurdity of the absence of the defense for the assault defendant.

B. Denying the Defense Produces Counterintuitive Results with Respect to Culpability

Denying defendants the opportunity to argue EED or adequate provocation in assault cases, while allowing these defenses to homicide offenses, produces counterintuitive results. Doing so effectively rewards defendants for having the worse intent. Culpability involves examining not just the harm the defendant sought to produce, but also the ability of a defendant to make choices—that is, to exercise free will. Where one defendant intends to kill a victim, but another intends merely to injure, the defendant who intends to kill is clearly more culpable with respect to the intended result. But both defendants can be equally culpable with respect to their capacity for free choice if they have each been adequately provoked or are suffering from EED since each defendant is equally disturbed, and the law theoretically treats their disturbance as equally reasonable. Yet, the effect of allowing the homicidal defendant to establish mitigation while denying that opportunity to the defendant who commits assault suggests that the latter's capacity to make a free choice no longer matters. Instead, all that matters is the

intended result, despite the fact that the criminal law has evolved to emphasize culpability, rather than solely results.[106]

One might object by pointing out that the EED and adequate provocation defenses historically evolved as a means of avoiding overly harsh penalties in certain homicide cases,[107] a concern that does not apply to assault cases because they generally carry a lower sentence than intentional homicide. There are two possible responses to the objection. First, the penalty for assault in the first degree sometimes approaches the penalty for certain homicide offenses, making the matter just as serious for such defendants.[108] Even for lesser assault offenses, the sentencing difference between degrees may still be quite significant. For instance, reducing a conviction of assault in the second degree to a conviction of assault in the third degree lowers the maximum available sentence by over eighty-five percent.[109] Second, penalties aside, the grading of offenses largely tracks a defendant's culpability. In fact, the defendant who becomes enraged or afraid, loses control, and then tries to kill someone loses just as much control as someone who, in the same circumstances and with the same emotional experience, intends only to cause physical injury. The degree of the emotional disturbance would be exactly the same, and the disturbance itself, just as reasonable—all that would change is the result. If culpability matters in criminal law, it must carry equal weight when two defendants equally lose control, but one commits homicide and the other assault.

C. Procedural Oddities

Denying defendants access to EED or adequate provocation defenses may also cause procedural tension where a defendant is charged with both assault and attempted homicide. In such a

---

[106] *See* DRESSLER, *supra* note 19, at 113 & n.7 (citing United States v. Cordoba-Hincapie, 825 F. Supp. 485, 490 (E.D.N.Y. 1993)).

[107] People v. Casassa, 49 N.Y.2d 668, 680 (N.Y. 1980).

[108] In New York, for instance, assault in the first degree and manslaughter in the first degree are both class B felonies, punishable by up to twenty-five years in prison. N.Y. PENAL LAW §§ 120.10, 125.20, 70.00(2)(b) (McKinney 2021). But if New York allowed mitigation for EED, a first degree assault conviction would be reduced to the class D felony of second degree assault, which is only punishable by up to seven years in prison. *Id.* §§ 120.05, 70.00(2)(d).

[109] Assault in the second degree is a class D felony in New York, punishable by up to seven years in prison. *Id.* §§ 120.05, 70.00(2)(d). Assault in the third degree is only a class A misdemeanor in New York, punishable by up 364 days in prison, *Id.* §§ 120.00, 70.15(1).

case, the jury is instructed on attempted homicide and the corresponding mitigation doctrine, as well as on assault. While the jury theoretically should not consider mitigation until it has found that the defendant intended to kill, juries may begin thinking about mitigation before coming to a full decision on the charges. Assuming the jury does not find the defendant guilty of intending to kill, the jury must then forget about any mitigation they may have already considered when addressing the assault charge. This can produce a counterintuitive tension in the minds of jurors, who may have, for example, determined that the defendant was operating under the influence of a reasonable EED or was adequately provoked but must then ignore the defendant's diminished culpability when addressing the assault charge. Allowing defendants to establish mitigation for both assault and attempted homicide avoids this counterintuitive scenario and properly recognizes that a defendant's decision-making is equally compromised where he or she merely intends to injure, rather than kill, the victim.

