

Rethinking “in Affect” – Disturbed States of Mind and Criminal Responsibility

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1 Introduction

Suppose that A throws a stone at B which hits him on the head with the result that B dies. Asked why he did what he did, A answers:

- I don't know; I was so upset that I never contemplated the consequences of my actions, or
- I honestly don't remember; my mind was in a whirl because I was so angry, or
- I was angry and acted purely on impulse, or
- B provoked me so much I couldn't restrain myself even though I knew what I was doing and that it was wrong.

All of these answers are plausible, and they all illustrate different ways in which an emotional turmoil within a perpetrator—*e.g.* rage, panic, fury and so on—can interfere with human behaviour and the capacity for self-control. It is certainly true that emotions affect human behaviour. It is also a fact that we have a limited ability to control our feelings. The interesting question is to what extent feelings should restrict our responsibility.

Actions carried out in affect, or other similar mental states of mind, can be evaluated in a quite different way than actions undertaken by people in full control of themselves. I will, therefore, *a priori* assume that an disturbed state of mind can be of significance for our understanding of human behaviour. My purpose in this essay is to shed some light on the question of what relevance, if any, a perpetrator's disturbed state of mind might have in the assessment of criminal liability. My analysis will focus primarily on crimes of violence against the person.

It is not at all clear *how* and *why* a disturbed state of mind should affect the establishing of criminal responsibility. There are several possible approaches in criminal law dogmatics and below I will mention a few. A disturbed mental state can sometimes influence assessment of *guilt*, either as an inculpatory or exculpatory factor. Being mentally upset, angry or in a rage may be important factors to be considered when courts decide whether the defendant, when an act was committed, was *conscious* to the extent required for incurring criminal liability. This, in turn, raises the question of whether *awareness* is a prerequisite for an (criminal) act. Having a violent temper and acting in the heat of anger, in affect can—depending on the circumstances—result from prior provocation and can thus be seen as something that (partially) *excuses* a person. The reason for being upset can, at least, function as a *mitigating* circumstance.

In short, it is not precisely clear what consequences follow from the fact that the perpetrator was upset when his actions took place. There are several reasons why we need to further elaborate on the importance of affect and disturbed states of mind.

Firstly, the terms affect, agitation, grave disturbance etc. are rather vague and cover a wide range of emotional or mental states of mind. Rage, fury, hot anger, as well as sadness, fear, anxiety, distress, panic, confusion can all be said to cause a disturbed state of mind. Often the terms employed refer to the actual

feelings of a person (*anger, rage* etc.). In other cases the terms used allude to the action itself and describe the circumstances surrounding it, *e.g. (acting) in haste, hastily, from impulse, as a reflex, under provocation*, etc. Some, but surely not all, indignant states of mind are relevant as factors that indicate or prove a blameworthy attitude, comparable to the one found when acting intentionally. Thus, we need a distinction between those states of mind that should affect the establishing of culpability and those which should not.

Secondly, even though it is clear from case law that affect can be relevant when establishing culpability, it is not clear why this is so. Hence, we need justification(s) for considering the perpetrator’s psychic state. Furthermore, *what reasons* the perpetrator had for being upset sometimes seem to be relevant. It is therefore necessary to elucidate what kind of reasons could be relevant. For example: Is it necessary for the reasons to be “good”, understandable, morally acceptable, and so forth, in order for them to be relevant? Or, is it sufficient that they have actually affected the defendant’s behaviour?

Thirdly, the question of what impact the above-mentioned states of mind have on the element of guilt and the establishment of culpability touches upon some broader questions, *e.g.* whether (loss of) self-control, (un)consciousness, (un)awareness and provocation are relevant when assessing responsibility.

2 Distinguishing Different States of Mind

There is no common or generally accepted terminology for analyzing feelings and their impact on human behaviour. Psychologists, philosophers and lawyers have different descriptions and conceptions of what constitutes “a state of mind”. Hence, there are various systems of classification. Nevertheless, as a starting-point it seems accurate to assume that feelings, involved in a mental process that is relevant when assessing criminal responsibility, constitute so-called *emotions*.¹ Emotions are more complex than mere sensations or general moods. Mental dispositions, such as “a disturbed state of mind” and other emotional disturbances, can take various forms. Mere feelings can be experienced without being directed towards anything specific. Hence, one can experience irritation, but not know why. Emotions, on the other hand, are always directed towards an object.

