COMPASSIONATE HOMICIDE

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ABSTRACT

Ample psychological studies demonstrate that emotions provide reasons for action and are powerful drivers of a host of behaviors, including criminal acts. Studies further establish that experiencing intense emotions might impair actors' judgment and decision-making, sometimes culminating in committing homicide.

Existing criminal law doctrines only partially correspond to these findings. They recognize mostly anger and fear as underlying the excuses of provocation, imperfect self-defense, and duress by mitigating murder charges to manslaughter or otherwise excusing offenders. Currently, however, no doctrine recognizes compassion as a basis for mitigation. Under existing laws, an actor who intentionally kills a terminally ill or severely disabled close family member, wholly out of compassion for the victim, commits the crime of murder. The actor's motive to end the victim's suffering is irrelevant for determining the scope of criminal responsibility.

In recent years, legal scholars have developed a new field of study focusing on the interplay between law and the emotions, including among others, in the realm of criminal law. This Article contributes to existing literature in this area by suggesting that compassion is yet another emotion that may trigger certain actions. Advocating the adoption of a statutory affirmative defense that is grounded in compassion, this Article argues that recognizing this excuse is consistent with the rationales and reasoning underlying criminal law's recognition of existing emotion-based excuses. This Article develops the theoretical and doctrinal bases for endorsing a compassion-based partial excuse by advancing three arguments. First, it contends that experiencing compassion towards a close family member might affect an actor's judgment and decision-making, motivating them to

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kill. Second, it argues that from a policy-based perspective, recognizing a compassion-based excuse is normatively warranted because while the killing is neither justified nor fully excused, it is an understandable reaction given the circumstances the actor was facing. Third, this Article outlines some necessary constraints on the scope and limits of the partial excuse to ensure that it is applicable only in appropriate cases, where actors normatively deserve mitigation.

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INTRODUCTION

On May 27, 2015, Bonnie Liltz, a fifty-six-year-old Illinois woman, killed her twenty-eight-year-old daughter Courtney by intentionally

administering her an overdose of medication.[1] Liltz adopted Courtney, who suffered from severe developmental disabilities and cerebral palsy, when Courtney was five-years-old, and according to witnesses' testimonies, had been a loving mother.[2] Liltz was Courtney's sole caregiver, and throughout her life changed her diapers, fed her through a tube, bathed and dressed her, lifted her in and out of her wheelchair, administered medications, and took her to medical appointments.[3] Three years prior to the killing, Liltz had been diagnosed with cancer, which required her to undergo surgery. While Liltz was hospitalized, she was compelled to leave Courtney in a nursing home, in which she was not well taken care of and seemed very unhappy.[4] Shortly before the killing, Liltz had undergone a colostomy bag surgery, due to ongoing complications from her illness.[5]

Liltz was initially charged with first-degree murder, under Illinois law, but later entered a guilty plea to one count of involuntary manslaughter of a family member in exchange for the state's recommendation that the trial court sentence her only to four years' probation and mental counseling.[6] Defendant stated in allocution that on the day of the homicide, she had awoken with severe abdominal pain and uncontrollable diarrhea, and her stomach was "indented," which her gastroenterologist explained was a sign that her intestines were failing.[7] At that moment, defendant believed that she was dying and had decided to kill Courtney and commit suicide because she was terrified that after her death, Courtney would not receive proper palliative care.[8] While Liltz had injected both herself and Courtney with a combination of four medications, Courtney died and Liltz had survived.[9]

Defense counsel argued for mitigation, claiming that Liltz acted with compassion, care, and unconditional love; thought she was dying; and believed, "reasonably or unreasonably, that she had no other choice."[10] Importantly, the prosecutor was willing to show compassion towards Liltz and recommended to the court a probation-only sentence, without any prison time.[11] However, the trial court rejected the prosecution's recommendation and instead sentenced Liltz to four years in prison.[12]

1. People v. Liltz, 2017 IL App (1st) 161996-U, ¶¶ 4–6.
2. *Id.* at ¶¶ 3, 6, 9.
3. *Id.* at ¶ 6.
4. *Id.* at ¶ 7.
5. *Id.* at ¶ 6.
6. *Id*. at ¶¶ 2–3.
7. *Id.* at ¶ 8.
8. *Id.*
9. *Id.* at ¶ 4.
10. *Id.* at ¶ 12.
11. *Id.* at ¶ 2.
12. *Id.* at ¶ 13 (noting that the court took into account both mitigating and aggravating factors, including that the victim was physically handicapped and that the defendant was a family member in a position of trust).

Liltz appealed her sentence, arguing that the trial court had abused its discretion by ignoring the ample evidence in mitigation and imposing a term of imprisonment despite the state's recommendation of a probation-only sentence.[13] The court of appeals affirmed both the judgment and the sentence, finding that the trial court properly weighed both mitigating and aggravating factors.[14] Liltz committed suicide two days before she was due to report to prison.[15]

Cases like *Liltz*, where actors kill terminally ill or severely disabled loved family members wholly out of compassion, in order to end their pain and suffering, challenge us to ask whether the criminal law ought to recognize a statutory defense that would provide a doctrinal basis for mitigating murder charges to a lesser form of homicide.[16]

Ample scholarly writings address the questions of *voluntary* euthanasia and assisted suicide, where deceased explicitly request to die, asking others to actively assist their killing or help them commit suicide.[17] Only scant scholarly attention, however, has been devoted to examining the scope of criminal responsibility in cases like *Liltz*, involving *non-voluntary* euthanasia, namely, circumstances where victims never requested to die.[18] This Article aims to fill this gap by exclusively focusing on these mercy killings, which are currently viewed as murder.[19] Consciously avoiding the euthanasia terminology, this Article coins the phrase "compassionate homicide" to refer to these cases.[20]

Considering whether defendants' compassion towards the victim ought to play any role in determining the scope of their criminal responsibility calls for delving into the growing scholarly interest in the relationship

13. *Id.* at ¶¶ 15, 19.

14. *Id.* at ¶ 21.

15. *See* George Houde, *Woman who Killed Self Before Prison Term for Daughter's Death in Despair After Judge Rejected Medical Request: Sister*, CHI. TRIB. (Nov. 28, 2017), https://www.chicagotribune.com/news/breaking/ct-met-disabled-daughter-killed-bonnie-liltz-cremation-20171128-story.html [https://perma.cc/N3PW-D2GW].

16. See *infra* Part IV.B for further discussion of the proposed defense's element "wholly out of compassion," including the question of whether the partial excuse should also be expanded to cover cases where actors killed "mostly," rather than "wholly" out of compassion.

17. For discussion of the difference between voluntary, non-voluntary, and involuntary euthanasia, see *infra* Part I.A.

18. For an excellent discussion of compassion as a potential defense for assisted suicide cases, and the possible implications of expanding the scope of such defense to voluntary euthanasia, see R.A. Duff, *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?*, 58 INQUIRY 189, 210 (2015).

19. For further explanation of this choice, see *infra* Part I.A.

20. Given the different types of euthanasia, using this term is confusing. The choice to use "compassionate homicide" captures not only the understanding that compassion motivates these killings but also that adopting the defense would result only in partially excusing a homicide as opposed to complete acquittal. *See* Shai Lavi, *Justice, Plurality, and Criminal Law: A Review of Alan Brudner's* Punishment and Freedom: A Liberal Theory of Penal Law, 14 NEW CRIM. L. REV. 439, 443 (2011) (book review).

between law and the emotions in general, and the role that emotions may play in underpinning criminal excuses in particular.[21] To consider compassion's role in criminal law, this Article draws on insights gained from psychological research on compassion and specifically familial compassion.[22] The latter is broadly defined as a caretaker's desire to alleviate or end the suffering of terminally ill or severely disabled close family member and the motivation to act upon this desire.[23]

Psychological research on the role that various emotions might play in affecting actors' judgment and decision-making has significantly developed in recent decades.[24] Ample studies demonstrate that emotions are potent, pervasive, and predictable drivers of decision-making.[25] Research further establishes the mechanisms through which powerful emotions not only shape individuals' judgments and choices, but also motivate them to engage in certain behaviors, including lethal ones.[26] Put differently, emotions often explain the reasons for people's actions.

Criminal law only partially comports with these psychological findings; doctrines such as duress, imperfect self-defense and provocation recognize the role that fear and anger play in either exculpating or partially excusing defendants who were motivated to commit crimes triggered by these emotions.[27] Existing criminal law doctrines, however, do not acknowledge that other emotions, including compassion, may provide grounds for recognizing additional criminal excuses.[28] Criminal law's recognition of some emotions, but not others, as bases for mitigation, raises the question whether this disparate treatment is warranted, and whether the law should take into account the effect of additional emotions on criminal conduct by adopting new excuses.[29] Conceding that a host of emotions might motivate homicide, this Article contends that compassion, and particularly familial compassion, may also ground a partial excuse.

Criminal law doctrines currently preclude any excuse—whether complete or partial—when actors kill gravely-ill or severely disabled family

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21. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (describing the mechanistic and evaluative conceptions of emotions to explain the scope of substantive criminal law doctrines including provocation, self-defense, duress, and insanity). For additional work in the area of law and the emotions see *infra* Part III.A.

22. See *infra* Part II for discussion of psychological research on compassion.

23. *See* Jennifer L. Goetz, Dacher Keltner & Emiliana Simon-Thomas, *Compassion: An Evolutionary Analysis and Empirical Review*, 136 PSYCHOL. BULL. 351 (2010).

24. *See* Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799 (2015).

25. *Id.* at 816.

26. For further discussion of these psychological studies see *infra* Part II.

27. *See infra* Part I.B.

28. *See infra* Part I.B.

29. *See infra* Part I.B (discussing existing emotion-based excuses).

members to end their suffering.[30] Put differently, no existing criminal defense recognizes compassion as grounds for mitigating murder charges to manslaughter.[31] Moreover, the law generally rejects the idea that actors' purportedly beneficial motive for committing compassionate homicide diminishes the scope of their criminal responsibility.[32]

Case law concerning compassionate homicide, however, demonstrates a deviation from black letter law. Compassionate actors' criminal responsibility is often significantly reduced, but this practice varies across different courts.[33] There are numerous examples where decision-makers refuse to convict compassionate killers as murderers, despite the absence of any principled basis for mitigation.[34] While often a murder charge is mitigated to manslaughter, sometimes it is even mitigated to involuntary manslaughter.[35] Yet in other cases, a claim for mitigation is denied altogether, resulting in a murder conviction.[36] In addition, a compassionate motive is sometimes taken into account as a mitigating factor at sentencing.[37] The upshot of a lack of a doctrinal framework underlying the theoretical basis for mitigation is inconsistent and unequal treatment of similarly situated defendants.

To address this doctrinal shortcoming in existing law, this Article's key argument is that the emotion of compassion ought to serve as grounds for adopting a new emotion-based partial excuse which would allow mitigating murder charges to manslaughter.[38] To support this argument, this Article examines insights from psychological research demonstrating that compassion is not merely a feeling but rather an emotional state that motivates action to help others. These findings might explain why compassion might motivate some actors to end the suffering of close family members.

Psychological findings, however, are insufficient in and of themselves for recognizing a compassion-based defense. The question of what types of

30. *See infra* Part I.B.

31. In jurisdictions that replaced the provocation defense with the extreme mental or emotional disturbance defense (EMED), arguably cases of compassionate homicide may fall under the latter. For further discussion of the possibility of applying EMED in compassionate homicide cases, see Part I.B, demonstrating that while theoretically EMED's language might provide a defense, most courts have not interpreted it to do so. For the typical elements of an EMED defense see MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST. 1985).

32. *See infra* Part III.B.3 (discussing hate crimes as an exception to the general rule that motives generally do not affect the scope of criminal liability).

33. *See infra* Part I.C.

34. See *infra* Part I.C and accompanying notes for examples of such cases.

35. People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 2.

36. *See infra* Part IV.H (discussing the Lance Anderson case).

37. *See infra* Part I.D (discussing mitigation at sentencing).

38. I later explain in detail why I advocate the adoption of a partial excuse that merely mitigates criminal liability rather than a complete excuse that results in complete acquittal. *See infra* Part III.B.3.

actors deserve mitigation is inherently a normative, rather than an empirical, question. Conceding that a compassion-based excuse must rest on arguments supported by criminal law theory itself, this Article develops the theoretical basis underlying this defense. It demonstrates that recognizing a compassion-based excuse is consistent with similar reasoning and rationales that underpin other emotion-based excuses that the criminal law already recognizes, including provocation, duress, and imperfect self-defense.[39] The latter defenses acknowledge that actors may experience objectively reasonable emotions, yet sometimes overreact by committing unreasonable acts. Endorsing the proposed partial excuse follows similar reasoning; defendant's compassion for the victim is a reasonable feeling given the dire circumstances that defendant was facing. Yet even reasonable people may act unreasonably on one particular occasion and kill. While the killing is neither justified nor fully excused, it is somewhat an understandable reaction. As such, it supports reducing defendant's criminal responsibility from murder to a lower form of homicide.[40]

Undoubtedly, some readers may find this provocative proposal unwarranted. Indeed, there are moral, ethical, religious, and evidentiary objections to recognizing a compassion-based excuse. These include, among others, the categorical value of the sanctity of life, which is equally important for victims with severe disabilities or terminal illnesses; utilitarian-based arguments, such as the need for general deterrence to prevent an increase in homicides ostensibly driven by compassion; and slippery slope concerns.[41] This Article directly confronts these concerns, without attempting to minimize them, by conceding that they warrant careful consideration. Yet, the fact that compassionate homicide is a difficult subject should not result in avoiding it altogether. Instead, this Article confronts the challenging topic head-on, suggesting that once the theoretical basis for a compassion-based excuse is established, it is necessary to consider some doctrinal constraints to limit its scope. Narrowly defining the defense's elements would ensure that it is not overly expansive and is applicable only in appropriate cases.

Moreover, this Article responds to potential arguments that even if mitigation might be normatively warranted, it should only be considered at the sentencing phase of the trial, rather than at the trial's guilt-determination phase. It argues that the preferable legal path to address compassionate homicide is for legislatures to define in advance the elements of an affirmative defense. A statutory solution is superior to leaving mitigation to

39. *See infra* Part III.B.3.
40. *See infra* Part III.B.3.
41. *See infra* Part I.D (elaborating on arguments for maintaining the status quo).

prosecutorial and judicial discretion because the treatment of compassionate homicide implicates value-based choices which are best left to legislatures.

To be clear, advocating the recognition of a compassion-based excuse nowhere suggests that compassionate homicide may be justified, resulting in complete acquittal. The premise underlying this Article's thesis is that compassionate homicide is an unjustifiable act, that cannot be fully excused, and ought to remain a criminal offense.[42] This Article makes a more modest claim, advocating only a *partial* excuse that might mitigate murder charges to manslaughter and result in less stringent sentences. Moreover, this Article nowhere argues that all compassionate homicide claims will necessarily result in mitigation. Instead, its goal is merely to provide juries and judges with the option to consider a compassion-based defense. Decision-makers will remain free to reject the defense's compassionate homicide theory. But the excuse would ensure that, doctrinally, similarly situated actors would be similarly treated by the law, bringing much-needed consistency into this area.

This Article proceeds as follows. Part I describes the treatment of compassionate homicide under existing laws. It explains why current doctrines, including provocation and necessity, are mostly unable to offer a basis for mitigation in these cases. It further reveals the divergence between law and practice, under which judges and juries often treat compassionate killers leniently yet without doctrinal support, resulting in inconsistencies between similar cases. This part also discusses various rationales for upholding the legal status quo, elaborating on arguments against mitigating the criminal responsibility of compassionate killers. Part II turns to psychological research on compassion, including familial compassion, comparing and contrasting compassion with other emotions. It then explains how compassion might motivate killings in some cases, as it is a powerful affective state that might impair individuals' thought processes, decision-making, and judgments. Part III develops and defends the legal theory underlying a compassion-based excuse by identifying the moral and theoretical principles that support its recognition. Drawing on insights gleaned from psychological research on compassion, yet assessing them from an evaluative perspective, this part posits that adopting a compassion-based excuse is normatively warranted. It further demonstrates that this defense comports with the reasoning underlying comparable emotion-based excuses such as provocation. Part IV considers some necessary limits on the applicability of a compassion-based excuse. It emphasizes that the scope of

42. For general discussion on the distinction between justifications and excuses see Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1157–58 (1987). *See also* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 436–37 (1982).

this partial excuse must be carefully cabined to avoid potential abuses. It outlines several requirements that would constrain the availability of the defense only to appropriate cases where mitigation is indeed normatively warranted.

I. COMPASSIONATE HOMICIDE UNDER EXISTING LAW

Compassionate homicide is not a new phenomenon, as society has long grappled with the reality of actors who kill close family members to end their suffering.[43] As contemporary advancements in medical procedures and treatments result in prolonging and sustaining life, more legal issues surrounding end of life decisions arise and are likely to become even more prominent.[44] Compassionate homicide raises not only complex moral and ethical conundrums but also challenging questions concerning the scope of the actor's criminal liability, the grading of the crime, and the level of deserved punishment. Moreover, from criminal law's perspective, the motivation for compassionate homicide is puzzling given the paradox of harm infliction; actors inflict on people they love the gravest and irreversible harm, in order to relieve them from experiencing another harm, namely, the suffering resulting from living with a terminal illness or severe disability.[45]

Existing criminal law doctrines answer these difficult yet nuanced questions with a simple bright line rule: intentional killing of another human being amounts to murder in all American jurisdictions. The motive for intentional killing may sometimes reduce criminal liability in cases where the law recognizes defenses such as self-defense, provocation, necessity and duress.[46] Yet beyond the scope of these statutorily recognized defenses, the actor's motive, whether it is benign or nefarious, love or hate, largely does not affect the scope of criminal responsibility, even if it may be taken into account as one mitigating or aggravating circumstance at sentencing.[47] In

43. *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 806, 811–812 (1993) (observing that the phrase nonvoluntary euthanasia refers to a person incapable of communicating her consent, where the killing is motivated entirely by compassion for the victims' suffering).

44. *See* Raphael Cohen-Almagor, *Euthanasia and Physician-Assisted Suicide in the Democratic World: A Legal Overview*, 16 N.Y. INT'L L. REV. 1, 5 (2003).

45. In circumstances where the victim's death was imminent and their suffering intolerable, arguably no paradox exists, because hastening death is beneficial for the victim. For the paradox of harm argument see THE LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, 2006-7, HC 30, at 145 (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228782/0030.pdf [https://perma.cc/RH84-W2X3].

46. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118–19 (8th ed. 2018).

47. Actor's motive does affect the scope of criminal liability in hate crimes. *See* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 99 (2006). For a thorough

practice, however, decision-makers are often reluctant to bring to bear heavy-handed murder rules in compassionate homicide cases.[48] As the discussion below demonstrates, decision-makers often convict compassionate actors only of lesser crimes, without any coherent doctrinal basis for mitigation. This response can be attributed to the fact that communities' moral and societal perceptions do not always align with the stringent legal response, as society's moral intuitions largely conceive of compassionate homicide as less morally blameworthy than other types of intentional killings.[49] But before describing the inherent tensions arising from the apparent discrepancy between law and practice, some terminological clarifications are necessary.

A. Terminology and Scope

The myriad of terms used, often interchangeably, to address cases where actors kill out of compassion, often leads to conceptual confusion. These terms are often used synonymously, mistakenly creating the impression that they describe similar behaviors. However, terms such as voluntary, involuntary, and non-voluntary euthanasia; mercy killing; compassionate killing; assisted suicide; and physician-assisted suicide refer to a host of distinct fact patterns. Distinguishing between different types of compassion-motivated killing is imperative both for purposes of conceptual clarity as well as for limiting the scope of the argument below.

At one end of the spectrum are situations involving assisted suicides, in which actors provide help to terminally ill or severely disabled individuals in ending their own lives. Here, actors are prompted to assist in committing suicide by deceased's explicit requests, for example, by procuring the necessary medication. These cases also include physician-assisted suicides, in which medical professionals help terminally ill patients end their lives at the explicit request of the patients.[50] Yet these are not homicide cases, since

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discussion of motive's role at sentencing see *id.* at 100–09. A compassionate motive may also serve as an aggravating circumstance in sentencing, because the actor breached a relationship of trust by taking advantage of the victim's vulnerability. *See* People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 13 (noting factors in aggravation, including that the victim was physically handicapped and the defendant was a family member in a position of trust).