D. Existing Remedies Are Inadequate

Existing remedies for the lack of EED and adequate provocation defenses, such as arguing for mitigation at sentencing, are inadequate to protect defendants whose culpability may be decreased. A defendant may argue that he or she was suffering from EED, or that he or she was adequately provoked at the time of the attack during sentencing in order to convince the judge that he or she had no control of his or her actions and thus deserves a reduced sentence. However, unless the jurisdiction acknowledges that argument as a pre-set sentencing factor warranting a downward reduction in the recommended sentencing range, such considerations will be entirely within the judge's discretion. However, if the law recognized EED or adequate provocation as sentencing factors or as defenses that reduced the sentencing range as a matter of law, a judge would be required to reduce the sentence. As a result, simply arguing the defenses at sentencing is inadequate without recognizing them in the statute itself, as a judge can simply decide that those arguments should not apply. It also "would only serve to mitigate punishment, not blame," leaving the underlying inconsistencies in the law's treatment of culpability—

and any moral component to way the law views defendants—unresolved.[110]

In *People v. Charles*, a New York court noted that the defendant could argue EED on a motion to dismiss the charges in the interest of justice, even though he could not argue the defense at trial.[111] However, a motion to dismiss the charges is also an inadequate remedy because it forces the defendant to try to seek dismissal of the entire charge—a much harder task than seeking simply to mitigate it down to a lesser offense. Further, allowing mitigation in such cases is "a matter of judicial discretion."[112] While a motion is inadequate because a judge is free to decide that circumstances do not warrant dismissal, judges may not ignore an affirmative defense if proven to a jury.

E. Public Policy

Allowing a defendant to establish mitigation for EED or adequate provocation would not undermine public policy because recognizing the offense merely "provide[s] the same type of mitigating, degree-reducing factor in the law of assault as exists in the law of homicide."[113] While one might argue that recognizing such a defense opens the door to defendants establishing mitigation for other violent offenses, such as sexual assault, rape, strangulation, or gang assault, a legislature is free to apply the defense to simple assaults only, rather than all violent offenses. Moreover, a jury must still find that the defendant's EED or the provocation at issue was reasonable under the circumstances, and studies suggest that juries largely only find that bar met where a defendant feared he or she was about to be harmed or suffered from some other mental illness, and not where a defendant was merely enraged.[114] Thus, the requirements of the offense itself provide a sufficient check to ensure that the defense is not applied in unreasonable cases.

Furthermore, the defense is intended to reduce punishment where a defendant in fact lacked full control over his or her actions. Promulgating a law that clearly establishes that

---

[110] Griffith Fontaine, *supra* note 105, at 231–32.

[111] 13 Misc. 3d 985, 987 (Sup. Ct. Kings Cnty. 2006) (citing N.Y. CRIM. PROC. LAW § 210.40(1)(a), (d) (McKinney 2020) (allowing judges to dismiss charges in the interest of justice)).

[112] N.Y. CRIM. PROC. LAW § 210.40(1) (McKinney 2020).

[113] LRC Commentary, *supra* note 79.

[114] Kirschner et al., *supra* note 43, at 130–31.

culpability bears on the severity of an offense in all contexts promotes justice by creating a clear, consistent system of laws that treats similar cases similarly and subjects all defendants to the same standard, free of arbitrary variations. Because the defense only applies where disturbance or passion is reasonable, recognizing the defense in assault cases would be limited and would not be against public policy.

III. MODEL LEGISLATION

This section suggests and evaluates three types of legislation for implementing EED and adequate provocation as affirmative defenses to assault charges: (1) the general affirmative defense approach; (2) the specific affirmative defense approach; and (3) as an element of the offense in question.