The fact that someone has had certain feelings—*e.g.* has been angry, felt disgusted or ashamed etc.—is one important aspect to consider when we try to ascribe to an actor a certain attitude towards something (*e.g.* a person, a risk, a result etc.). If an emotion is considered and carefully thought out, and consequently adopted by the agent, then it constitutes an attitude.² Attitudes are certainly important in a criminal law context. A mere feeling or emotion is not necessarily of any relevance for criminal responsibility unless it materializes into an adopted attitude. A tentative conclusion is that emotions must be rather distinct and organized to be of relevance when establishing culpability.

1 On the notion of emotions, see Nils Jareborg, *Mening, värde och rationalitet* 2009 Chapter 8, and Alan White, *The Philosophy of Mind* 1967 p. 123 ff.

2 Roger Trigg, *Pain and Emotion* 1970 p. 51 f.

Sometimes emotions take over a person’s normal or rational way of behaving, thus paralyzing or absorbing him in a way which determines his behaviour. For a short while anger, fear, thrill or sadness capture or consume a person in a certain way, making him act in a way that is not characteristic of him. The object of the emotion (*e.g.* anger) becomes the cause of the reaction. We then refer to his state of mind as an emotional disturbance or agitation.³ The emotions that cause such a disturbance can be either pleasant or unpleasant. It is, therefore, possible for an upset or a disturbed state of mind to be caused by feelings or emotions (*e.g.* of joy, exhilaration, happiness etc.). Thus, it becomes important to acknowledge that being upset or in a disturbed state of mind does not presuppose negative, indifferent or hostile emotions. However, only those emotions that display a hostile, or at least an indifferent, attitude to an interest protected by criminal law can be of relevance in the assessment of guilt.

In this essay I will mainly focus on acts carried out *in affect*.⁴ “Affect” is translated as *emotion(s)*. In the context of criminal law the concept has negative connotations. It implies that the perpetrator is in a rage or burning with anger, and acting (sometimes uncontrollably) out of fury etc. The essential problem with situations of this sort is that while the perpetrator, on the one hand, is filled with negative emotions (towards someone/something) he might, on the other hand, have only a limited ability to control himself. The same emotions that make him villainous or wicked also have an effect on his capacity to control himself. Seen as an expression of a certain attitude, his disturbed state of mind indicates a blameworthy attitude (comparable to other forms of *dolus*). Treated as a question of capacity, a disturbed state of mind could indicate an impaired psychological condition, therefore implying diminished responsibility. The perpetrator is then supposed to have had a limited ability to apprehend and interpret the specific situation. Emotional disturbances or a disturbed state of mind can, thus, affect the attitude of the offender as well as his cognitive ability to foresee the consequences of his actions. I will discuss both of these aspects.

3 Affect and the Requirements of Consciousness and Awareness

It is sometimes assumed that actions undertaken in affect indicate that the agent lacked the necessary capacity to control himself in such a way that criminal responsibility can be ascribed to him. This touches upon the questions (*a*) what are the basic requirements for criminal responsibility and, (*b*) is the lack of capacity equivalent to the lack of consciousness or awareness.

3.1 *Can Impulsive Acts carry with them Criminal Responsibility?*

A perpetrator is often said to act on impulse or as a reflex when, in affect he does something out of the ordinary. Such a statement implies that the action was not carried out by “free will” or, at least, that the actor had a diminished capacity to control his actions.

3 Alan White, *The Philosophy of Mind* 1967 p. 122.

4 In German: “Affekttaten”; in Swedish: “handlande i affekt”.

To act on impulse, or without due deliberation or reflection, can often be said to be unwise and perhaps uncharacteristic of people. Nevertheless, it does not imply that the behaviour is irrelevant from point of view of criminal law. If we accept that actions—as opposed to physical bodily movements—are guided by reasons (and not causes) it becomes obvious that the mental requirement of an act is a general ability to apprehend things and to balance reasons. This leads to the conclusion that the required mental capacity for criminal responsibility is a certain degree of consciousness and awareness. We do not refer to movements or courses of events as “actions” when such awareness does not exist.