48. *See* Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, LAW & CONTEMP. PROBS., no. 2, 2012, at 83, 90 n.37 (noting that mercy killers commit premeditated killing, yet prosecutors often refuse to prosecute them).

49. *See id.*; *see also* Michael J. Zydney Mannheimer, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879, 895–96 (2011).

50. Physician-assisted cases are often referred to as medical euthanasia. *See* Edward J. Larson, *Euthanasia in America—Past, Present, and Future: A Review of* A Merciful End *and* Forced Exit, 102 MICH. L. REV. 1245, 1247 (2004) (book review). Oregon and Washington adopted Death with Dignity

actors may only be charged under assisting suicide statutes.[51] While assisted suicide cases raise many complex moral questions, among others, whether the assister was acting in a personal or professional and paid capacity, as well as the obligations of medical professionals and their ethical duties in cases where health care professionals provided the assistance, this Article does not address them, as it solely focuses on homicide cases.

At the other end of the spectrum are cases where actors actively kill terminally ill or severely disabled family members in order to end their pain and suffering. When a person is *competent* to make decisions, and expresses an explicit request or desire to die, these cases are typically referred to in the literature as *voluntary* euthanasia.[52] Cases where victims did not expressly request to die are further subdivided into non-voluntary and involuntary euthanasia. *Non-voluntary* euthanasia refers to circumstances where victims were *not competent* to make their own decisions regarding ending their lives due to grave illness, severe disability, or young age.[53] In sharp contrast, *involuntary* euthanasia refers to circumstances where victims were *competent* to express their wishes. A further distinction may be drawn between cases where competent victims never expressed any explicit wish to die, even if they could have done so, and cases where competent victims explicitly objected to dying, manifesting willingness to continue living despite the illness or disability, yet actors killed them contrary to their wishes.[54]

The presence or absence of consent to die stands at the core of the distinction between voluntary euthanasia on one hand and non-voluntary and involuntary euthanasia on the other.[55] Arguably, in *voluntary* euthanasia cases, the voluntariness of deceased's request to die precludes their status

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Acts, which allow for mentally competent terminally ill patients to request and receive a prescription for medication to end their lives voluntarily. *See* OR. REV. STAT. § 127.805 (2019); WASH. REV. CODE § 70.245.020 (2019).

51. *See* Thaddeus Mason Pope, *Legal History of Medical Aid in Dying: Physician Assisted Death in U.S. Courts and Legislatures*, 48 N.M. L. REV. 267 (2018) (discussing assisted suicide statutes).

52. *See* N. Ferreira, *Latest Legal and Social Developments in the Euthanasia Debate: Bad Moral Consciences and Political Unrest*, 26 MED. & L. 387, 390 (2007) (discussing cases where the actor kills a patient in "response to a repeated and informed consent, under certain pre-established conditions, according to his/her request and/or will, and through painless means.").

53. *See* Tom L. Beauchamp, *The Justification of Physician-Assisted Deaths*, 29 IND. L. REV. 1173, 1176 (1996) (distinguishing between non-voluntary and involuntary euthanasia, stressing that the latter is universally condemned but there are moral justifications for voluntary and non-voluntary euthanasia).

54. *See* Norman L. Cantor, *On Kamisar, Killing, and the Future of Physician-Assisted Death*, 102 MICH. L. REV. 1793, 1816 (2004).

55. Additionally, euthanasia may either be active or passive. Passive euthanasia includes homicides by omission, namely, situations in which defendants, whether health professionals or family members, purposely omit conduct that would have saved life, whereas active euthanasia refers to the voluntary act of killing a human being. *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 705 (8th ed. 2019). The above distinction is not pertinent to the argument I develop in this Article.

as victims. In contrast, in *non-voluntary* and *involuntary* euthanasia cases, actors commit unilateral actions without the consent or request of deceased who are victims in the conventional sense of the term.

Extensive literature has been devoted to the ethical and legal conundrums surrounding assisted suicides and voluntary euthanasia, largely focusing on the scope and conditions of consenting adults' right to die.[56] Here, I do not further engage in these conversations, as the discussion below expressly excludes voluntary euthanasia cases.[57] In addition, the proposed partial excuse that this Article develops explicitly *excludes* from its scope cases of involuntary euthanasia where victims clearly objected to their killing, expressing their wish to continue living despite their suffering, yet defendants flagrantly opted to disregard these autonomous choices, violating victims' dignity.[58]

The remainder of this Article focuses on *non-voluntary* euthanasia cases, where victims lacked the capacity to express their wishes due to an illness, disability or young age, as well as cases where victims were legally competent but have not explicitly expressed a wish to die. As noted earlier, I collectively refer to these cases as "compassionate homicide."[59]

B. The Law: Recognizing Passion, but not Compassion

Having delineated the types of cases that this Article is concerned with, I now turn to examine the divergence between law and practice in the treatment of compassionate homicide.

Broadly speaking, actors' motive for committing murder largely does not matter for determining the scope of their criminal responsibility. Commonly referred to as "the irrelevance of motive principle," the maxim holds that the law does not distinguish among malicious or beneficial motivations for

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56. *See, e.g.*, Richard Doerflinger, *Assisted Suicide: Pro-Choice or Anti-Life?*, 19 HASTINGS CTR. REP., Jan.–Feb. 1989, at 16, 16–19; Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 741–53 (1995); Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, *in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 225, 245 (John Keown ed., 1995).

57. I leave open the question of recognizing a complete excuse for voluntary euthanasia where the victim explicitly requested to die. *See generally* Kathryn L. Tucker, *In the Laboratory of the States: The Progress of* Glucksberg*'s Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1600–07 (2008) (discussing aid-in-dying statutes, such as Oregon's Death With Dignity Act, that provide a choice for mentally competent, terminally ill patients to seek medication to bring about a peaceful and dignified death, and suggesting that more states should adopt such laws to allow terminally ill patients to control the timing and manner of their deaths.)

58. *See infra* Part IV.D (discussing the exclusion of the defense in cases where the victim objected to the killing and expressed a wish to continue living).

59. *See* Introduction.

intentional killings.[60] But there are important exceptions to this rule where the law recognizes a justification or excuse, such as provocation, extreme mental or emotional disturbance, self-defense, duress, or necessity.[61] None of these defenses, however, apply in compassionate homicide cases.[62]

To begin with, the common law's provocation defense, which remains good law in the vast majority of jurisdictions today, allows for mitigating murder charges to manslaughter if the actor killed under a heat of passion, stemming from adequate provocation and without an opportunity to cool off.[63] While arguably the term "heat of passion" covers a host of powerful emotions, and is not exclusively limited to anger, two reasons account for why the provocation defense is inapplicable in compassionate homicide cases. First, courts and commentators mostly perceive provocation as an anger-based defense, which does not cover actors' reactions that are triggered by other emotions such as fear.[64] Second, provocation doctrine requires a provoking incident, namely, that deceased engaged in some blameworthy behavior amounting to "adequate provocation."[65] Victims of compassionate homicide did nothing to provoke actors, as suffering from a terminal illness or severe disability is a blameless predicament. The provocation defense is, therefore, not only normatively inappropriate but also doctrinally inapplicable as an excusatory basis for mitigation in compassionate homicides.

In jurisdictions that have replaced provocation with a defense modeled after the Model Penal Code's Extreme Mental or Emotional Disturbance (EMED), existing statutory language is arguably sufficiently expansive to offer an excusatory basis for mitigation in compassionate homicides. Providing that a homicide which would otherwise constitute murder constitutes manslaughter when it is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable

60. *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 2 (2002) (observing that commentators stress the irrelevance of motive, arguing against hate crimes liability and in support of liability for mercy killing).

61. Hate crime statutes are a notable exception to the rule that motives generally do not affect the scope of criminal liability. For further discussion of motives see *infra* Part III.B.3.

62. Admittedly, the defenses of self-defense and duress are inapplicable to compassionate homicide cases; while it may be argued that EMED and necessity could cover compassionate homicide, in practice that has not been the case, as the discussion below demonstrates. *See* Boyle v. State, 214 S.W.3d 250, 253–54 (Ark. 2005).

63. *See* Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 24 (2014) (noting that only 12 jurisdictions replaced provocation with the defense of extreme mental or emotional disturbance); DRESSLER, *supra* note 46, at 501.

64. Self-defense statutes recognize fear as a basis for exculpation. *See* Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1762 (2018). For a proposal to recognize fear as a basis for the provocation defense see *id.* at 1736–37.

65. *See, e.g.*, Commonwealth v. Towles, 208 A.3d 988, 1001, 1004 (Pa. 2019) (citing Commonwealth v. McCusker, 292 A.2d 286, 290–93 (Pa. 1972)).

explanation or excuse, the Model Penal Code's proposal for EMED defense does not require any provocative incident by the victim.[66] However, only twelve jurisdictions have adopted some version of EMED; this defense cannot apply in the vast majority of jurisdictions, in which the elements of the provocation defense must be established.[67]

But even in jurisdictions that revised their statutes by adopting some version of EMED, this defense mostly does not apply in cases of compassionate homicide. In some of these jurisdictions, courts recognize that murder charges may be mitigated to manslaughter once juries determine that a defendant's self-control and reason were overborne by various intense feelings, including not only anger but also distress, grief, and excessive agitation.[68] Yet, despite this broad wording and the fact that statutory interpretation itself does not preclude compassionate killing from the scope of the defense, case law demonstrates that the EMED defense is mostly used either in cases that would otherwise fall under the provocation defense or in cases where defendants' mental disorders fall short of the insanity defense.[69] Moreover, in some jurisdictions that adopted EMED, courts read a provocation element into the defense, requiring evidence that defendant killed the victim immediately following some provocation, such as physical fighting, a threat, or a brandished weapon, despite the fact that statutory language does not require a provocative incident.[70] Furthermore, some jurisdictions go as far as explicitly excluding compassionate homicide from the scope of their extreme emotional disturbance defense, stressing that the claim that a killing was motivated by love is completely irrelevant because mercy killing is not a recognizable defense to murder.[71] For example, the Arkansas Supreme Court in *Boyle v. State* affirmed the trial court's refusal to instruct the jury on a lesser included offense, upholding defendant's conviction of a capital offense with a sentence of life without parole.[72] In this case, defendant killed his live-in girlfriend who suffered from various health problems that caused her chronic pain, claiming that he suffered from an extreme emotional disturbance resulting from watching his beloved girlfriend's suffering.[73] Rejecting defendant's claim, the court held:

66. *See* MODEL PENAL CODE § 210.3(1)(b) (AM. LAW INST. 1985).

67. *See* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1039–40 (2011).

68. *See, e.g.*, State v. Elliott, 411 A.2d 3, 5, 8 (Conn. 1979) (defendant killed his brother arguing that the act was motivated by fear).

69. *See* Duff, *supra* note 18, at 208.

70. *See, e.g.*, Kail v. State, 14 S.W.3d 878, 880 (Ark. 2000); Spann v. State, 944 S.W.2d 537, 539–40 (Ark. 1997) (holding that in order to receive a manslaughter jury instruction, there must be evidence of some provocation).

71. *See* Boyle v. State, 214 S.W.3d 250, 253–54 (Ark. 2005).

72. *Id.* at 252.

73. *Id.* at 254.

> Absent a legally-recognized defense, where a person intentionally causes the death of another, his act constitutes murder, and it is completely irrelevant that the act was motivated by love rather than malice. A humanitarian purpose is neither a defense to murder nor a substitute for the passion and provocation necessary to establish extreme-emotional-disturbance manslaughter.[74]

The necessity defense is also inapplicable in compassionate homicide cases. Characterized as a "residual justification," the traditional common-law defense recognizes that certain natural conditions, not humanly created, compel an actor to choose the least harmful alternative between two evils.[75] But even in jurisdictions that have statutorily adopted a necessity defense that covers human-created conditions, the elements of a necessity claim are rigid and extremely difficult to satisfy;[76] actors must face a clear and imminent danger, expect that their action will be effective in abating the danger they seek to avoid, and show that no effective legal way to avert the harm existed, that the harm they caused was less serious than the harm they sought to avoid, that lawmakers have not weighed in on their choice of evils situation and made a decision that conflicts with that choice, and that their own behavior has not contributed to the emergency situation.[77] These requirements, however, cannot be met in compassionate homicide cases. First, in most jurisdictions, the defense of necessity does not apply in homicide cases.[78] Second, in balancing the harms stemming from killing the victims and the harms suffered by the victims as a result of their illness or disability, causing death cannot be viewed as a lesser harm compared with the suffering that victims endure. Furthermore, while compassionate killers subjectively believe that, given the circumstances, they have no other way to alleviate the suffering of their loved ones other than to kill them, thus arguably making the killing necessary, this feeling is not supported by objective reasons, as in most cases there are viable alternatives to killing.[79]

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74. *Id.*

75. *See* DRESSLER, *supra* note 46, at 275; *see also* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 90 (15th ed. Supp. 2019) ("Under the force of extreme circumstances, conduct which would otherwise constitute a crime is justifiable and not criminal; the actor engages in the conduct out of necessity to prevent a greater harm from occurring.").

76. *See, e.g.*, 18 PA. CONS. STAT. § 503 (2020); People v. Brandyberry, 812 P.2d 674 (Colo. App. 1990).

77. *See* DRESSLER, *supra* note 46, at 273–75.

78. *Id.* at 279.

79. There are no reported cases where defendants raised a necessity defense in compassionate homicide cases, but Canadian courts thoroughly examined the elements of this defense and rejected its application. *See* R. v. Latimer, 1995 CanLII 3993 (Can. Sask. C.A.) (involving a father who had killed his severely disabled 12-year-old daughter out of compassion). The legal proceedings lasted six years and produced two decisions by the Supreme Court of Canada, both convicting Latimer of second degree

Since existing defenses largely fail to provide a doctrinal basis for mitigation in compassionate homicide cases, current laws mostly view them as murder cases.[80] While handed down over thirty years ago, the 1987 North Carolina decision in *State v. Forrest* is still good law, succinctly capturing existing stringent legal treatment of compassionate homicide.[81] The *Forrest* case concerns a defendant who arrived at the hospital where his terminally ill father was hospitalized, and after becoming extremely emotional at the sight of his father's deteriorating medical condition, pulled out a pistol and shot him.[82] The sobbing and upset defendant did not try to run away, and instead cooperated with the police while muttering, "He's out of his suffering. I killed my daddy. He won't have to suffer anymore. I know they can burn me for it, but my dad will not have to suffer anymore."[83] Defendant was charged with first-degree murder and the case was submitted to the jury on one of four possible verdicts: first-degree murder, second-degree murder, voluntary manslaughter, or not guilty.[84] After the jury convicted him of first-degree murder, defendant appealed his conviction, arguing that there was insufficient evidence of premeditation and deliberation.[85] While it was apparent that defendant was motivated to kill out of compassion, the North Carolina Supreme Court upheld the verdict, holding that there was substantial evidence that the killing was premeditated and deliberated.[86] The court stressed that defendant's own statements supported this conclusion, as he had stated that "he had thought about putting his father out of his misery because he knew he was suffering" and that "he had promised his father that he would not let him suffer and that, though he did not think he could do it, he just could not stand to see his father suffer any more [sic]."[87] The court further clarified that the provocation defense could not have provided grounds for reducing the degree of the homicide from murder to voluntary manslaughter because the seriously ill victim did nothing to provoke the defendant's action.[88]

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murder of his daughter. *See id.*; R. v. Latimer, 1997 CanLII 11316 (Can. Sask. Q.B.); R. v. Latimer, [1997] 1 S.C.R. 217 (Can.); R. v. Latimer, 1998 CanLII 12388 (Can. Sask. C.A.); R. v. Latimer, [2001] 1 S.C.R. 3 (Can.).

80. *See, e.g.*, People v. Cleaves, 280 Cal. Rptr. 146, 150–51 (Ct. App. 1991) (stating that mercy killing is not a defense to a murder charge); People v. Johnson, No. A139389, 2015 WL 7012997, at *7 (Cal. Ct. App. Nov. 12, 2015) (noting that mercy killing is not a form of manslaughter recognized under California law).

81. State v. Forrest, 362 S.E.2d 252 (N.C. 1987).

82. *Id.* at 254.

83. *Id.* (internal quotation marks omitted).

84. *Id.*

85. *Id.*

86. *Id.* at 257–58.

87. *Id*. at 258.

88. *Id.* at 256.

The *Forrest* case is the paradigm example of a decision that stands for the proposition that compassionate homicide remains murder in the eyes of the law, as defendant's compassionate motive for the killing did not mitigate his criminal responsibility, rendering it any less criminally culpable.[89] Indeed, conventional wisdom in criminal law is that motives largely do not play any role for the purpose of determining actors' criminal responsibility.[90] Instead, homicides are graded based solely on defendants' mens rea; according to the *Forrest* court, since Forrest intended to kill his father, that intent justified his conviction of the highest grade of homicide, as well as its accompanying stigma and labeling as a murderer. But the role that motives *ought* to play in determining the scope of criminal responsibility is in fact more nuanced than these oversimplified observations. This Article will revisit motives' role in Part III, while advocating for a compassion-based excuse, which presumes that actors' motives do matter for the purposes of grading homicide offenses.[91]

C. The Practice: Inconsistent and Unprincipled Mercy

The criminal justice system's treatment of compassionate homicide exemplifies an area where a gap emerges between doctrine and practice. While legal doctrines categorically deny any basis for mitigation of criminal responsibility in compassionate homicide, case law demonstrates inconsistencies across the board; in some cases, murder charges are significantly reduced, either to manslaughter or even to involuntary

89. *See id.*; DRESSLER & GARVEY, *supra* note 55, at 278 (excerpting and discussing the *Forrest* case), 697–717 (discussion of a new criminal excuse for euthanasia).

90. *See* Douglas Husak, *"Broad" Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 472 (2012) (noting that motives are generally insignificant to liability, as opposed to sentencing).

91. *See* Part III.B.3 (discussing why motives for criminal conduct should affect the level of criminal responsibility).

manslaughter.[92] Other times, however, defendants bear the full heavy weight of the criminal justice system and are convicted of murder.[93]

To highlight the tension between doctrine and practice and the potential for inconsistencies in treatment between similarly situated defendants, consider the *Liltz* case discussed earlier.[94] There, the killing was committed following long-term caretaking responsibilities, and defendant claimed that she was motivated to kill her daughter wholly out of compassion because she was deeply concerned that her daughter would not receive proper care at a nursing home.[95] While the prosecutor exercised merciful discretion by recommending a probation-only sentence, the sentencing judge insisted on sending defendant to four years in prison, treating her motivation as an aggravating circumstance.[96]

The doctrinally muddled treatment of the *Liltz* case is disconcerting, as prosecutorial discretion and judicial discretion resulted in strikingly different outcomes. This disparate treatment raises concerns that similarly situated defendants might be treated differently by the criminal justice system. The fact that some compassionate killers are perceived by prosecutors, judges, and juries as deserving mercy, but others as undeserving, raises the question of what might account for the difference in decision-makers' perceptions.