A. General Affirmative Defense

Following the Kentucky model, jurisdictions can incorporate a general affirmative defense of EED or adequate provocation in their criminal code.[115] Kentucky's EED affirmative defense applies to any offense "in which intentionally causing physical injury or serious physical injury is an element of the offense."[116] In an MPC jurisdiction, the legislature could implement the following text:

> In any offense for which intentionally causing physical injury or serious physical injury is an element of the offense,[117] it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance, the reasonableness of which is determined from the viewpoint of the defendant under the circumstances as he or she believed them to be.[118] This section shall not apply to any strangulation, gang assault, rape, or sexual assault offense.

In a common law, adequate provocation state, the legislature could adopt the following language:

> In any offense for which intentionally causing physical injury or serious physical injury is an element of the offense, it shall be an affirmative defense that the defendant was adequately provoked, where the adequacy of the provocation is reasonable from the perspective of the defendant under the circumstances

---

[115] *See* KY. REV. STAT. ANN. § 508.040 (West 2019).
[116] *Id.* § 508.040(1).
[117] *Id.*
[118] *See, e.g.*, N.Y. PENAL LAW § 125.25(1)(a)(i) (McKinney 2019).

> as he or she believed them to be. This section shall not apply to any strangulation, gang assault, rape, or sexual assault offense.

B. Specific Affirmative Defense

Alternatively, states can insert specific provisions into each offense for which the legislature wishes the defense to apply. For example, the New York legislature could insert a new provision into its existing first degree assault statute,[119] stating:

> In a prosecution for assault, it shall be an affirmative defense to assault in the first degree that the defendant acted under the influence of extreme emotional disturbance, the reasonableness of which is determined from the viewpoint of the defendant under the circumstances as he or she believed them to be.[120] A defendant who successfully establishes the defense when charged with assault in the first degree will be guilty of assault in the second degree.

By adding such language to each degree of assault (with substitutions of appropriate language for each reference to a lesser included offense), the legislature enables the defense to be invoked solely for assault, and mandates that the offense is reduced to the next most serious assault offense, just as the EED affirmative defense under New York homicide law mitigates second degree murder down to the next most serious offense, manslaughter in the first degree, assuming the prosecutor requests an instruction.[121]

C. Legislation Incorporating Mitigation as an Element of the Offense

Following the Missouri model, a state could also incorporate the defense into the elements of the lesser offense.[122] In New York, for example, a defendant is guilty of assault in the first degree when, "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous

---

[119] *See generally id.* § 120.10 (1996).

[120] *See, e.g.*, *id.* § 125.25(1)(a)(i) (2019).

[121] *See id.* ("Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.").

[122] *See, e.g.*, MO. ANN. STAT. § 565.052(2) (West 2017).

instrument."[123] If New York were to implement this approach, a new provision might read:

> A defendant is guilty of assault in the second degree when, [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person,[124] provided that the defendant establishes, by a preponderance of the evidence, that he or she was acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the perspective of the defendant under the circumstances as he or she believed them to be.[125]

Analogous language would be added for each grading of the offense.

CONCLUSION

Jurisdictions that do not recognize EED or adequate provocation—as either affirmative defenses or sentencing factors for assault—should pass legislation permitting application of the defenses, especially since those jurisdictions already allow the defenses for homicide and attempted homicide. In both homicide and assault offenses, the culpability of the defendant is equally reduced by the provocation or the emotional disturbance. In the interest of public policy, jurisdictions may also limit application of the defenses based on the wording of the statute. And, no matter what, a jury must still find that the disturbance was reasonable for the defense to succeed preventing undesirable outcomes. The best available option is to add the defense to each specific statute because it allows the legislature to confine the defense to specific offenses, rather than opening the door for a defendant to argue EED or adequate provocation as mitigation for any crime. However, whether the jurisdiction follows the traditional common law scheme or the MPC scheme, the defense can and should be recognized as a matter of legal and conceptual symmetry.

---

[123] N.Y. PENAL LAW § 120.10(1) (McKinney 1996).
[124] *Id.* § 120.05 (2016).
[125] *Id.* § 125.25(1)(a)(i) (2019).