Diminished capacity can, of course, have an effect on the control of actions and their consequences. We then refer to a chain of events where the defendant lacked the possibility to control his movements or to halt a chain of events. For example: If A pushes B into C, then B did not have the possibility of controlling his body. Spasms, convulsions or actions carried out during sleep are likewise not considered to be actions relevant for criminal liability. Such actions are characterized as unfree.⁵

An action taken on reflex or impulse is normally not the same as an unfree action. As long as a person acts on reason, and not merely from cause, we consider it to be an action (relevant for criminal liability).⁶ Criminal intent does not presuppose any deliberation on the part of the agent. It is not an essential requirement that he has made a decision to do something. Therefore, we cannot say that acting on reflex is the same as performing an unfree action. Only if a person’s mind is so disturbed that he is completely unable to balance reasons can we refer to the actions as unfree (*e.g.* compulsive behaviour or behaviour carried out by mentally disturbed people).

This leads to the following conclusions. Being in affect and acting impulsively can clearly be uncharacteristic of a person. What is perceived as ‘out of character’ is that the person acts without proper deliberation, thus with a lack judgement. However, this does not alter the fact that an impulsive act—carried out in a disturbed state of mind— can still fulfil the requirement of an (free) act.⁷ At the same time there seems to be a possibility that a person’s mind is so disturbed that he cannot properly apprehend facts or balance reasons. There must then be something significant or salient about the condition. When a person’s cognitive or reasoning capacities are that impaired we usually treat them as

5 See Nils Jareborg, *Handling och uppsåt* 1969 p. 114 ff., Ivar Strahl, *Allmän straffrätt i vad angår brotten* 1976 p. 91 and R. A. Duff, *Intention, Agency and Criminal Liability* 1990 p. 102.

6 Compare *e.g.* a person who is screamed at and, as a reflex, clenches his fist, thereby pulling the trigger of a gun, to a person who hears a telephone signal and on impulse or as a reflex picks up the phone. The first person can be said to have acted by reflex, thus carrying out a physical movement caused by force or fright; he has not acted from reason. The second person has acted from reason even though he never deliberated about whether it was a good or bad thing to do so.

7 The same opinion is expressed by Roxin concerning the approach in German law, see Claus Roxin, *Strafrecht, Allgemeiner Teil – Band 1* 1994 p. 206.

pathological and see them as symptoms of mental illness.⁸ Then any action normally carried out by such an agent is rather unstructured and uncontrolled and therefore resembles physical movements rather than actions. Actions carried out in affect are usually not of this kind.

3.2 *Affect, Knowledge and Awareness*

A question akin to the one posed above, is whether a mental state of "affect" can be considered equivalent to unconsciousness. This requires a definition of (un)consciousness.

At first sight it might seem easy to separate unconsciousness (as in oblivion, sleep or coma) from consciousness. Unconscious people cannot perform any (relevant) actions and, of course, cannot act with intent. However, consciousness is a matter of degree, and the open questions remain: what does it mean to be aware of something (a fact), and what is needed in terms of knowledge when we establish culpability? Psychologists and psychiatrists tend to differentiate between consciousness and semi-consciousness. A person is sometimes said to be in a zone between consciousness and unconsciousness.

What is important here is to distinguish "being conscious" from "being conscious of something". To become (or remain) conscious of something is to have one's attention held by it, thus having it at the front of one's mind (in perception, thought and so on). Simply being conscious or unconscious means that the person is either "awake" or has ceased to be conscious of anything. As White explains, being conscious is not incompatible with being unconscious of certain facts (*a, b or c*).⁹

If a person is very angry and upset, it is likely that he will lose some of his ability to understand or apprehend what is happening. The assumption must then be that overwhelming emotions detract from the agent's focus, thus making him unaware of certain things. All of this can be true to some extent, but it does not mean that an action undertaken under such conditions is not carried out consciously, knowingly and possibly with intent. In order to deal with the prerequisite for consciousness properly, we need to divide the notion into two parts.