These concerns are further exemplified by comparing and contrasting the *Liltz* and *Forrest* cases.[97] Similar to Liltz, Forrest also killed his father *wholly* out of compassion. In fact, the *Forrest* case arguably suggests an even stronger justification for recognizing a compassion-based excuse because Forrest's father was a terminally ill patient whose death was

92. See, for example, the case of Kimberly Lightwine, a Missouri mother who killed her autistic and blind son. Initially charged with second degree murder, Lightwine pled guilty to involuntary manslaughter, following a plea agreement. Harrison Keegan, *Mom Pleads Guilty to Killing Blind, Autistic Son; She Could Be Free in 4 Months*, USA TODAY (May 10, 2018, 7:14 PM), https://www.usatoday.com/story/news/nation-now/2018/05/10/autistic-teen-killed-missouri-mother-pleads-guilty-his-death/6 00151002/ [https://perma.cc/CLZ2-SBHA]. See also the New York case against Gigi Jordan who killed her autistic eight-year-old son, was convicted of manslaughter, and was sentenced to eighteen years in prison. Sarah Kaplan, *The Millionaire Mom Who Poisoned Her Autistic Son and Called It a Mercy Killing*, WASH. POST (May 29, 2015, 5:11 AM), https://www.washingtonpost.com/news/morning-mix/wp/2015/05/29/a-murder-or-a-mercy-killing-the-tangled-and-troubling-trial-of-gigi-jordan/?noredirect=on&utm_term=.6bee2ec41ad6 [https://perma.cc/LS8M-732X]. For further discussion of the need for consistency and uniformity in sentencing while minimizing the role of judicial discretion at the sentencing phase, see *infra* Part III.C.2.

93. *See, e.g.*, People v. Johnson, No. A139389, 2015 WL 7012997, at *1–5 (Cal. Ct. App. Nov. 12, 2015) (defendant killed her 8-year-old severely disabled daughter and was convicted of second degree murder); People v. Anderson, No. B276741, 2017 WL 3326831, at *1 (Cal. Ct. App. Aug. 4, 2017).

94. People v. Liltz, 2017 IL App (1st) 161996-U. For discussion, see *supra* notes 1–15 and accompanying text.

95. *Id.* at ¶ 12.

96. *Id.* at ¶ 2.

97. *See supra* Part I.B (discussing the *Forrest* case).

imminent, whereas Liltz's daughter was severely disabled but not terminally ill.

Comparing and contrasting the *Liltz* and *Forrest* cases raises a worry that this difference stems not from principled distinctions between different cases but rather from unrelated factors that ought to be irrelevant for the grade of the homicide. One possible explanation is that gender might play a role in this context, with female defendants being treated more leniently, but only if their behavior is consistent with gender-biased constructions of femininity, motherhood and caretaking roles.[98] Another explanation rests with decision-makers' own emotions, and particularly feelings of empathy towards some, but not all, compassionate killers. These emotions lead decision-makers to find ways to avoid condemnation of compassionate killers as murderers in cases where they find them worthy of merciful treatment. Yet an alternative explanation is that divergent outcomes might stem from a conceptual difference in personal worldviews of the prosecutors who handle different compassionate homicide cases, which could occur even in the same jurisdiction.[99] The *Liltz* prosecutor acted in the spirit of a social worker (which was, until very recently, an infrequent prosecutorial model in our existing over-punitive criminal justice system), whereas the *Forrest* prosecutor applied a heavy-handed tactic.[100] I will further critique the overbroad prosecutorial discretion in compassionate homicide cases in Part III, while developing the proposal for a new excuse.[101] Before moving to consider whether compassion ought to play any role in determining the grade of a homicide, it is pertinent to consider the various rationales that are commonly used for upholding the legal status quo.

D. Arguments for Upholding Current Law

The idea of recognizing a compassion-based partial excuse is not only provocative but also generates a wide array of counterarguments that vehemently reject the possibility of providing a doctrinal basis for mitigating compassionate murders to manslaughter. Let me concede right

98. *See generally* Jamie R. Abrams, *The Feminist Case for Acknowledging Women's Acts of Violence*, 27 YALE J.L. & FEMINISM 287, 315 (2016) (addressing gender-based constructions).

99. I thank Professor Joshua Dressler for directing me to this explanation.

100. For alternative models of prosecution see Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1129–30 (2005) (advocating a new prosecutorial model under which the prosecutor serves as a problem-solver). In recent years, the phenomenon of progressive prosecutors, including more merciful prosecutors is gaining traction. *See* Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8 (2018); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542792 (describing the rise of the so called progressive prosecutor movement, of which merciful prosecutors are an integral part).

101. *See infra* Part III.C.1–2.

away that there are valid reasons for refusing to recognize such an excuse. Rather than trying to dismiss these arguments or minimize their strength, my goal here is to lay them out up front by directly confronting them. Indeed, ample justifications, grounded in policy-based arguments, support the objection to allowing compassionate killers to bring before a jury a compassion-based partial excuse. These generally fall under theoretical, practical, and evidentiary-based rationales.

1. Theoretical Rationales

A lively scholarly debate on the question of whether the law ought to legalize voluntary euthanasia emerged as early as the 1950s with professor Yale Kamisar's oft-cited article on objections to mercy killing legislation.[102] While Kamisar mostly focused on voluntary euthanasia in the context of physician-assisted deaths, one of his main concerns was that legalizing the latter would ultimately lead to a slippery slope, which would result in an increase in non-voluntary euthanasia. Additionally, many of the arguments against voluntary euthanasia apply even more forcefully in the context of non-voluntary euthanasia which is my focus here. Kamisar's position rests on utilitarian arguments against voluntary euthanasia, concluding that a cost-benefit calculus tips the scale towards rejecting the idea of legalizing the practice. The potential harms of opening the door towards voluntary euthanasia, posits Kamisar, outweigh the benefits that allowing it would provide to some people.[103]

Utilitarian-based rationales by and large reject an excusatory basis for compassionate homicide.[104] Justifications grounded in the need for criminal law's general deterrence (as opposed to specific deterrence), might suggest that mitigation should not be provided in these cases. Utilitarian punishment theorists generally reject criminal excuses that are grounded in exercising mercy towards defendants because doing so belies the purpose of punishment.[105] Under a utilitarian account of punishment, recognizing a doctrinal basis for mitigation in compassionate homicide cases mostly does

102. *See* Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 1030–38 (1958) (responding to the publication of GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957) advocating for the legalization of voluntary euthanasia).

103. Kamisar's emphasis on voluntary euthanasia's utilitarian obstacles does not take issue with retributivist arguments that might support voluntary euthanasia. *See id.* at 974 n.21.

104. For a general discussion of a utilitarian theory of punishment see DRESSLER, *supra* note 46, at 16–17 (utilitarian justifications for punishment hold that the punishment of specific offenders serves as a societal instrument aimed at producing beneficial social utility. This consequentialist account calls for a calculus that weighs the benefits of punishment against its harms, concluding that punishment is justified only when benefits exceed harms, producing future good in terms of crime control).

105. *See* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1013 (1996).

not produce any social good. Additionally, utilitarian theorists might argue that recognizing an excuse not only does not reduce future crime but also risks the possibility of an increase in crime, as partially excusing compassionate killers might encourage actors to take similar action by sending an expressive message to the community that compassionate homicide warrants mitigation.[106]

Arguably, retributivist theories of punishment might also deny mitigation for compassionate killers: given the gravity of the harm inflicted on victims, a murder conviction is ostensibly proportional and therefore deserved.[107] The retributivist position concerning compassionate homicide, however, is more nuanced. Part III explains how retributivism may be reconciled with exercising mercy towards compassionate killers.[108]

Sentencing-based rationales also reject an excuse for compassionate homicides, arguing that mitigation of punishment may be accomplished at the sentencing phase.[109] Federal and state sentencing laws and guidelines provide sentencing judges ample discretion to take into consideration the nature and circumstances of the offense and the history and characteristics of the defendant.[110] The specific offender's characteristics include personal background and other circumstances, especially those directly relevant to

106. There are, however, utilitarian counterarguments to this position. While rejecting the excuse rests on an empirical claim that it promotes deterrence, it is not clear whether allowing such defense will in fact decrease deterrence. Additionally, utilitarian theorists may weigh in their calculus the harms caused to compassionate killers by punishing them as murderers and the harms caused to incompetent terminally ill patients if their loved ones will not end their pain and suffering, even when it might be beneficial for them.

107. *See* Joshua Dressler, *Some Very Modest Reflections on Excusing Criminal Wrongdoers*, 42 TEX. TECH L. REV. 247, 252–56 (2009).

108. *See infra* Part III.B.3 (discussing the way in which the notion of equitable mercy comports with a retributivist theory).

109. Federal and state sentencing laws require sentencing courts to impose sentences that are sufficient but not greater than necessary to fulfill the purposes of sentencing. *See, e.g.*, 18 U.S.C. § 3553(a) (2018). The U.S. Supreme Court has long recognized that while sentencing guidelines provide much-needed uniformity, are aimed at reducing unjustified disparities between similarly situated defendants and provide evenhandedness and neutrality, sentencing judges must always consider every convicted person as an individual and unique case. Courts recognize the tension between the need for consistent, uniform sentencing of similarly situated defendants on one hand and the need for individualized outcomes that take into account offenders' specific backgrounds. *See* Koon v. United States, 518 U.S. 81, 113 (1996).

110. For relevant circumstances that may be taken into consideration at sentencing see, for example, 18 U.S.C. § 3553(a) (2018) (Factors to be Considered in Imposing a Sentence: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant."). Also, the United States Sentencing Guidelines Manual states that mental condition, among others, may be relevant at sentencing if present to an unusual degree. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.3, 5H1.4 (U.S. SENTENCING COMM'N 2018).

the commission of the offense charged.[111] While sentencing rules often forbid sentencing judges from considering factors such as race or creed, factors such as defendants' mental condition, that are directly relevant to defendant's culpability, might be considered at sentencing.[112] Importantly, while defendants' motives for committing the offense largely do not matter for defining the level of criminal responsibility itself, they matter at sentencing, as sentencing laws allow sentencing judges to consider various motives.[113]

One argument for maintaining the current legal treatment of compassionate homicide is that even assuming that notions of compassion and mercy may play a role in the criminal justice system, that role might be brought to bear only at sentencing.[114] Since sentencing laws allow taking into account defendant's compassionate motive, a plausible argument is that exercising mercy ought to be left to sentencing, rather than muddying the waters at the trial's guilt-determination phase.[115] Yet, leaving mitigation to sentencing is problematic for several reasons; first, murder convictions typically trigger mandatory minimum sentences, often life without parole, and these provisions do not take into account individuals' circumstances, such as a compassionate motive.[116] Second, taking into account the offender's unique circumstances for committing the homicide is entirely discretionary, rather than mandatory. Defendants do not have a right to demand that their compassionate motive serve as a mitigating factor at sentencing. While some judges would take this fact into consideration, others would not, contributing to inconsistent outcomes across the board.[117] Third, sentencing judges may not only refuse to treat compassion as a mitigating factor, but may treat it as an aggravating circumstance.[118] Judges

111. *See* NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY 322, 325, 341 (4th ed. 2018) (noting that sentencing schemes generally distinguish between immutable characteristics, namely, personal characteristics that are outside of defendant's control and circumstances that are within the defendant's control).

112. *Id.* at 325–26.

113. *Id.* at 266.

114. Regarding the role of mercy at sentencing, some legal scholars reject altogether the idea that mercy plays any role within criminal justice, suggesting that justice and mercy are viewed as incompatible notions. Yet others hold that a compassionate motive may be taken into consideration at the sentencing phase. *See infra* Part III.B.3.

115. *See* Stephen P. Garvey, *Tempering Justice with Compassion*, 15 OHIO ST. J. CRIM. L. 283, 290–91 (2018) (suggesting that professor Dressler initially supported exercising mercy only at sentencing and not at the guilt determination phase, but had later revised his position given harsh and rigid sentencing practices).

116. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1155–56 (2009) (noting that the only exception is death penalty cases).

117. *See* People v. Anderson, No. B276741, 2017 WL 3326831, at *15 (Cal. Ct. App. Aug. 4, 2017); *cf.* People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 13 (stressing that defendant's circumstances were taken into account at sentencing, but ought to be balanced against the severity of her crime).

118. *See* People v. Stuart, 67 Cal. Rptr. 3d 129, 142–43 (Cal. Ct. App. 2007).

may hold that caretakers who kill especially vulnerable family members breach a special duty of trust and care they owe them.[119] The combined effect of an especially vulnerable victim, who is unable to express their wishes, with the enhanced duty of care and trust characterizing the relationships between a caretaker and a dependent family member, leads some sentencing judges to view compassionate homicide as aggravating the severity of the homicide.[120] Fourth, the upshot of a murder conviction is labeling and stigmatizing a compassionate killer as a "murderer," which is problematic given the arguably beneficial motive that triggered the killing. Treating compassionate homicide merely as a sentencing issue, rather than a matter that touches directly on the scope of criminal responsibility itself, does not provide a satisfactory legal framework for addressing these cases.

Another potential objection is that the existing doctrine of jury nullification already offers a legal tool to address the unique circumstances of compassionate homicide.[121] Jury nullification doctrine empowers juries to refuse to apply the law, or nullify its effect, in situations where its strict application would lead to an unjust or inequitable result.[122] Arguably, this doctrine provides a useful tool for juries to avoid the possible unjust outcomes in compassionate homicide cases where communities' perceptions about defendant's culpability are inconsistent with the strict treatment of penal codes. Therefore, it is better to leave these controversial cases to a case-by-case resolution, where juries might refuse to convict defendants with a serious homicide offense if they believe that defendant's culpability is reduced given the compassionate motive. The problem with this argument, however, is that the practice of jury nullification mostly draws on notions of tolerance rather than on principled doctrine; the law

119. *Id.* at 143 (observing that "an adult child who takes it upon herself to commit the 'mercy killing' of a very elderly parent based only on that parent's 'apparent wishes' has abused a position of trust and committed a very serious crime. A court is not required to conclude such an act rests on a higher moral plane than any other killing.").

120. *See id.*; *see also* People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 13.

121. On jury nullification under Canadian law, and for discussion of a Canadian case specifically concerning mercy killing see Benjamin L. Berger, *The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination*, 61 U. TORONTO L.J. 579, 597–98 (2011) (noting that the criminal justice system expresses ambivalence towards the practice of jury nullification, as best captured in the *Latimer* court's statement that: "[a]s a matter of logic and principle, the law cannot encourage jury nullification. When it occurs, it may be appropriate to acknowledge that occurrence." (quoting R. v. Latimer, [2001] 1 S.C.R. 3, para. 68 (Can.))). For further discussion of the *Latimer* case, see *supra* note 79.

122. *See* Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 167 (1991) (observing that jury nullification "is a power to 'complete' or 'perfect' the law by permitting the jury to exercise that one last touch of mercy where it may not be appropriate and just to apply the literal law to the actual facts"); *see also* David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 865 (1995) (noting that instructing jurors on jury nullification would provide a rational basis for jury deliberation and decision making, increasing citizen participation in the criminal justice system).

grudgingly accepts the practice as inevitable yet falls short of supporting it.[123] Moreover, jury nullification rests on subjective and elastic juries' beliefs on what is inequitable and unjust rather than offer a coherent theoretical basis for mitigation. Commentators often critique the practice as lawless, positing that it implements the jury's own idiosyncratic view of justice and morality.[124] Furthermore, similarly to the discretionary nature of providing mitigation to compassionate killers by sentencing judges, jury nullification is also entirely discretionary.[125]

Other arguments that reject any recognition of an excusatory basis for compassionate homicide rest on moral, ethical and religious rationales.[126] Drawing on arguments such as the sanctity of life and human life as a fundamental human right, which are equally applicable for all individuals, including terminally ill patients and people with disabilities, some scholars strongly oppose any proposals to decriminalize assisted suicide, to mitigate criminal liability for voluntary euthanasia, or to recognize an excuse for compassionate homicide.[127]

2. Practical and Evidentiary Rationales

Various evidentiary concerns and practical difficulties further support the rejection of a doctrinal mitigation for compassionate homicide. It is often difficult to identify victims' genuine wishes regarding whether they would have wanted to end their lives, had they been competent and provided a choice.[128] The cases that this Article targets concern mostly victims who are incompetent and therefore lacked the capacity to request to die. It is therefore impossible to evaluate whether they would have genuinely wanted the actor to kill them, if they had been capable of making their own choices about continuing living.

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123. *See* Garvey, *supra* note 105, at 1043–45.

124. *See* Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 39 (1997).

125. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1264 (2011) (noting that juries have the discretionary power to nullify).

126. *See* William Wagner, John Kane & Stephen P. Kallman, *Suicide Killing of Human Life as a Human Right: The Devolution of Assisted Suicide Law in the United Kingdom*, 6 LIBERTY U. L. REV. 27, 43–50 (2011) (critiquing Britain's assisted suicide policy and parliamentary proposals).

127. *See id.* A counterargument to the "sanctity of life" argument is that the proposed excuse does not advocate providing full justification to the compassionate killer, but instead only a partial excuse. Recognizing a partial excuse is not inconsistent with the sanctity of life argument and the fundamental right to live.

128. *See* Teresa Harvey Paredes, Comment, *The Killing Words? How the New Quality-of-Life Ethic Affects People with Severe Disabilities*, 46 SMU L. REV. 805, 828 (1992). Much scholarship was written in response to the Canadian case of Robert Latimer, R. v. Latimer, 1995 CanLII 3993 (Can. Sask. C.A.). *See, e.g.*, Kent Roach, *Crime and Punishment in the* Latimer *Case*, 64 SASK. L. REV. 469 (2001); Kent Roach, *Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip*, 40 MAN. L.J., no. 3, 2017, at 1, 15–17.

Additional concerns rest on slippery slope arguments, mostly the claim that line-drawing in these cases is an impossible task. Arguably, it is often difficult to distinguish between defendants who were genuinely wholly motivated by compassion for the suffering victim and those whose motivations were mixed. A defendant may be motivated by compassion but also by a personal agenda such as financial gain, or by self-compassion, such as the desire for relief from the financial, emotional and physical burdens of caretaking.[129]

Additionally, a powerful argument concerns the unintended consequences of recognizing a compassion-based excuse for individuals with disabilities.[130] People with disabilities and their advocates oppose this excuse due to the potential implications of such recognition.[131] Providing mitigation, they argue, carries a host of negative effects on people with disabilities, by contributing to the misguided perception that their lives are somehow less valuable and not worth the law's protection.[132] The assumption that severe disabilities diminish people's quality of life to the extent that death is preferable to life is fraught with difficulties.[133] Quality of life assessments are inherently subjective, as there is no objective way to measure and judge another's pain and suffering.[134] Recognizing caretakers' ability to make unsubstantiated assumptions about which lives lack any quality is therefore dangerous, opening the door to potential abuses. Such assumptions might draw from caretakers' own biases about people with disabilities. In addition, some disability-studies scholars warn that modern day eugenics, including euthanasia, shares common features with the Nazis' reliance on eugenics and euthanasia.[135] Moreover, since disabled victims are often incapable of expressing their own wishes, a defendant's unilateral act of killing arguably takes advantage of their disempowered status, violating their dignity and autonomy.[136]

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129. For further discussion of mixed motivations see *infra* Part III.B.3.

130. *See* M. David Lepofsky, *The* Latimer *Case: Murder is Still Murder When the Victim is a Child With a Disability*, 27 QUEEN'S L.J. 319, 326–30 (2001).

131. *Id.*

132. *Id.*

133. *See* Paredes, *supra* note 128, at 821–30 .

134. *See* John Carroll Byrnes, *The Health Care Decisions Act of 1993*, 23 U. BALT. L. REV. 1, 63 (1993) (observing that "[c]are must be taken to avoid subjective 'quality of life' or financially driven decisions").

135. *See* Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It* Or *an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 438 (2011) (noting that the Nazis engaged in systemic killings of disabled individuals based on eugenics theories).

136. While these are serious concerns, their force is significantly diminished, as this Article nowhere advocates excusing actors but instead only partially excusing them. Additionally, the thesis advanced in this Article focuses on the actor's motives for the killing rather than on the victim's perspective. Adopting the proposed partial defense therefore diminishes the risk of negative expressive consequences for people with disabilities.

Finally, pragmatists might suggest that from a practical standpoint, a doctrinal reform is unnecessary, since in practice, compassionate killers are already being treated mercifully under existing laws.[137] Adopting a compassion-based partial excuse is not needed, the argument continues, because compassionate killers are convicted of lesser offenses anyway, through both lenient plea agreements, and sentencing judges' discretion.[138] Moreover, those who are skeptical of the need for a doctrinal overhaul in the area would likely suggest that the disparate outcomes in compassionate homicide cases demonstrate that decision-makers eventually accomplish just outcomes based on the specific circumstances of the cases at hand. Arguably, since prosecutors wield enormous discretion to shape the level of defendants' criminal responsibility by offering lenient plea agreement only to defendants who they believe warrant mercy, a statutory reform is redundant. This Article will revisit these arguments in Part III, while elaborating on why adopting a doctrinal basis for mitigation is superior to accomplishing similar outcomes through exercising prosecutorial and judicial discretion.[139]

II. PSYCHOLOGICAL RESEARCH ON COMPASSION

In recent decades, psychological studies on various emotions and their behavioral impact have significantly developed, with numerous studies establishing that emotions have powerful effects in shaping and motivating many types of human behavior.[140] While a substantial body of psychological studies is devoted to researching familiar emotions like anger, fear, disgust, sadness and enjoyment (or happiness), in recent years, research on compassion has also gained traction.[141]

137. I thank Professor Aya Gruber for pointing my attention to this argument.

138. *See* People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 2 (noting that pursuant to a negotiated plea agreement between the parties, the State recommended a sentence of four years' probation with mental health counseling) ; Alridge v. State, No. 11–03–00246–CR, 2004 WL 292062, at *2 (Tex. App. Feb. 12, 2004) (the trial judge's comments to prospective jurors regarding the range of possible sentences included the following: "*It may be that this particular defendant who was convicted, it was murder, but it was a mercy killing. This particular defendant may be up in age and the person that he was convicted of murdering was his wife who was very ill at the time and suffering very badly.* We could go through numerous scenarios that go across the broad range of circumstances in a murder case, but the point that I'm—I want to make and I want to stress is that you have to keep an open mind and consider the full range of punishment." (emphasis in original)); *see also* Gonzales v. State, No. 01-99-00642-CR, 2000 WL 233141, at *4 (Tex. App. Mar. 2, 2000) (during *voir dire* hypotheticals, the judge told the "venire panel that an 'abused spouse case' or a 'mercy killing' are the types of cases that merit probation or a minimal sentence.").

139. *See infra* Part III.C.2.

140. *See* Lerner et al., *supra* note 24, at 816.

141. *See* RICHARD S. LAZARUS, EMOTION AND ADAPTATION 287–88 (1991).

One notable feature that emerges from these psychological studies is that compassion is a unique emotion.[142] While generally, many psychological studies on emotions such as anger and fear mostly agree on many of their common characteristics, compassion is a more complex notion. Psychological literature reveals that there is little agreement among emotion researchers on compassion's defining features, including whether it is a distinct emotion or synonymous with other emotions, and even whether it is an emotion at all or rather a hybrid affective state.[143] Before delving into the particular features characterizing compassion, it is essential to clarify some theoretical points underlying this notion.

A. What is Compassion: Definitional Questions

While emotion researchers often disagree on the precise definition of compassion, they identify several theoretical accounts that explain this notion. Some researchers describe compassion as a vicarious emotion, consisting of an experience of another's distress, and thus as synonymous with empathic distress.[144] The implication of this account is that the state of compassion is associated with the same expressive behavior and underlying appraisals of the state it is mirroring, like distress, pain, sadness, or fear.[145] Another theoretical account perceives compassion not as an independent affective state but instead as a variant of sadness, love, or their blend.[146] Its implication is that compassion shares the core appraisals, properties of experiences and display of behavior of sadness, love, or both.[147] A third theoretical account, which is especially dominant in recent psychological literature, considers compassion as either a separate emotion, or a distinct affective state with unique features that differ from those of other

142. *See infra* Part II.A.

143. Most emotions researchers agree that there are six basic emotions, which include happiness, fear, surprise, anger, distress, and disgust. *See* LAZARUS, *supra* note 141, at 79. They also agree that there are a range of responses to experiencing these various emotions. For example, anger may simmer/brood, suppress, and culminate in using physical force to harm someone else. *See id.* at 59. Ekman's studies compare and contrast familial compassion with these familiar other emotions, for the purpose determining whether compassion is an emotion or a distinct phenomenon. *See* Paul Ekman, *Paul Ekman's Taxonomy of Compassion*, GREATER GOOD MAG. (June 21, 2010), https://greatergood.berkeley.edu/article/item/paul_ekmans_taxonomy_of_compassion [https://perma.cc/F4PJ-5B65]. Others define emotions more broadly to also include joy, grief, fear, anger, hatred, pity or compassion, envy, jealousy, hope, guilt, gratitude, disgust, and love. Kahan & Nussbaum, *supra* note 21, at 276.

144. *See* Goetz et al., *supra* note 23, at 353; Martin L. Hoffman, *Is Altruism Part of Human Nature?*, 40 J. PERSONALITY & SOC. PSYCHOL. 121, 128–29 (1981).

145. *See* Goetz et al., *supra* note 23, at 353.

146. *See id.*; Phillip Shaver, Judith Schwartz, Donald Kirson & Cary O'Connor, *Emotion Knowledge: Further Exploration of a Prototype Approach*, 52 J. PERSONALITY & SOC. PSYCHOL. 1061, 1065–70 (1987).

147. *See* Goetz et al., *supra* note 23, at 353.

emotions.[148] This account is strongly supported by an evolutionary-based analysis that assumes that emotions are adaptations to survival and reproduction-related situations.[149]

Additionally, most emotion researchers distinguish between empathy, sympathy, and compassion.[150] While some researchers define empathy as a family of responses to another that are other-focused and include feelings of sympathy and concern for unfortunate individuals,[151] others refer to it as the vicarious experience of another's emotions.[152] Also, researchers define sympathy as "an emotional reaction that is based on the apprehension of another's emotional state or condition that involves feelings of concern and sorrow for the other person."[153] Moreover, there is disagreement among researchers on whether compassion is distinct from pity.[154] While researchers mostly agree that compassion is distinguished from empathy, sympathy, and pity, they disagree on whether it is a distinct emotion.[155] Some believe that compassion is neither among the basic five emotions of anger, fear, disgust, sadness, and contempt nor is it a mood, but instead, it is a hybrid between an emotion and an affective state which is more akin to a character trait.[156] Compassion, they explain, once cultivated, is an enduring feature of a person, a permanent part of their personality.

148. *See id.* at 352 tbl.1.

149. *See* Goetz et al., *supra* note 23, at 354–55; *see also* Randolph M. Nesse & Phoebe C. Ellsworth, *Evolution, Emotions, and Emotional Disorders*, 64 AM. PSYCHOLOGIST 129, 131–32 (2009).

150. *See* Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT'L J.L. CONTEXT 184, 185 (2017) (noting that the terms compassion, empathy, sympathy and pity have no fixed meaning, creating confusion).

151. *See* Mark H. Davis, *The Effects of Dispositional Empathy on Emotional Reactions and Helping: A Multidimensional Approach*, 51 J. PERSONALITY & SOC. PSYCHOL. 167, 167–68 (1983).

152. *See* Goetz et al., *supra* note 23, at 351–52.

153. *Id.* at 354 (citing multiple sources).

154. *See* Martha Nussbaum, *Compassion: The Basic Social Emotion*, SOC. PHIL. & POL'Y, Winter 1996, at 27, 27–28. Treating pity and compassion as synonymous terms, Nussbaum identifies three key features of compassion: the belief that the suffering is serious rather than trivial, the belief that the suffering was not caused primarily by the person's own culpable actions, and the belief that the pitier's own possibilities are similar to those of the suffered. *Id.* at 31. Other scholars, however, distinguish between pity and compassion, stressing that pity involves condescension on the part of the subject who feels in a superior place compared to the object of pity. *See* LAZARUS, *supra* note 141, at 287–89 (distinguishing pity from compassion).

155. Most emotions researchers agree that there are at least six core emotions, including fear, anger, disgust, and sadness. *See supra* note 143. Professor Paul Ekman believes that there are seven core emotions, based on facial expressions, and adds to the list enjoyment and surprise. *See Universal Emotions*, PAUL EKMAN GROUP, https://www.paulekman.com/universal-emotions/ [https://perma.cc/2K62-J9JF].

156. *See* EMOTIONAL AWARENESS 139–42 (Paul Ekman ed., 2008) (opining that despite the similarities to other emotions, compassion entails some key characteristics that distinguish it from other emotions: compassion needs to be cultivated while other emotions do not; compassion, once cultivated, is an enduring feature of a person; compassion does not distort the perception of reality; and its focus is restricted to the relief of suffering).

Despite disagreements among emotion researchers on the precise definition of compassion, one common account that repeatedly emerges in psychological literature defines compassion as the feeling that arises in witnessing another's suffering, motivating a subsequent desire to help.[157] This definition focuses on conceptualizing compassion as an affective state, stemming from a subjective feeling rather than as an attitude or a general response to others regardless of their suffering.[158]

The lack of consensus on whether compassion is best understood as an emotion or a hybrid affective state does not carry direct implications for the main question that concerns me in this Article, which is whether compassion, however defined, may serve as grounds for mitigating murder to manslaughter charges when actors kill loved family members to end their suffering.

B. Compassion as Motivating Action

A distinct tenet of compassion that many researchers agree upon is that compassion is a motivational state that drives action.[159] Compassion entails a proactive reaction, which includes acting towards ameliorating others' suffering, as witnessing it motivates a desire to actively help by engaging in specific behavior towards others in need.[160] Compassion is therefore not merely a feeling or an affective state encompassing a wish to relieve the suffering of loved ones, but it also triggers unique responses that are absent in other emotional states such as distress and sadness. In contrast with empathy and sympathy, which are mostly understood as passive feelings, compassion triggers action.[161] Research further shows that compassion often motivates individuals to respond to others' suffering quickly and instinctively.[162]

Moreover, since compassion is associated with increased concern for the other and reduced concern for the actor's own needs, it motivates not only caring behavior but also altruistic behavior.[163] A series of studies suggest that people who encounter others in a state of distress are often motivated

157. *See* LAZARUS, *supra* note 141, at 289 (noting that "[i]n compassion, the emotion is felt and shaped in the person feeling it not by whatever the other person is believed to be feeling, but by feeling personal distress at the suffering of another and wanting to ameliorate it. The core relational theme for compassion, therefore, is being moved by another's suffering and wanting to help." (emphasis omitted)).

158. *See* Goetz et al., *supra* note 23, at 351–52.

159. *See id.* at 354.

160. *See id.* at 352.

161. *See* Bandes, *supra* note 150, at 185–86.

162. *See* Goetz et al., *supra* note 23, at 361–62.

163. *See id.*

to address their needs and enhance their welfare.[164] These studies confirm that compassion overwhelms selfish concerns, promoting altruistic behavior.[165] Research further establishes that compassion motivates harm-reducing actions, even at a cost to actors themselves, as it is perceived as the "'guardian' of the moral domain of harm and undeserved suffering."[166]

Conceding that compassion might motivate action also calls for recognizing that sometimes people act out of several motivations after simultaneously experiencing the combined effect of more than one emotion.[167] Emotion researchers have long observed that emotions do not operate in a mutually exclusive way and that individuals are often affected by a cluster of emotions.[168] While the state of compassion may be the key motive driving actors to kill, additional emotions, such as despair, hopelessness, and powerlessness, act in concert and may also explain compassionate homicide.[169]

C. Familial Compassion and Caregiving Relationships

A substantial contribution to understanding the operation of compassion in the context of caretaking relationship between close family members is found in the work of leading emotions researcher Professor Paul Ekman.[170] Ekman's taxonomy of compassion identifies a sub-type that is particularly relevant to this Article, namely familial compassion.[171] Ekman coined the term to delineate "the seed of compassion," planted through close familial bonds and consisting of the desire and motivation to alleviate the suffering of close family members, such as parents and children.[172] Familial compassion, posits Ekman, is brought about in the moment when the actor

164. *See* Dacher Keltner, *The Compassionate Instinct*, *in* THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS 8, 12–13 (Dacher Keltner et al. eds., 2010) (describing studies conducted by researcher Daniel Batson).

165. *Id.* at 13.

166. *See* Goetz et al., *supra* note 23, at 366.

167. *See* LAW COMMISSION, PARTIAL DEFENCES TO MURDER, 2004, at 53 (UK), http://www.lawcom.gov.uk/app/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf [https://perma.cc/4V3N-LCFR] (citing the British Royal College of Psychiatrists, Response to Consultation Paper No. 173, for the proposition that anger and fear are not distinct emotions). This finding, among others, led the authors to recommend that British law also recognize fear as triggering provocation defense.

Relatedly, people may be motivated both by compassion as well as by selfish motives. *See infra* Part III.B.3.

168. *See* Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 466 (2009).

169. *See* Heather Keating & Jo Bridgeman, *Compassionate Killings: The Case for a Partial Defence*, 75 MOD. L. REV. 697 (2012).

170. *See* EMOTIONAL AWARENESS, *supra* note 156, at 139–225. Many of Ekman's writings on compassion draw on insights from ancient Tibetian philosophy and are co-authored with the Dalai Lama.

171. *See* Ekman, *supra* note 143 (distinguishing between various forms of compassion, including global compassion, sentient compassion, heroic compassion, and familial compassion).

172. *Id.*

sees a loved family member's suffering, or given the possibility that they would suffer in the future.[173] When compassion is activated, he continues, the actor's attention is solely focused on what is relevant to reduce that suffering.[174]

Moreover, while Ekman holds that compassion is not a separate emotion, he argues that it shares some important features with core emotions.[175] Similar to other emotions, he posits, compassion is an automatic, quick, unconscious response that happens without any deliberation.[176] When compassion is activated, continues Ekman, just like other emotions such as anger and fear, it is often inescapable, happens very fast, and is an automatic appraisal.[177] In some instances, the experiential and physiological aspects of compassion motivate actors to immediately respond to loved ones' suffering.[178]

D. Compassion's Effect on Moral Judgment and Reasoning

Psychological research demonstrates how compassion shapes moral judgment and reasoning.[179] Ample studies show that various emotions have a potent and pervasive effect on individuals' cognitive thought processes,

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173. *See* EMOTIONAL AWARENESS, *supra* note 156, at 139–225.

174. *Id.*

175. *See* Dalai Lama Center for Peace and Education, *Paul Ekman - Darwin, the Dalai Lama and the Nature of Compassion*, YOUTUBE (Dec. 24, 2010), https://www.youtube.com/watch?v=dPJvbf6aOyQ (stressing compassion, similarly to emotions is unbidden, involuntary, immediate, and fast and that it is constructive in nature, as it is intended to help a loved one rather than be harmful and destructive). Scholars from other disciplines, mostly philosophers, also agree with Ekman on this point, stressing that distinct aspect of compassion. While the emotions of anger and fear mostly carry negative connotations, compassion mostly carries positive overtones as it is generally perceived not only as a normal and welcome emotional state, but also as an important part of good and virtuous human life, and constitutive of excellence of character. *See* Duff, *supra* note 18, at 194 (discussing the general idea that emotions are understood as an important part of good human life). The foundational roots of virtue ethics moral theory are traced to the Greek philosopher Aristotle and were further developed in the works of contemporary philosophers, most notably Martha Nussbaum. *See* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33–34 (2011); Taslitz, *supra* note 168, at 447 (citing MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 48–52 (2004)). Legal scholars have examined how virtue ethics may inform better understandings of criminal responsibility. *See* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423–25 (1995).

176. *See* Dalai Lama Center for Peace and Education, *supra* note 175.

177. *See* EMOTIONAL AWARENESS , *supra* note 156, at 38, 142 (observing that the compassionate response is an involuntary desire to help relieve suffering); *see also* Paul Ekman & Daniel Cordaro, *What Is Meant by Calling Emotions Basic*, 3 EMOTION REV. 364, 365 (2011) (enumerating several characteristics that are common to all emotions, including automatic responses). Regardless of whether familial compassion is a true emotion or rather an affective state that is a hybrid between an emotion and a trait, there is a consensus that whenever it is triggered, it is inescapable, happens very quickly, and without any deliberation.

178. *See* EMOTIONAL AWARENESS, *supra* note 156, at 142; *see also* Goetz et al., *supra* note 23, at 366 (observing that the experiential facets of compassion motivate the individual to respond quickly and appropriately to the suffering of others).

179. *See* Goetz et al., *supra* note 23, at 366–67.

judgment and decision-making and may constitute powerful drivers of action.[180] These studies establish that emotions play a key role in understanding motivations for human actions, including harmful ones, like taking the lives of others.[181]

While most psychological studies exploring the relationship between emotions and judgment and decision-making focus on familiar emotions like anger and fear, compassion has similar impact on actors' judgment and decision-making.[182] Historically, researchers disagreed on whether compassion could be a source of principled moral judgment.[183] While earlier thinkers, such as Kant, have argued that compassion was an unreliable measure for moral judgments about right and wrong, modern emotion researchers have refuted this account, demonstrating that compassion figures prominently in moral judgments and in shaping action.[184]

Contemporary understandings of the role of emotions in actors' judgments and decision-making processes demonstrate a shift in how emotions are perceived. While previously, emotions were viewed as irrational forces and "enemies of reason," now they are generally perceived as an integral part of cognitive thought processes, as well as reasoned and cognitive-based reactions.[185] Psychological researchers today mostly reject the historic dichotomy between cognition and reason-based decision-making processes on one hand and emotion-based decision-making on the other.[186] Instead, various emotions, including compassion, are now largely understood as rational and reasonable reactions, affecting decision-making processes and shaping actors' moral judgments.[187] Put differently, reason and emotion play an integral role in the course of rational decision-making

180. *See* Lerner et al., *supra* note 24, at 801–16.

181. *See id.* This piece notes that emotion researchers develop models that integrate emotions into the decision-making process. For example, the authors propose an alternative model of decision-making called Emotion-Imbued Choice Model (EIC). EIC describes the ways in which emotion permeates choice processes, and accounts for the newly recognized emotional inputs, integrating them with conventional rational choice theories. This model synthesizes emotions into researchers' previous understanding of decision-making first by focusing on the fact that predicated emotions are treated as rational inputs in the decision process and are evaluated much like utility, and second, it focuses on emotions that are felt at the time of decision-making by considering ways in which these emotions influence the evaluations of outcomes. *Id.*

182. *See* Keltner, *supra* note 164, at 12–13.

183. *See* Goetz et al., *supra* note 23, at 351.

184. *See id.* at 366–67.

185. For an excellent discussion of the shift in psychological and legal perceptions of emotions, see Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 848–56 (2018).

186. *Id.* at 852–56 (citing ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 192–221 (2005)).

187. *Id.* at 853 and accompanying note 174.

with emotions not only influencing judgments but also being shaped by judgments.[188]

Under this account, compassion may trigger harm-reducing actions, including motivating altruistic actions towards those who suffer, even at a cost to the actor.[189] This happens because experiencing compassion is a moral barometer that tracks suffering and other harm-related concerns, serving as an intuition that guides attitudes that seek to remedy unjustified harm.[190] Importantly, research shows that compassion might sometimes lead to what Ekman calls "constructive anger," outbursts of negative reactions to injustice or suffering.[191]

Furthermore, psychological studies demonstrate that powerful emotions may sometimes impair actors' judgment and decision-making, explaining harmful actions.[192] Understanding criminal wrongdoing, including homicide, draws on the causal connection between emotional arousal and actors' thoughts and decision-making processes. Compassionate homicide might be viewed as an instance where the emotional experience of compassion has led an actor to act unreasonably on one particular occasion and commit an act of killing.[193]

These psychological insights may also carry legal implications for the purpose of criminal law theory and doctrine. In what follows, this Article draws on insights about the operation of compassion to develop the theoretical and moral basis for recognizing a compassion-based excuse.

III. THE THEORETICAL BASIS FOR THE EXCUSE

The discussion below considers the legal implications of the psychological findings discussed above, including the normative ramifications for articulating the conceptual basis for a compassion-based excuse. To do that, it evaluates whether from the criminal law's perspective, including public policy considerations, recognizing a compassion-based excuse is warranted.

A. Psychological Research's Implications for the Law

Psychology researchers' enthusiasm for studying emotions as one aspect of individuals' rational agency as well as providing reasons for certain

188. *Id.* at 853–54.

189. *See* Goetz et al., *supra* note 23, at 366.

190. *See id.*

191. Daniel Goleman, *Hot to Help*, *in* THE COMPASSIONATE INSTINCT: THE SCIENCE OF HUMAN GOODNESS 171, 173–74 (Dacher Keltner et al. eds., 2010).

192. *See* George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 269 (2001) (observing that emotions may result in destructive behavior).

193. *See infra* Part III.B.3.

actions has in turn influenced legal scholarship. In recent years, commentators became interested in exploring the relationship between law and the emotions.[194] Initially, in line with early psychological research, the law similarly assumed that there was no place for emotions in law as the latter rests on rationality, whereas emotions were perceived as irrational.[195] But after psychological research into emotions' role in judgment and decision-making significantly developed, legal scholars also began pondering whether there ought to be a role for emotions in the law.[196] During the first stage of research in this field, scholars explored how law and emotions may be reconciled, explaining that emotions are rational and cognitive responses.[197] Next, law and emotions scholars delved into specific emotions, such as vengeance and remorse, as they are manifested in particular legal fields, and considered the ways they operate in various contexts including the criminal law.[198] The third stage in this line of research, which continues to develop, consists of an inquiry into the normative consequences of recognizing the interrelations of emotions and law, namely, what *should* the law do with knowledge gained about emotions' cognitive effects.[199] The main implication of this inquiry concerns using psychological understandings to improve legal doctrine and reforming the law to produce particular emotional effects by ameliorating negative emotions.[200]

194. The work of several scholars, including Susan Bandes, Terry Maroney, Dan Kahan, Kathryn Abrams, and Hila Keren have paved the way for recognition of this new legal field of law and emotions, which examines the role that emotions in general and specific emotions in particular, play within the law, including among others in the criminal law. *See, e.g.*, Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006) (elaborating on the significance of emotions for the law and explaining that the term "emotions" includes feelings, moods, and affect); *see also* Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1401 (noting that emotions are subjective psychological states associated with psychological processes); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Susan Bandes, *Introduction*, *in* THE PASSIONS OF LAW 1 (Susan Bandes ed., 1999).

195. *See* Garvey, *supra* note 105, at 1042–43; *see also* Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 661 n.13 (1989).

196. Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RES. L. REV. 571, 572–73 (2009).

197. *See* Garvey, *supra* note 105, at 1042–43.

198. *See* Abrams, *supra* note 196, at 573 (discussing the historical developments of law and emotions legal scholarship).

199. *See* Abrams & Keren, *supra* note 194, at 2049–50 (describing the third stage of development, that they term integration, which is ongoing).

200. *See* Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 319–22 (2007); *see also* Keren, *supra* note 185 (providing a contemporary account of the cognitive conception of emotions and their integral part in the law).

Scholars' interest in exploring the role that emotions play in shaping legal judgments has also reached the realm of criminal law.[201] In a seminal paper titled *Two Conceptions of Emotion in Criminal Law*, professors Dan Kahan and Martha Nussbaum identify two disparate approaches to emotions that are at work in criminal law doctrines, known as the mechanistic and evaluative conceptions of emotion.[202] The mechanistic conception holds that emotions are impulses that lead to action without embodying beliefs.[203] Moreover, since under a mechanistic account, emotions do not contain or respond to thought, this view is skeptical about the coherence of morally assessing emotions.[204] In contrast, the evaluative conception views emotions as embodying beliefs and expressing cognitive appraisals of the significance of events, and they can be morally evaluated for appropriateness or inappropriateness.[205] The evaluative conception also focuses on actors' motives and on moral appraisals of their actions as relevant to determining the grade of the homicide.[206] Kahan and Nussbaum further argue that an evaluative conception of emotion not only better explains the role of emotions in criminal law, but is also more just and superior to a mechanistic one because the doctrines structured to reflect the evaluative view better promote the purposes of criminal law.[207]

While Kahan and Nussbaum's work applies the evaluative conception of emotions to several criminal law doctrines, including provocation, self-defense, duress, and insanity, they do not specifically examine the implications of this conception in the realm of compassionate homicide.[208] Moreover, while their work touches on the general role for mercy in criminal law, it does so only in the context of sentencing, rather than the guilt-determination phase of the trial.[209] They stress, however, that evaluating defendants' actions, including the emotional motivations for committing them, is done at the trial's guilt-determination phase.[210]

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201. I have also engaged in this emerging field in previous work by considering the implications that psychological research on the emotions of fear and anger might have for the purpose of reconstructing the scope of the provocation defense. *See* Buchhandler-Raphael, *supra* note 64; *see also* Michal Buchhandler-Raphael, *Loss of Self-Control, Dual-Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815 (2020).

202. Kahan & Nussbaum, *supra* note 21, at 273.

203. *Id.* at 277–78.

204. *Id.*

205. *Id.* at 273–74, 278 (explaining that their descriptive account demonstrates that changes in social norms over the years have also resulted in changes in the content of the law's evaluations and the law's appraisal of emotions).

206. *Id.* at 323–27.

207. *Id.* at 274, 350–58.

208. *Id.* at 305, 327–50.

209. *Id.* at 367–69.

210. *Id.* at 368.

Commentators have yet to consider the role that compassion might play in shaping the scope of criminal responsibility in homicide offenses. The argument I develop below draws on Kahan and Nussbaum's account of the evaluative conception of emotions, similarly rejecting the mechanistic view. In doing so, I consider how insights gained from psychological research on compassion may contribute to legal evaluations and inform the criminal law's understanding of compassionate homicide.

Various emotions play a critical role in actors' judgment and decision-making, which has implications for the scope of criminal excuses and suggests that compassion might also play a role in grounding a criminal excuse.

The compassionate feeling, encompassing the motivation to end the suffering of a close family member, may sometimes impair individuals' judgment and decision-making. Therefore, similarly to the way that other emotions provide reasons for action, compassion may also motivate action, including in some instances, triggering a killing.

Psychological studies on compassion, however, are merely the first step in developing the theoretical and moral basis for a compassion-based excuse. Legal scholars' shift towards a consensus that statutory schemes and policy choices ought to be supported in reputable empirical evidence rather than on mere moral intuitions is a laudable direction. Embracing this welcome trend, however, also requires legal scholars to cast doubt on the extent to which the law relies on empirical findings, by conceding the inherent limits in such reliance.[211] Empirical evidence, standing alone, is unable to provide the necessary normative basis underlying the adoption of a legal overhaul, including recognizing a compassion-based excuse.

An additional vital component of recognizing a new criminal excuse requires identifying the normative dimensions that warrant the adoption of such excuse, as drawn from criminal law theory itself. In other words, in order for the criminal law to embrace a new excuse, it is not enough that psychological studies support it. To justify mitigation of an actor's criminal liability, an evaluative conception of the emotion of compassion ought to demonstrate that the moral blameworthiness of compassionate actors is reduced, given their motivation for committing the killing. A normative evaluation of an actor's motive to end the suffering of a close family member considers the appropriateness of the emotional state of compassion, explaining why the act is worthy of mitigation. Therefore, in addition to drawing on psychological studies on compassion, a compassion-based excuse must be further supported in arguments that are grounded in criminal

211. *See generally* Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 232–33 (2018) (noting the limitation of empirical evidence in the area of family law).

law theory itself, as well as in normative and moral considerations, which the sections below consider.

B. The Legal Basis for Reducing Culpability

Developing the theoretical framework that supports a compassion-based excuse calls for identifying the moral basis underlying mitigation. In general, two separate legal constructs might allow mitigating murder charges to a lesser form of homicide. The first is crafting a separate offense titled compassionate homicide, in which the compassionate motive would be incorporated into an element of the crime and the prosecution would have to prove its elements beyond a reasonable doubt.[212] The second is developing an affirmative defense, placing the burden of proof on defendants, that would enable murder defendants to raise as a partial excuse if they were motivated to kill by compassion. In developing the argument below, this Article focuses on the latter legal framework, because it is consistent with the structure, reasoning, and rationales underlying existing criminal excuses such as duress, provocation, and imperfect self-defense.[213] In advocating the recognition of a compassion-based excuse, I mostly draw on the works of professors Joshua Dressler and R.A. Duff, whose writings in this area have been instrumental.[214]

1. Compassionate Homicide as Lack of Fair Opportunity

Professor Dressler has long developed a general theory of excuses, which he refers to synonymously as the personhood principle or choice theory.[215] Dressler posits that there are certain conditions under which actors' choice to commit crime is not free, and therefore it is not blameworthy (or less blameworthy) and may be excused, partially or completely.[216] The personhood principle identifies two general excusing conditions, which in turn support the recognition of two generic excuses; the first is grounded on the notion of lack of capacity (or at least substantial capacity) to conform conduct to the requirements of the law, and the second rests on the notion of lack of fair opportunity to conform conduct to the law's requirement.[217]

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212. A proposal for revising homicide offenses, which included a separate offense of "mercy killing" was considered in England, in the 1976 Criminal Law Revision Committee, but was eventually dropped from their final report due to lack of support. *See* LAW COMMISSION, *supra* note 45, at 147.

213. *See* Duff, *supra* note 18, at 207–09.

214. *See* DRESSLER & GARVEY, *supra* note 55, at 697–717 (considering the adoption of a new criminal excuse for euthanasia); Duff, *supra* note 18.

215. *See generally* Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 689, 701 (1988).

216. *See* Dressler, *supra* note 107, at 253.

217. *See id.*

The insanity defense is the paradigm example of an excuse that rests on lack of capacity, whereas the excuse of duress exemplifies lack of fair opportunity.[218] Actors may be excused because their choice to commit the crime, under the untenable circumstances they were facing, reflects society's legitimate expectations of moral strength.[219]

The generic excuse of lack of sufficient opportunity, however, has not been applied by Dressler, or any other commentator, in the specific context of compassionate homicide. The proposal below, advocating the recognition of a new partial excuse grounded in a compassionate motive, applies Dressler's framework of lack of fair opportunity to the realm of compassionate homicide. Under the account I develop here, partially excusing compassionate killers is *not* grounded on the idea of lack of mental capacity to conform to the law. More specifically, a compassion-based excuse is *not* based on the notion that compassionate killers had lost the capacity for exercising self-control over their behavior.[220] Instead, it rests on the position that these actors lacked a fair opportunity to conform to the criminal law's requirements because the dire circumstances they were facing given their family members' medical condition placed them in an untenable situation in which they felt that ending their lives was the morally appropriate action.

2. Reasonable Emotion Motivating Unreasonable Action

Professor R.A. Duff's writings on the place of compassion as a basis for mitigation of actors' criminal responsibility lays out the groundwork for recognizing a compassion-based excuse for homicide.[221] In a paper titled *Criminal Responsibility and the Emotions: If Fear and Anger Can Exculpate, Why Not Compassion?*, Duff answers that it can. Similarly to recognizing fear and anger as grounding the excuses of duress and

218. *See id.*

219. *See* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1334 (1989).

220. I *partially* draw on Professor Stephen Morse's writings to support the idea that a generic excuse of partial responsibility could be adopted for compassionate homicide. *See* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003). Morse rejects the concept of loss of self-control to describe cases in which actors' rational thinking was impaired. *Id.* at 295. Instead, he suggests that criminal law recognize a generic excuse of partial responsibility that is grounded in the notion of diminished rationality. *Id.* at 299–300. While I agree with Morse that the notion of loss of self-control ought to be rejected as a basis for an excuse, I *disagree* with his conclusion that the notion of diminished rationality should be used. Instead, I support the notion of impairment in judgment and decision-making, but reject the idea that actors who were impacted by emotions acted "irrationally." Like other law and emotions scholars, the position I advocate here is that emotions in general, and compassion in particular, are rational and reasonable emotions, rather than examples of diminished rationality. It should be noted, however, that Morse has not applied his generic excuse of diminished rationality in the context of compassionate killing.

221. *See* Duff, *supra* note 18, at 207–13.

provocation, he suggests that compassion should also be recognized as grounding an excuse for assisting suicides.[222]

Duff begins his analysis by considering the roles for anger and fear in grounding the excuses of provocation and duress, then applies similar reasoning and rationales to the case of compassion as a basis for an excuse. Drawing on an Aristotelian view of the emotions, Duff posits that emotions are an integral part of individuals' rational agency, providing reasons for action.[223] When emotions motivate actions, continues Duff, one should not only ask whether the emotion was rational, reasonable, and justified, but also whether it was appropriately expressed in the specific action taken, because a reasonable emotion can motivate an unreasonable and unjustified action.[224] Duff further stresses that reasonable and justified emotions are inherently liable to destabilize actors' rationality.[225] The critical distinction between reasonable emotion and reasonable action stands at the core of Duff's account of the excuses of duress and provocation.[226] Both defenses require a two-step inquiry; first, whether the emotion—fear or anger—felt by the actor was justified, second, whether the reaction to this justified emotion was properly expressed.[227]

Following the same exculpatory logic that explains the role of fear and anger in grounding the defenses of duress and provocation, Duff suggests next that a similar double-inquiry ought to apply when considering compassion.[228] It first asks whether compassion was a reasonable and justifiable manifestation of emotion given the actors' circumstances.[229] Second, it asks whether that reasonable and justified compassion also reasonably and justifiably motivated the specific criminal reaction taken.[230] Duff continues to list the circumstances underlying the exculpatory conditions for a compassion-based excuse. First, the emotion of compassion is a reasonable feeling when an actor faces the suffering of a loved one.[231] Second, the reasonable compassionate feeling should properly motivate an action of helping to relieve the person's suffering.[232] Third, even if the reaction taken is in itself wrong, it is not unreasonable to be tempted to

222. *Id.* at 201, 207–208.
223. *Id.* at 193–94 (observing that rather than being understood as disturbances of rationality and hostile to reason, emotions embody rational judgments).
224. *Id.*
225. *Id.*
226. *Id.* at 194.
227. *See id.* at 194–207.
228. *Id.* at 207–13.
229. *Id.* at 209.
230. *Id.*
231. *Id.*
232. *Id.*

commit this wrong.[233] Fourth, the compassionate feeling is capable of interfering with the actor's judgment and decision-making, resulting in an unreasonable act of giving in to the temptation.[234] Recognizing a compassion-based defense concedes that the actor's criminal act, although unjustified, was rationally attractive, a temptation by which it was not unreasonable to be drawn, namely, a good reason but not sufficiently good reason to act.[235] Duff concludes that applying these conditions to actors who assisted suicide of family members supports recognizing a compassion-based excuse.[236]

Duff's work provides two important insights into whether criminal law theory ought to recognize a compassion-based excuse for homicide. First, he suggests that like anger and fear, compassion should also bear on criminal responsibility itself, rather than be relegated to the realm of sentencing. Second, he crafts the important distinction between reasonable emotion and unreasonable action.

Yet, Duff's powerful account addresses only compassion's role as grounding a partial excuse for assisting suicide, rather than for murder, which is the focus of my argument here.[237] Importantly, Duff remains agnostic about whether a compassion-based excuse ought to be expanded to also cover homicide cases.[238] Since assisted suicide and murder are entirely different crimes, evincing disparate levels of moral blameworthiness, expanding Duff's thesis to murder cases remains underdeveloped both in his own work, as well as in other commentators' writings.[239] Duff further acknowledges that he does not elaborate on the form that the general defense of motivation by reasonable compassion might take, including its doctrinal elements and its scope.[240] Additionally, Duff's work focuses on criminal law theory inquiries as well as on the normative dimensions underlying a compassion-based excuse. But his account does not draw on any psychological studies demonstrating how compassion might motivate lethal action. In sum, Duff's proposal to recognize the excusatory effect of compassion stops short of expanding it to homicide crimes. The remainder of this Article aims to pick up Duff's argument where he left off by developing a compassion-based excuse that would allow mitigating murder charges to manslaughter.

233. *Id.* at 209–10.

234. *Id.* at 211.

235. *Id.* at 209–11.

236. *Id.* at 211–12 (leaving open the question of whether such an excuse should be formally recognized in the law, or rather be left to prosecutorial discretion).

237. *See id.* at 189–90, 211 n.65 (clarifying that his paper only discusses compassion in the limited context of assisted dying, which significantly differs from murder).

238. *See id*. at 211–12.

239. For an examination of English law, see Keating & Bridgeman, *supra* note 169.

240. *See* Duff, *supra* note 18, at 208.

3. A Compassion-Based Excuse for Homicide

Advocating the recognition of a compassion-based partial excuse for homicide rests on the assumption that it is warranted from a moral and theoretical perspective. But before further developing this argument, it is important to concede a few preliminary assumptions that underpin the conceptual framework articulated below.

First, recognizing a compassion-based partial excuse is mostly justified under a retributive account, as it is harder to justify on utilitarian grounds.[241] A retributive-justice justification for punishment (commonly referred to as "just deserts") determines the amount of punishment according to the actor's personal blameworthiness.[242] In doing so, this theory takes into consideration not only the seriousness of the offense but also situational factors that affect an actor's culpability.[243] Broadly speaking, criminal excuses are better understood from a retributive justice rather than from a utilitarian perspective.[244]

Yet, while a compassion-based excuse is *mostly* justified on retributivist grounds, the nature of the caregiving relationship between compassionate actors and their terminally ill or severely disabled family members adds a utilitarian argument supporting mitigation. It explains why compassionate killers cannot be regarded as dangerous, neither to specific individuals nor to society at large. Compassion-motivated homicide is a limited reaction, which is targeted only to one specific individual—that is, the caretaker's close family member.[245] The unique circumstances underlying compassionate actors' killing make their wrongdoing one-time tragedies that are highly unlikely to reoccur. The lengths of their punishments should therefore be reduced to reflect this reality.

The unique circumstances underlying the targeted response of an actor who killed a loved family member out of compassion arguably does not justify a punishment that is grounded in specific deterrence considerations. But general deterrence concerns remain, suggesting that, broadly speaking, it is more difficult to underpin a compassion-based excuse in a utilitarian

241. *See supra* Part I.D (A utilitarian cost-benefit calculus of the harms versus the benefits of recognizing a compassion-based excuse reveals that the scale would necessarily tip towards rejecting such defense.). For one utilitarian-based argument supporting mitigation, see *infra* Part III.C.1.

242. *See generally* 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, 5 (2003).

243. *Id.*

244. *See* Garvey, *supra* note 115, at 289; *see also supra* Part I.D.1 (discussing utilitarian arguments against recognizing any excuse for compassionate homicide).

245. *See* EMOTIONAL AWARENESS, *supra* note 156, at 141 (noting that one feature of compassion, distinguishing it from other emotions is that the focus of compassion is more narrowly circumscribed, as it is focused just on specifically relieving the suffering the actor witnesses).

argument. Thus, the moral basis for such defense is predominantly grounded in retributivism.[246]

Retributive justice theories further stress the notions of proportionality and even-handed justice.[247] The proportionality principle holds that the severity of punishment should depend on a combination of the harmfulness of the criminal conduct and the actor's culpability.[248] It forbids the infliction of a greater amount of punishment than what the offender deserves, thus limiting the scope of criminal liability.[249] In the case of compassionate homicide, the degree of moral blameworthiness is reduced, therefore supporting the reduction of criminal responsibility as well. Inflicting on the compassionate killer the same amount of punishment as the punishment inflicted on an offender who was motivated to kill by a nefarious motive would be disproportional. The discussion below proceeds from the assumption that a compassion-based excuse may mostly be justified under a retributive-justice framework.

Second, the compassion-based defense advocated here rests on the premise that it is a partial excuse, rather than a justification or a full excuse. The assumption underlying such partial excuse is that while compassionate killers experience a reasonable and justifiable emotion, the action that the emotion motivates—the killing of an innocent victim—is unreasonable and thus cannot be justified, even partially.[250] Yet conceding that the action is unjustified does not mean that it cannot be *partially* excused.

Third, and related to the point about reasons for action, recognizing a compassion-based defense adopts the position that contrary to popular belief, actors' motives for killing do matter for the purpose of determining

246. While some retributivist theorists reject any role for exercising mercy towards criminal defendants, arguing that it interferes with the demands of justice, others support the exercise of what they call "equitable mercy," arguing that it complements rather than contradicts justice. When legal rules that define offenses fail to do justice in individual cases based on either the seriousness of the offense or on the defendant's culpability, their argument continues, criminal punishment systems sometimes provide zones of discretion that allow decision-makers to take into account the relevant particularities of a case and treat offenders more leniently than what the formal rules prescribe. *See generally* R. A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361 (2007); *see also* Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389, 390 (2007); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1444–45 (2004).

247. *See* Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 296–97 (1993).

248. *See* Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69 (1999) (noting the seriousness of the wrong and actor's culpability as relevant considerations to deserved punishment).

249. *See generally* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1835 (2007) (discussing the connection between proportionality and retributivism).

250. The view that compassionate homicide ought to be only partially excused rather than fully justified is debatable, as one might argue that there are certain circumstances in which the homicide was necessary to avoid a greater harm, for example, in situations where death was imminent and the victim's pain was excruciating. *See* Duff, *supra* note 18, at 218–19.

the scope of their criminal liability. As noted earlier, conventional wisdom holds that motives do not make any difference in terms of delineating the level of actors' criminal responsibility.[251] Yet, the relevance of motives for criminal liability is far more nuanced. Despite what seems like a rigid rejection of the idea that motives do not matter for the guilt determination phase of the trial, commentators recognize that this is an inaccurate statement, as there are several contexts in which nefarious motives do matter.[252] The paradigm example is hate crimes, where defendants' racist or otherwise biased or bigoted motive increases the level of their criminal liability.[253]

Compassionate homicide presents the opposite question, that is, whether a benign or ostensibly beneficial motive may serve to mitigate the severity of the homicide. Several commentators have answered the question in the positive, suggesting that the degree of the actor's blameworthiness varies based on what motivated the criminal act.[254] Some commentators note that recently legislatures have begun to seriously contemplate the role of motive in compassionate killing and its implications for criminal statutes.[255] Others observe that courts may judicially create new excuses which are based on benign motivations, noting that unlawful mercy killing of a loved family member is not justified but merely excused—courts might exculpate a killer whose motive was not evil.[256] Yet, courts cannot recognize a defense raised by a hospital worker who killed an unrelated terminally ill patient, because a justificatory defense (unlike an excuse) usurps legislative prerogative.[257]

Still others posit that contrary to the conventional wisdom that taking motives into consideration interferes with the rule of law, there are certain cases in which motives may advance the rule of law.[258] Comparing and

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251. *See supra* Part I.B.

252. *See* Owen D. Jones, *Behavioral Genetics and Crime, in Context*, 69 LAW & CONTEMP. PROBS., Winter/Spring 2006, at 81, 90, 92 (noting that "criminal law is one of the few areas . . . in which motive matters," and that "motives for committing even a single criminal act can vary dramatically, with implications for the principal goals of criminal law: deterrence, retribution, isolation, and rehabilitation").

253. *See* Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 668–69 (2005).

254. *See* Kahan & Nussbaum, *supra* note 21, at 315 ("[A]n undesirable act can be carried out for a variety of reasons and is more or less worthy of condemnation depending on what the actor's motives for doing that act express."); *see also* Ferzan, *supra* note 48, at 90 n.37.

255. *See* Chiu, *supra* note 253, at 675 (referring to these as euthanasia cases); Husak, *supra* note 90, at 474 (discussing the different treatment of an actor who killed out of benevolent motive such as in the case of mercy killing and one who killed out of a selfish motive).

256. *See* Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 743–47; Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317, 331–33 (2003).

257. *See* Gardner, *supra* note 256, at 744–45.

258. *See* Shachar Eldar & Elkana Laist, *The Irrelevance of Motive and the Rule of Law*, 20 NEW CRIM. L. REV. 433, 460 (2017).

contrasting mercy killing and mercenary killing for financial gain, the argument continues, demonstrates that different motives carry different moral significance; therefore a law that neglects to afford significance to this difference may be rightly criticized.[259] The partial excuse advocated here rests on the premise that from a normative perspective, motives matter for the purpose of morally evaluating the level of actors' blameworthiness and in turn for determining the scope of their criminal responsibility. Specifically, a compassion-based excuse draws on the idea that actors' beneficial motive diminishes the scope of their criminal liability.

Moving forward from these assumptions and concessions leads to this Article's key thesis that recognizing a new partial excuse for homicide that is grounded in the notion of compassion is warranted from the perspective of criminal law theory. The discussion below suggests that actors may experience objectively reasonable compassion, which might lead them to commit an unreasonable act of killing. This distinction between a reasonable emotion and an unreasonable action as underlying the proposed compassion-based excuse draws an analogy to similar rationales underlying existing defenses of provocation and imperfect self-defense.

Developing a compassion-based excuse builds on integrating the research findings of psychological studies on compassion discussed above with a moral evaluation of the compassionate state, demonstrating that the actor's moral blameworthiness is reduced. Since diminished blameworthiness is directly relevant to the scope of substantive criminal responsibility, a compassionate motivation warrants recognition of an affirmative defense, rather than treatment as a mitigating circumstance at sentencing.

In advocating for a compassion-based excuse, I draw on Professor Duff's argument, under which experiencing *reasonable compassion* may nonetheless result in committing an *unreasonable act* of killing a close family member to end their suffering.[260] Experiencing compassion is a reasonable and rational emotional state, even if the reaction to it is *unreasonable and excessive.* This position acknowledges that while the killing itself might be unreasonable per se, it is *not unreasonable* to be *tempted* to act as the actor did, given the compassionate feeling to help a close family member. This view concedes that even reasonable people may act unreasonably on one particular occasion, when they are motivated by a compassionate desire to end the suffering of loved ones.

259. *See* Hessick, *supra* note 47, at 113–14 (noting that the theory of expressivism supports an expanded role for motive in punishment and the paradigmatic example of mercy killing is best explained by expressivism. The mercy killer is willing to disrespect the value of life only to end another person's suffering as opposed to pecuniary gain.).

260. *See* Duff, *supra* note 18, at 208–211.

Conceding that compassionate homicide is unreasonable and unjustified does not mean that it is not an understandable reaction.[261] Understanding this reaction rests on acknowledging that the reasonably felt powerful emotion of compassion may sometimes impair actors' judgment and decision-making.[262] While compassionate killing is an unjustified wrong, allowing consideration of a partial excuse that would mitigate murder to manslaughter acknowledges that it is not unreasonable for compassionate actors to be tempted to commit the act.[263] Giving in to the temptation to end the suffering of a close family member by killing them cannot be justified, but it can be viewed as an understandable human reaction. This is so because in these cases, judgment and decision-making processes are excessively shaped by feelings of compassion, accompanied by despair, hopelessness and powerlessness.

Furthermore, the idea that compassionate homicide may be perceived as an understandable reaction draws an analogy to the provocation defense. In advocating an alternative view of provocation, professor Victoria Nourse has developed the notion of "warranted excuse," that recognizes circumstances in which the provoked killer's emotional reaction is somewhat understandable—even if not justified or completely excused—given the wrongdoing perpetrated by the deceased.[264] A similar reasoning equally applies in the context of compassionate homicide. Here, normative arguments support the position that the actor ought to be partially excused because given the reasonableness of the emotional experience, their reaction may be understandable.

Comparing and contrasting a compassion-based excuse with the provocation defense is also useful because the former is likely to be subject to less critique than the latter. The provocation defense has been extensively

261. *See, e.g.*, Elise J. Percy, Joseph L. Hoffmann & Steven J. Sherman, *"Sticky Metaphors" and the Persistence of the Traditional Voluntary Manslaughter Doctrine*, 44 U. MICH. J.L. REFORM 383, 392 (2011) (observing that the provocation doctrine is based on the idea that the provoked actor's behavior was at least understandable even if not excusable). For further elaboration of the idea of understandable reaction in the context of the provocation defense, see the discussion below of Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense,* 106 YALE L.J. 1331, 1393, 1396–97 (1997) (suggesting that when provoked defendants take the law into their own hands and respond with rage shared by the law, society "understands" defendant's emotions and their reaction). Such understanding of defendant's emotions does not justify the act itself, but may provide the basis for a warranted excuse. When the defendant's outrage is based on acts that the law would independently punish as wrongful acts, the defendant is placed in a position of normative equality vis-à-vis the victim and may raise the partial excuse of provocation. *Id.*

262. *See* Duff, *supra* note 18, at 205 (noting that emotions, when strongly felt, are apt to destabilize practical reason).

263. *Id.* at 193–94 (opining that a reasonable emotion can motivate action that is unreasonable or unjustifiable).

264. *See* Nourse, *supra* note 261, at 1337–38 (suggesting that the provocation defense should be limited to cases in which defendants' emotional judgment are understandable from their belief that the victims committed legal wrongs).

criticized on various grounds, not least its arguably harmful implications for female victims of intimate-partner violence.[265] Commentators lament that male defendants who killed their departing female intimate partners may claim that the latter's behavior provoked the killing.[266] Elaborating on the feminist critique of the provocation doctrine exceeds the scope of this Article, but for purposes of the argument here, suffice it to say that one of the reasons why provocation is viewed as problematic is that it embodies a judgment of victim's fault as partially contributing to the killing.[267] In contrast, a compassion-based excuse avoids the pitfalls of implying blame on victims.[268] While the victim's dire medical conditions provide the reasonable explanation for the unreasonable—yet understandable—act of killing, recognizing a compassion-based excuse nowhere hinges on the problematic notion of imputing blame on victims, as it is solely defendant-centered. Furthermore, there is an even stronger case for recognizing a compassion-based excuse than provocation; the motivation for the compassionate killing is other-regarding, focusing on the actor's belief about the best interests of the close family member, whereas provocation is a self-regarding reaction.[269]

Additionally, the idea that an actor may act unreasonably yet still deserve partial mitigation also underlies self-defense statutes, as many jurisdictions recognize imperfect self-defense.[270] The doctrine of imperfect self-defense may apply where a fearful actor subjectively but unreasonably believed that the use of deadly force was necessary, resulting in a manslaughter rather

265. *See* Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273 (2015).

266. *See* Nourse, supra note 261, at 1332 (observing that reform of the provocation defense has permits juries to return a manslaughter verdict in cases where the defendant claims passion because the victim left); *see also id.* at 1392 (noting that the departing wife's killer cannot claim that leaving merits outrage).

267. *See* Nourse, *supra* note 261, at 1338.

268. One possible counterargument is that recognizing a partial excuse might send an expressive message to society that the lives of severely disabled and terminally ill patients are less deserving of the law's protection. This concern, however, may be mitigated by stressing that the proposed defense only offers a partial excuse, rather than complete acquittal. Recognizing the defense does not rest on a justificatory basis, that holds that the act of killing itself was justified. Instead, it is based on partially excusing the actor in light of understanding their emotional reaction. See also *supra* note 136 for additional responses to the above concern.

269. *See* Thomas Morawetz, *Empathy and Judgment*, 8 YALE J.L. & HUMAN. 517, 521 (1996) (book review) (noting that anger is self-regarding and compassion is other-regarding).

270. *See* DRESSLER, *supra* note 46, at 222–23. In Pennsylvania, for example, voluntary manslaughter consists not only of traditional anger-based provocation but also of unreasonable belief in the need to use self-defense, even if the belief was mistaken and the elements of self-defense cannot be met (imperfect self-defense). *See* 18 PA. CONS. STAT. § 2503(b) (2020) ("A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable.").

than murder conviction.[271] Drawing an analogy to imperfect self-defense doctrine supports the suggestion that an unreasonable yet understandable act of compassionate killing may also warrant reduction of murder charges to manslaughter. Just like an actor who overreacted to intense fear by unreasonably killing another, the compassionate killer acts unreasonably as a result of an overreaction to an overwhelming compassionate feeling.[272] Similarly, the compassionate actor cannot be fully acquitted of homicide yet deserves to be convicted of a lesser crime, as well as avoid the collateral consequences and moral stigma associated with being labeled a murderer.[273]

Taken together, juxtaposition of compassionate homicide with killings motivated by anger or fear demonstrates that recognizing a compassion-based defense is entirely consistent with the reasoning and rationales underlying other emotion-based defenses that the criminal law already recognizes, such as provocation, duress, and imperfect self-defense.[274] In all of these emotion-motivated killings, actors' emotions were reasonable yet their reactions were excessive and unreasonable, albeit understandable.

In sum, the above arguments establish that the basis for partially excusing compassionate killers rests on acknowledging that experiencing compassion reduces the level of actors' moral blameworthiness and therefore should also reduce their criminal culpability.

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271. *See* Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 589 n.17 (2004) (book review) ("While anger is the most common emotional basis for the partial defense of provocation, fear of serious bodily harm or death is the emotion that justifies the complete defense of self-defense."); *see also* People v. Blacksher, 259 P.3d 370, 421 (Cal. 2011); State v. Smullen, 844 A.2d 429, 439–40 (Md. 2004).

272. *See, e.g.*, People v. Sotelo-Urena, 209 Cal. Rptr. 3d 259, 278–79 (Ct. App. 2016) (reversing defendant's conviction of murder by holding that the jury could have reasonably concluded that the defendant, a homeless man, who arguably could have overreacted to fear, might have successfully raised an imperfect self-defense claim); State v. Marr, 765 A.2d 645, 648 (Md. 2001) (recognizing imperfect or partial self-defense when the defendant's actual, subjective belief was that he was in *apparent* imminent danger of death or serious bodily harm from the assailant, requiring the use of deadly force, but that belief was not objectively reasonable).

273. Imperfect self-defense excuse may also support an alternative basis for compassion-based excuse, one that rests on a theory of "imperfect necessity." Under this account, partial mitigation might be considered where defendant subjectively believed in the necessity of killing, however, objectively, the killing was unnecessary, making the defendant's belief a mistaken one. In this project, I do not further develop the notion of imperfect or incomplete necessity excuse, because the use of necessity as a defense is rarely successful, and the analogy to the provocation defense is stronger.

274. While criminal law doctrines already recognize other emotion-based excuses, such recognition is in itself controversial, and there are scholarly debates concerning whether the law *ought* to recognize them. The scholarly debates are especially lively in the context of the provocation defense. For an excellent discussion of the scholarly critique, including the feminist critique of the provocation defense, see generally Gruber, *supra* note 265, at 292–99.

C. Additional Normative Arguments Supporting the Excuse

As the previous section demonstrates, recognizing a partial excuse for compassionate homicide rests on rationales and reasoning grounded in criminal law theory itself. Mitigation is normatively warranted and is constructed by considerations that the criminal law normally relies upon, predominantly hinging on the idea of reduced moral blameworthiness. The below policy considerations further support the position that criminal law ought to recognize a partial excuse that is grounded in compassion.

1. The Emotional Toll of Caregiving

The unique nature of familial caring and caretaking relationship between compassionate killers and their victims play a critical role in making a case for a compassion-based excuse. Intensive caregiving entails a degree of selflessness, as compassion is closely associated with altruism. [275] Importantly, intense familial caretaking responsibilities takes a heavy emotional toll on caregivers. Yet, the law is reluctant to recognize the critical role of caretaking and its host of emotional, physical and financial implications for those who are sole providers of long-term caregiving.[276]

Explaining why compassionate killers' reactions may be viewed as understandable from a normative perspective draws on acknowledging the physical and emotional tolls that intensive caretaking exact on caregivers. These experiences may in turn affect caretakers' judgement and decision making, sometimes leading to lethal action.

Compassionate homicide cases exemplify how the law not only fails to take into consideration caregiving relationships and particularly familial caretaking, but also disregards the emotional toll they take, and the psychological, physical and financial strains brought on by around-the-clock care. Commentators note that one common theme characterizing compassionate homicide is the intensive nature of care provided by actors to their children, parents, and spouses, and the deep feeling of isolation that caretakers feel given the inadequate or limited care by others including

275. *See* Hurd, *supra* note 246, at 415–20 (noting that mercy plays a crucial role in the area of intimate relationships) Hurd argues that mercy is a salient example of what she calls quasi-superogatory actions within intimate relationships. When one person loves another or is a friend of another person, continues Hurd, such relationship sometimes demands that this person supererogate because love and friendship necessitate supererogation. *Id*. The term *supererogation* is a term of art used in ethics scholarship to refer to acts that are morally good although not strictly required. *See* David Heyd, *Supererogation*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2019 ed. 2019), https://plato.stanford.edu/archives/win2019/entries/supererogation/ [https://perma.cc/J4CF-K28Q].

276. *See* Jacqueline Fox, *Caring and the Law*, 35 J. LEGAL MED. 337 (2014) (book review).

caring agencies.[277] Moreover, they continue, the timing of compassionate homicide is often causally linked to withdrawal of support or refusal of care, and to compassionate killers' fear that their loved ones might receive negligent or inadequate care if they were unable to provide care themselves.[278]

Additionally, the long-lasting nature of caretaking also explains the cumulative impact that various emotions, including compassion, have on caregivers. Psychological researchers observe that experiencing a host of powerful emotions over extended periods of time may carry cumulative effect, as these emotions increasingly simmer until they culminate in a breaking point.[279] Yet the law often fails to recognize the impact of the cumulative nature of emotions, by insisting on doctrinal elements that are inconsistent with this experience.[280]

Moreover, caretaking relationships carry broader societal ramifications than these personal implications. The duty of caring for sick and disabled family members is unequally distributed, falling for the most part on close family members.[281] The government forces private actors into these intense caregiving relationships because it does not offer adequate public caregiving alternatives for the sick, disabled, and elderly.[282] Arguably, when the government exerts its coercive power and punishes individuals who killed because they overreacted to compassion, the lack of publicly supported alternatives should at least be taken into account as a basis for reducing the level of criminal liability.[283]

2. Substituting Consistency and Uniformity for Discretion

Another normative argument supporting the recognition of a compassion-based partial excuse rests with the need to provide consistent and uniform outcomes to similarly situated defendants. Part I has identified a gap between doctrine and practice, noting that while despite the absence

277. *See* Keating & Bridgeman, *supra* note 169, at 715–16; *see also* Heather Keating & Jo Bridgeman, *Intensive Caring Responsibilities and Crimes of Compassion?*, *in* REGULATING FAMILY RESPONSIBILITIES 253 (Jo Bridgeman, Heather Keating & Craig Lind eds., 2011).

278. *See* Keating & Bridgeman, *supra* note 169, at 716.

279. *See* NORMAN J. FINKEL & W. GERROD PARROTT, EMOTIONS AND CULPABILITY: HOW THE LAW IS AT ODDS WITH PSYCHOLOGY, JURORS, AND ITSELF 131–36 (2006).

280. *Id.* at 95–97 (using an example from the context of the provocation defense, the typical requirement that a provoking incident be sudden and that no time has lapsed between it and the killing). See also *supra* Part III.B.3 for cumulative provocation.

281. *Cf.* Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 159–63 (2015) (discussing the duty of support that family members owe one another and the reduced role for the state).

282. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13, 19–20 (2000).

283. I thank Hila Keren for directing my attention to this point.

of a doctrinal basis for reducing murder charges to lesser offenses, compassionate killers are sometimes, but not always, treated leniently by decision-makers, as prosecutors and judges exercise their discretion to provide mercy.[284] Yet, a critical feature of this form of mercy is that prosecutorial and judicial discretion are inherently discretionary. Its exercise is therefore unpredictable, inconsistent, and often results in lack of uniformity across the board.[285]

Recognizing a statutory doctrinal basis for mitigating compassionate killers' criminal responsibility is preferable to relying on prosecutors offering lenient plea agreements precisely because of the highly discretionary nature of this practice. Commentators have long critiqued the enormous discretion that prosecutors exercise in shaping the criminal justice system in general, beyond the specific context of compassionate homicide, noting that prosecutors wield unconstrained, unchecked, and unreviewable discretion in selecting not only what cases to prosecute but also what charges to bring.[286] Commentators further lament that prosecutors serve as de facto adjudicators in most criminal cases because over ninety-five percent of cases are resolved in plea agreements rather than in trials.[287] Voluminous writings have been devoted to the pitfalls of prosecutorial discretion;[288] elaborating on the shortcomings of such tremendous exercise of discretion in the administration of criminal justice, as well as on the risks and intended consequences embedded in this practice, exceeds the scope of this Article. For purposes of my argument here, it is worth stressing that this discretion results in lack of consistency and uniformity, with similarly situated defendants treated differently without a coherent doctrinal basis. [289]

Similarly, the practice of judges exercising mercy at sentencing is subject to the same shortcomings characterizing prosecutorial discretion given the discretionary nature of sentencing.[290] Importantly, the question of whether

284. *See supra* Part I.C.

285. *See infra* notes 286–291 and accompanying text.

286. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001); Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1509–10 (2007).

287. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

288. *See id.* at 871–73; *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

289. *See, e.g.*, John Seewer & Thomas J. Sheeran, *Ohio Hospital Shooting: Mercy Killing or Murder*, NBC NEWS, (Aug. 12, 2012, 2:15 PM), http://www.nbcnews.com/id/48638867/ns/health-health_care/t/ohio-hospital-shooting-mercy-killing-or-murder/#.Xu0N52hKjIU [https://perma.cc/A84G-VBBA].

290. People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 21 (noting that the trial court considered the State's recommendation of probation and reviewed both the factors in mitigation and aggravation and thus had not abused its discretion in sentencing defendant to a prison term of four years).

providing mitigation for compassionate homicide is normatively warranted is inherently a public policy choice that rests on value-laden judgments. As such, it ought to be made by legislatures, who are authorized to make ex ante rules that promote their constituencies' public policy preferences, rather than judges, who exercise their discretion ex post to accomplish justice in individual cases.[291]

Consistency and uniformity are crucial values in the criminal justice system in general,[292] and in compassionate homicide in particular. They ameliorate the problematic effects of decision-makers' exercise of discretion in deciding which defendants deserve to be treated more leniently and which do not. Adopting a compassion-based excuse might also offset decision-makers' implicit biases, such as gender-based biases, that often characterize the exercise of discretion.[293] It ensures that a compassionate motive towards a victim is consistently treated by the criminal justice system as a mitigating circumstance that might reduce the grading of the homicide.

Furthermore, recognizing a compassion-based partial excuse may also counterbalance the harsh effects of the current over-punitive criminal justice system with its stringent sentencing schemes and policies and their unintended consequences.[294] Under current laws, actors who killed their terminally ill or severely disabled family member out of compassion may be convicted of the crime of murder.[295] Importantly, murder convictions carry mandatory minimum sentences, which are typically life sentences, thus depriving judges the opportunity to exercise any discretion at

291. *See, e.g.*, Blumenthal v. Brewer, 2016 IL 118781, ¶ 77, 69 N.E.3d 834, 857 (stressing that public policy determinations properly belong to the legislatures and that judges should not usurp the authority to decide them); *see also* Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 431 (2013).

292. *See generally* Mona Lynch, *Expanding the Empirical Picture of Federal Sentencing: An Invitation*, 23 FED. SENT'G REP., 313, 313 (2011) (noting that sentencing guidelines were "meant to minimize irrationality and uncontrolled discretion in the system, and presumably would result in consistency and uniformity in sentencing").

293. *See supra* Part I.B–C (comparing the *Liltz* and *Forrest* cases).

294. Voluminous writings are devoted to criticizing the criminal justice system, both at the federal as well as at the state level, and its numerous unintended consequences including the disparate effects on minorities. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); *see also* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 2–15, 17, 61–66 (2017). Further elaborating on the broader implications of the overly punitive criminal justice system exceeds the scope of the argument I make in this Article. Instead, advocating the recognition of a new excuse is a necessary part of a much larger reform of the criminal justice system, because of its specific implications for compassionate killers.

295. *See, e.g.*, People v. Johnson, No. A139389, 2015 WL 7012997, at *7 (Cal. Ct. App. Nov. 12, 2015) (characterizing the homicide as "mercy killing" but observing that the law does not excuse such killing); People v. Anderson, No. B276741, 2017 WL 3326831, at *12 (Cal. Ct. App. Aug. 4, 2017) (upholding defendant's murder convictions and observing that mercy killing is not a defense to murder).

sentencing by mitigating defendant's punishment.[296] Legislatively amending existing statutes to include a compassion-based excuse would allow judges to impose lighter sentences, and therefore contribute to a more just and less punitive criminal justice system.

Furthermore, the absence of consistency is particularly salient when considering the role that various emotions play in underpinning different criminal defenses. Scholars note that the law treats emotions in conflicting ways and does not provide a uniform answer to the question of how emotions affect culpability, including in its treatment of doctrines like provocation, duress, and imperfect self-defense.[297]

Yet, uniformity, consistency, and predictability are especially pertinent values in the context of compassionate homicide, because a compassionate motivation might cut both ways, sometimes serving as a mitigating factor, but other times as an aggravating one. While some prosecutors and judges may believe that actors' compassionate motives ought to result in diminished criminal responsibility, other decision-makers view this motive as a factor in aggravation, due to the unique vulnerability of terminally ill or severely disabled victims and the special position of trust and duty of care that caretakers owe their family members, which the killing breaches.[298]

Adopting a compassion-based excuse is likely to result in less reliance on exercising prosecutorial and judicial discretion to accomplish a more lenient treatment of compassionate killers. The excuse provides a principled doctrinal basis that allows a defendant to request that the judge instruct the jury on this defense. Granted, exercising discretion is an integral and inescapable component of prosecutorial and judicial authority.[299] Rather than suggesting that the criminal justice system ought to do away with discretion altogether, the more modest claim that this Article makes is that when possible, it is preferable to diminish the extent to which it is exercised. It is better to rely on a statutory, doctrinal reform to accomplish goals like consistency and predictability, rather than leave enormous amount of discretion in the hands of institutional actors.

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296. *See* Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1246–47 (2011).

297. *See* Kahan & Nussbaum, *supra* note 21, at 270–73 (noting that the law treats emotions in conflicting ways).

298. *See* People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 13. The trial court considered both mitigating factors, including the unique circumstances that led to the killing. *Id.* The court also considered factors in aggravation, including the fact that the victim was physically handicapped, and that the defendant was a family member in a position of trust. *Id.* It was within the judge's discretionary power to decide how to weigh these factors. Compassionate motive was a factor in aggravation because the defendant, as a primary caretaker, owed a special duty of care and trust to her disabled daughter. *Id*.; *see also supra* Part I.D.1.

299. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422–23 (2008).

In addition, amending criminal codes to legislatively recognize a compassion-based excuse makes a difference not only for curbing prosecutorial and judicial discretion but also for structuring juries' decision-making process. While the vast majority of criminal trials resolve in plea agreements, where juries do not play any role,[300] if a compassionate homicide case goes to trial, the existence of a compassion-based excuse might change its outcome. Since existing laws do not recognize any doctrinal basis for reducing the grade of the homicide to a lesser offense, juries currently do not have a legal hook to hang a manslaughter conviction on. A legislative overhaul adopting a compassion-based excuse would provide juries with such necessary hook. Jurors, however, would remain free to reject the partial excuse, retaining their discretion to make factual findings based on the specific circumstances of the case. Rather than entitling defendants to mitigation, the excuse merely adds an additional tool to the juries' toolbox, one that not only helps structure and guide their discretion but also one that they are free to use or decline.[301]

IV. THE SCOPE AND LIMITS OF THE DEFENSE

Having identified the partial excuse's theoretical basis, the discussion below draws on these principles to consider its doctrinal implications. First, the premise underlying the recognition of a compassion-based excuse is that it would be an affirmative defense, namely, one that the defendant would have to prove by preponderance of the evidence.[302] Next, the question is what elements an actor would have to satisfy in order to successfully raise a compassion-based excuse. Answering this question requires carefully crafting the scope of a compassion-based excuse by elaborating on the circumstances and conditions under which it may or may not apply and delineating its precise elements.

One clarification is in order before proceeding further. Legislatively adopting a compassion-based excuse suggests neither that mitigation is necessarily warranted in a particular case nor that the defense ought to be available to every defendant claiming to have killed a family member out of compassion for the victim. Put differently, adopting the proposed excuse does not mean that the jury would always be instructed on the defense every

300. *See* Stuntz*, supra* note 286, at 528, 536–37.

301. *See, e.g.*, White v. State, 699 S.E.2d 291, 296 (Ga. 2010) (observing that the issue of justification is for the jury to decide, and the jury is free to reject a defendant's claim that he acted in self-defense); *see also* Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1022 (2001) (observing a trend in the law toward broadening juries' discretion to decide which circumstances amount to adequate provocation).

302. This position is consistent with the treatment of comparable emotion-based excuses such as provocation, duress, and self-defense. On affirmative defenses, see generally DRESSLER, *supra* note 46, at 74, 210.

time a defendant raises the claim. The judge will remain free to refuse to instruct the jury on the elements of the defense if it is clear that they cannot be established, similarly to other excuses such as provocation, self-defense and duress.[303] Since instructing the jury remains within the sole province of judges, a court may refuse to instruct the jury on a defense if there is insufficient evidence, as a matter of law, to support it.[304]

Conceding that there might be circumstances where raising the defense would be appropriate but others where it would not, calls for formulating limits on the availability of the defense to ensure that it is successfully raised only in suitable cases. Arguably, some readers may agree with the proposed theoretical basis undergirding the excuse, yet disagree on its doctrinal implications and precise elements. It is thus necessary to consider the circumstances under which the defense would be excluded in order to prevent excessive reliance on it as well as slippery slope and abuse concerns.

One controversial question is whether the availability of a compassion-based excuse ought to be tethered to the severity of victims' medical conditions, hinging on the specific types of illnesses and disabilities that they suffer from. Put another way, should the defense depend on whether the victim's death from the illness was imminent anyway, regardless of the actor's intervention? Arguably, the relatively easier cases concern victims who suffered from terminal illnesses, in which it was clear that their death was impending even without the actor's intervention. The most controversial circumstances, however, concern killings of severely disabled individuals, like Courtney Liltz, whose death was not imminent yet whose condition necessitated intensive caretaking.[305]

It is neither my goal here to define in advance what medical conditions are appropriate for considering the compassion-based mitigation nor to implicitly suggest that some lives are not worth living. Instead, I suggest that victims' precise medical conditions that trigger compassionate killing should not be incorporated into an element of the defense. It is impossible to identify in advance predefined categories of medical conditions that might trigger compassionate killing. Rather than enumerating a rigid list of medical circumstances and conditions that might lead an actor to kill out of compassion, the question of when accepting the defense's theory might be appropriate should be left to the jury to decide on a case by case

303. *See, e.g.*, United States v. Greenspan, 923 F.3d 138, 149 (3d Cir. 2019); United States v. Sarno, 24 F.3d 618, 621–22 (4th Cir. 1994).

304. *See supra* note 303.

305. *See* People v. Liltz, 2017 IL App (1st) 161996-U, ¶¶ 6–8.

determination after being properly instructed by the judge on the excuse's doctrinal elements.[306]

The subsections below elaborate on the proposed elements that judges ought to consider when determining whether to instruct the jury on a compassion-based excuse. These narrowly defined elements provide some critical legal constraints on the availability of the defense.

A. An Objective Component: Reasonable Emotional Experience

An important doctrinal constraint to limit the availability of the proposed excuse concerns including an objective prong as an element of the defense, in addition to a subjective prong. The subjective element of the proposed defense would require the defendant to establish, by preponderance of the evidence, that they were motivated to kill a close family member wholly out of compassion for the victim. Put differently, the actor experienced a compassionate feeling, triggering them to end the suffering of a loved one. Yet, an additional objective element is necessary here. It must be based on the reasonableness of the compassionate feeling, measured against the standard of an ordinary person, in similar circumstances.

Courts and scholars note an important distinction between the notions of emotion reasonableness and act reasonableness in the context of the provocation defense.[307] In general, an act reasonableness inquiry requires assessing the reasonableness of defendant's act of killing by asking whether a reasonable person in defendant's shoes would have similarly killed.[308] Emotion reasonableness, on the other hand, requires evaluating whether defendant's emotional experience was reasonable under the circumstances, asking whether a reasonable person would be likely to act rashly after

306. This position draws an analogy to the provocation defense and specifically to the objective element of the adequacy of the provocation. Today, most jurisdictions have rejected predefined rigid categories as amounting to adequate provocation, instead leaving to the jury to determine whether the defendant acted in response to being adequately provoked from an objective perspective. *See* DRESSLER, *supra* note 46, at 503–504. Similarly, the proposed compassion-based excuse would leave juries to decide the circumstances in which the defense might be appropriate. Under my proposed compassion-based excuse, juries would be granted discretion in deciding which circumstances ought to partially excuse defendants. Yet, exercising this type of discretion by the jury is an integral component of every jury trial, and the case of compassionate homicide is not different from cases where juries' discretion determines whether the defense's theory would be accepted. The proposed excuse rests on the premise that it is preferable that juries would exercise their discretion after being properly instructed by the judge on the legal elements of the defense, instead of leaving all discretion at the hands of prosecutors in deciding which cases warrant mitigation, without any legislative basis derived from a statutorily pre-defined defense.

307. *See, e.g.*, People v. Beltran, 301 P.3d 1120, 1130 (Cal. 2013).

308. *See* Alafair S. Burke, *Equality, Objectivity and Neutrality*, 103 MICH. L. REV. 1043, 1053 (2005) (book review).

experiencing the intense emotion.[309] The compassionate homicide excuse that I propose here is based on such an emotion reasonableness framework.

Similarly, the objective prong of the compassion-based affirmative defense would require the defendant to prove, by preponderance of the evidence, that the feeling of compassion that they experienced at the time of the killing was a reasonable emotional response and that an average person, in similar circumstances, would have also experienced that emotion, *and* might have been tempted to act rashly.[310] Put differently, the jury would be instructed on the defense if the judge rules that there was sufficient evidence to allow a reasonable jury to find by preponderance of the evidence, that any average person facing defendant's circumstances might have been similarly tempted to act rashly.

The objective component is a necessary constraint on the scope of the defense because it affords mitigation only to defendants whose behavior is judged to represent societal understanding of the predicament the defendant was in. This evaluative conception of compassion requires the law to take into account defendant's benign motive, namely, the motivation to help relieve a family member of their pain and suffering.

B. Motivated by Compassion for the Victim

The subjective element of the proposed defense would require the defendant to establish that they were motivated to kill a close family member wholly out of compassion for the victim. The defendant would have to prove that they subjectively experienced a compassionate feeling, triggering them to end the suffering of a loved one. This requirement ensures that a compassion-based partial excuse is limited only to circumstances in which the actor's killing was *wholly* motivated by compassion for the victim. This position draws a normative line between defendants who deserve mitigation and those that do not. As psychological research establishes, the main tenet of compassion is the sole altruistic desire to help loved ones.[311]

The implication of this requirement is that the excuse ought to be excluded from defendants in two types of circumstances; first, defendants who killed out of financial motivations, such as the prospect of inheritance

309. *See* Gruber, *supra* note 265, at 275 & n.10 (discussing the provocation defense as applied in the *Beltran* case).

310. *See* Buchhandler-Raphael, *supra* note 64, at 1787 (discussing the proposed fear-based provocation's objective prong).

311. *See supra* Part II.B–C.

or the financial relief from hefty medical bills.[312] The proposal therefore categorically rejects mitigation where financial greed and pecuniary advantages motivate the killing. A second type of exclusion concerns defendants who were motivated to kill by compassion towards the self, rather than the victim: they killed because of the selfish desire to relieve themselves from caretaking responsibilities. In these cases, actors' own emotional struggles and limitations, such as the inability to cope with caretaking responsibilities and its emotional toll, mostly motivated the killing. Indeed, compassionate homicide often implicates complex familial relationships, as well as structural entanglements that contribute to the decision to kill.[313]

The latter basis for excluding the excuse, however, calls for closer scrutiny. Reality is far more complicated than a single-dimensional view of individuals' motivations, as people's reasons for action are often multi-faceted, combining several cumulative motivations. An actor may kill *mostly* (as opposed to wholly) out of compassion towards the victim, but also out of some self-compassion, given the emotional toll that intensive caregiving exacts on the caretaker.

The question whether the proposed excuse should be strictly limited to defendants who killed *wholly* out of compassion towards the victim or rather expanded to also cover killings committed *mostly* out of compassion towards the victim is therefore debatable and at this point may be left for future consideration of legislatures.[314] For now, suffice it to say that conceding that some actors might be motivated by a combination of reasons should not necessarily lead to rejecting altogether a compassion-based excuse in these circumstances. From a normative perspective, the law might also recognize a compassion-based excuse in cases where it was *mostly* compassion for the victim that motivated the killing, albeit intertwined with

312. Arguably, there is room for distinguishing between greed-motivated killing and relief from significant financial stress. The single caretaker's financial costs of caregiving, including difficulties in maintaining a paid job, could put their entire family at risk of bankruptcy, poverty, and homelessness. This is especially true in our health care system which places the financial burdens of caretaking for the sick and the disabled on their family members, mostly women. *See* Eduardo Porter, *Why Aren't More Women Working? They're Caring for Parents*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/business/economy/labor-family-care.html [https://perma.cc/NN2D-H54Y]. The financial relief from caretaking costs also include, at least in part, relief from the accompanying stress, anxiety, and insecurity. These considerations pertaining to relief from significant financial burden fall under self-compassion, as opposed to an act that was wholly motivated by compassion for the victim, and could be attacked as improper motivations. For that reason, reasonable legislatures may diverge on whether to adopt a partial excuse that requires an act that is "wholly" or "mostly" driven by compassion for the victim. As noted below, in this Article, I choose to leave this nuanced question open for further debate.

313. I thank Jamie Abrams and Hila Keren for directing my attention to this point.

314. My goal in this project is to begin sketching in broad strokes some of the elements of the proposed excuse. I do not purport to fully address *all* the doctrinal implications stemming from recognizing such an excuse. I leave for future scholarly work as well as for states' legislatures the choice of whether to require that the killing was "mostly" or "wholly" motivated by compassion.

some self-compassion towards oneself. Arguably, these cases ought to be brought before juries, who will ascertain whether it was mostly compassion for the victim that motivated the killing and whether the specific defendant deserves mitigation. Juries routinely make similar complex factual determinations in other contexts as well.[315]

C. Close Family Members Following Caretaking Relationships

Another constraint on the scope of the proposed defense concerns limiting its operation only to close family members. Paradigm examples include parents, children, siblings, and spouses. The proposed defense would be excluded from professional caretakers such as doctors, nurses, or other *paid* caretakers.[316] The rationale behind such constraint lies with the unique nature of caretaking relationship in the familial context. It recognizes the emotional toll that providing intensive caregiving to loved family members exacts on caretakers. These relationships are characterized by the one-on-one nature of care and the fact that often, a single caretaker bears all the responsibility of caregiving for a sick or disabled family member. Furthermore, as close family members, these single caretakers are not being financially compensated and are often forced to forego paid employment opportunities, which puts them at greater financial risks.[317] In contrast, professional caretakers, like nurses and other third parties, are being paid to do the job of caretaking as part of their professional responsibility. Moreover, in close familial relationships, the natural assumption is that the killing was motivated out of love and genuine compassion, as opposed to third parties who might be more likely to act out of other motivations.

The above limit leaves open the question of who falls under the definition of "a close family member." Arguably, there is room for debate on whether the law ought to provide mitigation based only on compassion towards victims who are close family members, according to formal tests, namely, blood relationship, adoption, and marriage. Notably, these would only include parents, children, siblings, and legal spouses.

But there is a growing societal and legal recognition that the definition of "close family members" should not be strictly limited to these formal

315. *See generally* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2012–13 (2005).

316. The question of the role of doctors and nurses ought to be left to circumstances involving physician-assisted suicides and voluntary euthanasia cases, since it better fits their unique features. As explained earlier, the scope of the argument in this paper is limited to non-voluntary euthanasia as opposed to voluntary euthanasia.

317. *See* Dhruv Khullar, *Who Will Care for the Caregivers?*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/upshot/who-will-care-for-the-caregivers.html [https://perma.cc/W94B-JE42].

definitions.[318] The law recognizes a variety of contexts in which the definition of "close family members" is further expanded to also cover "functional" family members.[319] These include relationships between individuals who are not formally related but their relationships practically mimic formal ones.[320]

The proposal advocated here supports the recognition of a functional definition of individuals who fall under the category of "close family members," rather than adhering to formal tests that limit the scope of the defense. For example, such functional definition would recognize live-in partners who were not formally married to the victims. Since functionally, unmarried cohabitants often act similarly to married couples, expanding the reach of the defense to them is normatively warranted. Yet, this expansion is sufficiently narrow to exclude killings committed by acquaintances, friends, or paid caretakers.

Several reasons support the outcome of denying mitigation to friends and acquaintances claiming to have acted out of compassion for the victim, reserving the partial excuse to unique circumstances involving close family members or their functional equivalent. As discussed earlier, psychological research on compassion devotes separate attention to the compelling force of familial compassion.[321] The proposed excuse's separate treatment of familial compassion tracks and parallels this line of research. Furthermore, unlike close family members, friends and acquaintances mostly do not engage in long-term, single caretaking responsibilities for terminally ill or severely disabled victims, and therefore their judgement and decision making are not similarly impaired. Additionally, limiting the excuse to familial compassion is warranted in order to address slippery slope concerns, prevent over-expansive applications of the defense, and avoid its abuse.[322]

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318. *See* Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 245–46 (2001); *see also* Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 493–99, 501–03, 516–19 (2007).

319. *See, e.g.*, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989); *see also* United States v. Haney, 287 F.3d 1266, 1271–73 (10th Cir. 2002) (duress defense is not limited to familial relationships), *vacated en banc*, 318 F.3d 1161 (10th Cir. 2003).

320. *See generally* James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's* Principles of the Law of Family Dissolution, 2001 BYU L. REV. 923 (2001).

321. *See supra* Part II.C (discussing Paul Ekman's separate treatment of familial compassion and distinguishing it from other forms of compassion).

322. *See* Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1, 1–2 (1998) (addressing the implications of overly expanding the scope of criminal excuses, in the context of what had been referred to as "abuse excuses," where criminal defendants and their attorneys claimed a history of abuse as an excuse for defendants' violent behavior).

D. The Victim Did Not Object to the Killing

In typical compassionate homicide cases, victims lacked the mental capacity to express their wishes due to a severe disability or terminal illness.[323] Importantly, advocating the recognition of a compassion-based excuse rests on the premise that the victim never expressed any objection to the killing. This limitation revisits the distinction discussed earlier between non-voluntary and involuntary euthanasia.[324] The proposed partial excuse advocated here should only apply in cases of non-voluntary rather than involuntary euthanasia. An important constraint on the application of the excuse would exclude it from a defendant who killed a victim who explicitly objected to their death and expressed their wish to continue living despite their pain and suffering. The victim's explicit objection to causing their own death is a critical factor that would justify a court's refusal to instruct the jury on the defense. Respect for victims' right to make their autonomous choices, as well as promoting victims' dignity, make the exclusion of the defense from defendants who ignored victims' wishes normatively warranted.

E. A Single Perpetrator, Excluding Conspiracies to Kill

Another constraint on the scope of the defense concerns limiting its availability only to single actors, as opposed to more than one perpetrator, acting together in concert. Consider, for example, a case in which two siblings decide together to kill their ailing parent to end her pain and suffering.[325] Arguably, both siblings might have been motivated to kill wholly out of compassion and genuine love for a suffering parent. Yet, policy-based reasons support the exclusion of the defense from co-defendants. First, adopting a partial excuse is warranted, among others, based on recognizing the emotional toll that a single caretaker experiences when carrying alone the burden of caregiving for a sick or disabled family member, without any support from the state or another family member. In contrast, when more than a single individual is caregiving for a close family

323. See, for example, a recent case involving eighty-seven-year-old Lilian Park, who was the single caretaker of her severely disabled adult grandson and purposely overdosed him. Derrick Bryson Taylor, *87-Year-Old Killed Her Disabled Grandson with Overdose, Police Say*, N.Y. TIMES (Sept. 25, 2019), https://www.nytimes.com/2019/09/25/us/florida-grandmother-overdose-grandson.html [https://perma.c c/TSA5-6GBX]; *see also* R. v. Latimer, 1995 CanLII 3993 (Can. Sask. C.A.) (involving a father who had killed his severely disabled twelve-year-old daughter out of compassion).

324. *See supra* Part I (discussing non-voluntary and involuntary euthanasia).

325. I thank professor Kimberly Robinson for directing my attention to this point.

member, the responsibilities are shared among them and therefore their respective burdens are at least somewhat alleviated.[326]

Moreover, when two perpetrators decide together on killing a close family member, they commit not only homicide, but also the separate crime of a conspiracy to commit murder.[327] The nature of the conspiracy, namely, an agreement to kill combined with an intent to take a life, significantly aggravates the nature of the crime.[328] The existence of such conspiracy therefore ought to preclude the defense from more than a single actor.

F. Limited Application: Homicide Offenses

Considering the adoption of a compassion-based excuse raises the question whether the defense ought to be strictly limited to homicide offenses or rather expanded to include additional criminal offenses. One can easily imagine a host of circumstances in which a defendant might claim that they committed various criminal acts out of compassion. Just to name one paradigm example, consider the case of a defendant who commits theft out of compassion towards the poor, the homeless, and the hungry rather than out of financial greed.[329]

Generally speaking, incorporating notions such as mercy and compassion as a basis for mitigation may appeal to many readers who are concerned with the existing harsh and over-punitive criminal justice system and its unintended consequences.[330] While this Article does not categorically reject the expansion of these notions to additional contexts, delving deeply into the specific implications of such expansion exceeds the scope of my arguments here and is better left to future work.

For the purposes of this Article, the compassion-based excuse is limited in scope to cover only homicide cases. By comparison, the scope of the comparable emotion-based provocation defense is similarly limited to homicide.[331] One reason that supports applying a compassion-based excuse

326. *See How to Share Caregiving Responsibilities with Family Members*, NAT'L INST. ON AGING, https://www.nia.nih.gov/health/how-share-caregiving-responsibilities-family-members [https://perma.cc/CVE6-PELJ].

327. *See, e.g.*, People v. Jessee, 222 Cal. App. 4th 501, 503 (2013) (a jury convicted a woman who had killed her husband for financial gain of both murder and conspiracy to commit murder).

328. The expansive nature of conspiracy liability has long been subject to extensive critique. *See, e.g.*, Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413 (1959).

329. *Cf.* VICTOR HUGO, LES MISÉRABLES (1862) (The protagonist, Jean Valjean, stole a loaf of bread from a baker to feed his poor sister's hungry children.).

330. Elaborating on the over-punitive criminal justice system exceeds the scope of this paper, but ample literature addresses these problems. *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015).

331. *See* Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 381 n.148 (2007) (noting that the partial defense of provocation is permitted only in homicide cases).

to homicide cases rests with the pervasive reliance by all jurisdictions on mandatory minimum sentences for defendants convicted of murder.[332] As noted earlier, in these cases, judges cannot exercise much discretion at sentencing; once the jury convicts a defendant of murder, a mandatory minimum sentence applies.[333] In contrast, in most other crimes, mandatory minimum sentences do not apply.[334] When mandatory sentences are not required by law, mitigation may be accomplished through the use of judicial discretion at sentencing. Put differently, providing a doctrinal basis for mitigating murder charges to manslaughter is especially urgent when the application of harsh mandatory minimum sentences is at issue.

G. A Proposed Model Defense

As elaborated earlier, this Article proposes that legislatures adopt a compassion-based partial excuse, rather than leave mitigation solely to prosecutorial and judicial discretion.[335] Given the necessity of incorporating the above-mentioned limits into the defense's elements, I outline below a model provision that policy makers could readily consider, and would cabin the potential applicability of the excuse.

> An Affirmative Defense: Partial Excuse for Compassionate Homicide
>
> An actor may be convicted of manslaughter, if he or she establishes by preponderance of the evidence that:
>
> a. The actor was the sole caretaker of a terminally ill or severely disabled close family member, whom the actor killed wholly out of compassion, and in killing was solely motivated by the desire to end the victim's pain and suffering; **and**
>
> b. Any ordinary person in the actor's situation, facing similar circumstances, would also have experienced the compassionate emotion affecting such person's judgment and decision-making, and would have been likely to act rashly.

332. *See* Caroline Forell, *Domestic Homicides: The Continuing Search for Justice*, 25 AM. U. J. GENDER SOC. POL'Y & L. 1, 22, 29 (2017).

333. *See supra* Part III.C.2 (addressing mandatory sentences for murder convictions).

334. One exception concerns serious drug crimes. *See* Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1614 (2012).

335. *See supra* Part III.C.2.

H. Applying the Proposal: Testing the Defense's Limits

Having sketched the elements of the proposed compassion-based excuse, let's hypothesize whether the defense might have been applicable in the *Liltz* case, discussed in the Introduction.[336] Liltz was the sole caretaker of her severely disabled daughter Courtney. She subjectively believed that her own death from cancer was imminent and that once she died, Courtney would not only be unable to receive proper care, but also would be extremely miserable. Since Liltz knew that her death was impending, she had no monetary motive for the killing such as the prospect of financial gain. Moreover, the dire circumstances that Liltz was facing show that her act was not motivated by self-compassion. Instead, Liltz's act was wholly motivated by compassion towards Courtney and the sole desire to prevent Courtney's future suffering. It is therefore likely that Liltz would have been able to satisfy the subjective prong of the partial excuse, by preponderance of the evidence.

Meeting the excuse's subjective element is merely the first step in the inquiry. Next, Liltz would have to establish, by preponderance of the evidence, that any ordinary person in her situation, including their own imminent death and being a single caretaker of a severely disabled child, would have also experienced a reasonable compassionate feeling towards a close family member. Liltz would further have to prove that the judgment and decision making of any ordinary person in her circumstances *might* have also been impaired, and that such impairment might have made that person prone to act rashly. Put differently, any ordinary person might have been tempted to prevent a family member's suffering, by overreacting, even if not necessarily by killing. It is therefore likely that Liltz could have established sufficient evidence to prove the excuse's objective element. In sum, applying the proposed excuse to the *Liltz* case suggests that it is a paradigm example where reducing murder charges to manslaughter would have been normatively warranted.

Yet, the mere existence of a compassion-based excuse nowhere compels an outcome in which defendant would necessarily prevail on the defense. To demonstrate the limited scope of the excuse, let's test its applicability on the facts of another case. The California decision in *People v. Anderson* is illustrative.[337] On December 11, 2013, Lance Anderson shot and killed his 68-year-old wife Maxine, to whom he had been married for 32 years, while she was sleeping, then took a taxi to the nursing home where his severely disabled sister Lisa was hospitalized and shot and killed her too.[338]

336. *See supra* Introduction.
337. People v. Anderson, No. B276741, 2017 WL 3326831 (Cal. Ct. App. Aug. 4, 2017).
338. *Id.* at *1–3.

Anderson told police detectives that he had killed them to end their suffering and "send them home."[339] He testified that Maxine had suffered from several health problems, which began with breast cancer, and continued to severe depression and anxiety. He further testified that the impact of those afflictions on Maxine was "brutal to watch," that she refused to take the medications that her doctors prescribed and that she had lost motivation and desire and did not want to live that way.[340] Anderson also told detectives that originally he had planned to shoot Maxine and then commit suicide but after shooting Maxine he had decided to also shoot his sister.[341] Anderson's severely disabled sister Lisa was a resident of a skilled nursing facility after a heart attack six years previous caused her severe brain damage.[342] She was unable to care for herself and used a feeding tube. Anderson said that "she never wanted to be in the bed like that," and that she had told him that she never wanted "to be laying around in my own shit," but had not signed an advanced directive documenting those wishes.[343] Both deceased, however, had never explicitly asked defendant to actively end their lives.[344]

Anderson was charged with two counts of murder under California law and waived his right to a jury trial.[345] In a bench trial, the trial court rejected Anderson's argument that he was culpable only of voluntary manslaughter because he was overcome by passionate feelings of helplessness in the face of the victims' prolonged suffering. The court found Anderson guilty of two counts of first-degree premeditated murder and sentenced him to an aggregate term of 100 years to life.[346]

On appeal, Anderson argued that the trial court applied an incorrect legal standard for voluntary manslaughter, and that it should have accepted a provocation claim and mitigated the murder charge to voluntary manslaughter.[347] He claimed that the killings were the product of an emotional response so intense that his reason was obscured so as to negate the element of 'malice' required to prove a murder charge.[348] He further argued that for the provocation defense to apply, it was sufficient that he

339. *Id.* at *1.

340. *Id.* at *4.

341. *Id.* at *3–5 (Police found a note in the house that read: "Good morning, lover, ... Sleep well. You will suffer no more. Give everyone my love. I will join you soon enough.").

342. *Id.* at *4.

343. *Id.* at *4.

344. *Id.* at *2. Jason King, Maxin's son from a previous relationship, testified that his mother had never told him that she could not live with the problems she was having or that she wanted to end her life. *Id.*

345. *Id.* at *1. For the California statute governing the *Anderson* case see CAL. PENAL CODE § 187 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.).

346. *Anderson*, 2017 WL 3326831, at *1.

347. *Id.* at *12. In addition, defendant appealed his lengthy sentence, arguing that the trial court had failed to accord appropriate weight to his mental state as a mitigating factor. *Id.* at *15.

348. *Id.* at *12.

was provoked, even if his passive victims did nothing to provoke him.[349] To support the provocation claim, defense introduced into evidence the testimony of a clinical and forensic psychologist.[350] The expert testified that there was no evidence to support an insanity defense as Anderson knew what he was doing and believed that the killings were rational and justified acts.[351] However, continued the expert, "there was an impairment in his ability to reason at that time that . . . undermined his ability to understand what he was doing from any perspective other than the one that he was rigidly stuck in at that time."[352] The expert further opined that Anderson had a limited ability to tolerate the pain and suffering of those he cared most about, and that over time, the exposure to that pain and suffering wore him down, resulting in a process that drove him to alleviate their suffering, and that he came to believe that the only way to do that was to actively end their lives.[353]

The California court of appeals rejected Anderson's arguments and upheld the two first-degree murder convictions.[354] The court held that the trial court allowed Anderson to present a provocation claim but then rejected it on the facts of the case; while provocation's subjective component was satisfied given the evidence that showed that Anderson was overcome by a sense of helplessness, its objective component was not met because the sleeping and incapacitated victims could not have provoked him. Anderson's emotional reaction to their suffering was not objectively reasonable.[355]

The question is whether the outcome might have been different had the proposed defense been legislatively adopted in California. Would Anderson have been able to prevail on a compassion-based excuse? Applying the subjective and objective prongs of the proposed defense demonstrates that it is most likely that Anderson would have failed to satisfy, by preponderance of the evidence, the requirements of the objective element.

Anderson would have likely satisfied the subjective element of the proposed partial excuse. Arguably, Anderson could have established that subjectively he killed his wife and sister wholly out of compassion after witnessing their continuous pain and suffering. Several factors, however, strongly suggest that Anderson would not have met his burden of establishing the objective prong of the excuse. To begin with, Anderson's

349. *Id.* at *12.
350. *Id.* at *6.
351. *Id.*
352. *Id.* (alteration in original).
353. *Id.* at *7.
354. *Id.* at *13–15 (Defendant's statements to police detectives established that defendant had premeditated the killings, by making funeral arrangements and practicing at a shooting range.).
355. *Id.* at *14–15.

wife Maxine was neither terminally ill nor severely disabled. Instead, she was a cancer patient who suffered from severe depression and anxiety, but there was no evidence to suggest that she was terminally ill or that her death was imminent. Moreover, while Anderson was the primary caretaker of his wife, he was *not* the primary caretaker of his sister, who was receiving medical care at an institution. Under the proposed model statute above, the applicability of the partial excuse may vary regarding Anderson's two victims; as for his sister, Anderson would fail to meet even the threshold element of being a "single caretaker," which is embedded in the defense's subjective prong. The analysis might differ with respect to Anderson's wife, as he might satisfy the subjective prong, and the inquiry would turn on whether the objective prong has been satisfied. Furthermore, the method of the killing strongly counsels against reducing murder charges to manslaughter. Anderson had shot both victims following a prolonged and detailed planning, including making funeral arrangements.[356]

In contrast to the *Liltz* case, the facts of the *Anderson* case suggest that mitigation of criminal responsibility is not normatively warranted. Anderson's double homicides were mostly motivated by self-compassion, rather than wholly motivated by compassion for his wife and sister. Anderson's main motivation for the killings was to relieve himself from the physical burden and emotional toll of caretaking responsibilities towards his sick and severely disabled family members. A totality of the circumstances inquiry would have likely demonstrated that Anderson had not established the defense's objective element. Anderson would have likely failed to prove that an ordinary person, facing a similar predicament, would have also been likely to act rashly.

CONCLUSION

"If I had not killed her, she would have died and that is something I could not bear to happen to her."[357]

—Toni Morrison, Beloved

356. Compare *id.* at *1–2, with People v. Liltz, 2017 IL App (1st) 161996-U, ¶ 8. The proposed partial excuse is not limited only to defendants who acted in a spur-of-the-moment manner, without any advanced planning or deliberation. The proposal recognizes that many situations involving compassionate homicides do entail some level of premeditation and deliberation. Instead, the inquiry under the objective prong contains the element of acting "rashly," requiring juries to assess whether any ordinary person in defendant's situation would have also been likely to act rashly.

357. TONI MORRISON, BELOVED 200 (New American Library 1987) (1987) (The protagonist Sethe explains why she chose to kill her baby daughter out of love and mercy, rather than allow her to endure the emotional and physical horrors of slavery.).

Compassionate homicide is a controversial topic, and the proposal to recognize a compassion-based excuse is hugely provocative.[358] In considering the elements of a compassion-based excuse, special attention should be given to the tension between defendants' claim for equitable mercy and the need to vindicate vulnerable victims' rights by sending an expressive message that affirms the wrongfulness of taking lives.

While this Article does not attempt to resolve all the intricacies surrounding the issue, it aims to ignite a scholarly debate that would lead to future contributions on the topic. Specifically, it hopes to contribute to the growing literature on the role of emotions in shaping behavior. Its goal is to better understand the reactions of compassionate killers and explain why they might deserve mitigation, without fully excusing them.

One advantage of recognizing a compassion-based excuse is that it confronts the contentious problem of compassionate homicide head-on. It offers a transparent basis for addressing the matter rather than disguising its complexities by relegating them to the realm of non-transparent and non-predictable exercises of prosecutorial and judicial discretion.

Inconsistencies and lack of uniformity are not unique features of compassionate homicide, as these are integral aspects of the criminal justice system. There are numerous other areas where exercising mercy is arguably warranted. While recognizing compassion-based excuse is merely one aspect of offering compassion towards defendants in a harsh, unforgiving and overly punitive system of criminal justice, compassionate homicide illuminates a paradigm example in which exercising equitable mercy is warranted. Because life expectancies are increasing, and new medical advances allow people to live longer, prolonging the lives of terminally ill patients, grappling with the ramifications of compassionate homicide is a timely and pertinent endeavor.

358. There is some historical evidence that compassionate homicide also occurred during the Holocaust, where parents had killed their children to prevent them from suffering the Nazis' atrocities. In a mock trial of infamous Nazi doctor Josef Mengele, Holocaust survivor Ruth Eliaz gave testimony about killing her baby who had no chance of survival after she gave birth to it in Auschwitz. *See Mother Tells of Killing Her Newborn Baby at Auschwitz: Mock Trial of 'Angel of Death' Ends in Israel*, L.A. TIMES (Feb. 7, 1985, 12:00 AM), https://www.latimes.com/archives/la-xpm-1985-02-07-mn-5158-story.html [http s://perma.cc/Z5SY-NGUP]. Another case is described in the testimonial of Holocaust survivor Esther Handlarsky. During the last transport of Jews from Shedlitz to Treblinka in November 1942, Handlarsky had witnessed a medical doctor injecting Cyanides to his wife, children, and himself, to prevent them from being sent to their death. Fourteen-year-old Esther begged the doctor to end her and her sister's lives too, but he said that he did not have enough poison. Esther Handlarsky and her sister hid in the woods and eventually survived. Interview by Hanna Pasovsky-Kaplan with Esther Handlarksy, in Jerusalem, Israel (May 16, 2005) (interview on file with the author).