To begin with, intent (in any form) does not presuppose that the perpetrator actively thinks about every fact or circumstance surrounding his act. What the actor must be aware of, or have knowledge about, is made clear from the prerequisites for a criminal(ized) act. Being aware of a fact only presumes that the agent has accepted a fact as true and has not forgotten about it.¹⁰ Therefore, knowledge can be either actual or latent, but both forms of awareness meet the definition of knowledge. This, in turn, demonstrates that knowledge does not have to involve current mental state or that the defendant was actively thinking about certain facts at the time of his offence.¹¹ The fact that a person, as a result

8 Swedish law, without doubt, takes a very peculiar and dubious position with respect to holding mentally disturbed criminals responsible.

9 Alan White, *The Philosophy of Mind* 1967 p. 73.

10 Nils Jareborg, *Handling och uppsåt* 1969 p. 215 ff.

11 R. A. Duff, *Intention, Agency and Criminal Liability* 1990 p. 160.

of anger or affect, does not actively think (of certain things or anything at all) does not preclude criminal liability.

An example can help to clarify this. Suppose that A has attacked and provoked B outside his home, leaving him extremely upset. B, who in his turn suffers from severe anxiety, goes into his house, fetches his gun and returns to A. B then shoots A twice in the chest. A later dies from his injuries. Asked later whether he knew what he fetched from the house, where he shot A, why he used a gun and so on, B answers: “I have no idea; I was neither aware of what I did nor where or why I shot A. I acted on pure impulse, without reason or deliberation”.

Given that the act of B can be understood as rational behaviour, and that there is nothing in the way he carried out his actions to support the assumption that they were a sequence of random events (*e.g.* shooting wildly in different directions by simply seizing hold of a gun), it is not a necessary requirement for criminal liability that he actively thought about every step in his behaviour.¹² Nor is it necessary that (at any time) he could give good reasons for his behaviour. As long as B—at the critical time—had not forgotten that the item he fetched was a gun or that it was loaded etc., the requirement for awareness is met. Being (extremely) angry at the time does not necessarily alter this fact. This was eloquently expressed by Ivar Strahl in his formulation – that the perpetrator “sees red, but he sees”.¹³

It is, of course, quite possible that the perpetrator was aware of everything at the time of the events, but that he later forgot.¹⁴ This is irrelevant. Repudiating unpleasant experience by denying or actually forgetting what has happened is a common way of dealing with a crisis. The requirement for awareness or knowledge concerns the mental state at the time of the deed. It is another thing that such awareness can be more difficult for the prosecutor to prove in a trial.

In the next section I will deal with another aspect of (diminished) consciousness and affect, *i.e.* an impaired ability to foresee risks and consequences.

12 In German doctrine this is discussed in terms of “Bewusstsein”. According to the prevailing opinion, what is necessary in terms of awareness or knowledge is that the perpetrator has actual or latent knowledge about relevant facts. It is, however, not necessary that he actively thinks about the circumstances (“daran denkt”). For further reading, *see* Claus Roxin, *Strafrecht, Allgemeiner Teil – Band 1* 1994 p. 400 ff.

13 Ivar Strahl, *Allmän straffrätt i vad angår brotten* 1976 p. 92.

14 *See* also Roxin: “Der Affekt schließt demnach nicht das Bewusstsein, wohl aber ggf. dessen Kontrollmöglichkeit und oft wohl auch die nachträgliche Erinnerung an das Geschehen aus“, Claus Roxin, *Strafrecht, Allgemeiner Teil – Band 1* 1994 p. 404.

4 Affect and Criminal Intent

4.1 Affect and Awareness of Risk

All forms of criminal intent (or recklessness) presuppose awareness of risk, and we are only interested in the defendant’s attitude after it has been established that he foresaw the possibility that the results would occur.¹⁵

Above I have said that a disturbed state of mind does not (automatically) lead to the conclusion that the perpetrator was not aware of what he was doing. I have also claimed that latent knowledge is sufficient, in the sense that the actor has it “stored in the brain and available if called on”.¹⁶ A person who “acts without thinking” can still be aware of what he is doing. Nevertheless, what would be the situation if a person is aware of what he is doing (actions) but not of the consequences of his act? An English case offers a good illustration of this question.

In *Parker* [1977 1 WLR 600] the defendant failed in his effort to make a telephone call from a payphone. In frustration he slammed down the receiver, thus breaking it. His defence was that he was so enraged that it never occurred to him that he might damage the phone. Parker was charged with, and convicted of, recklessly causing criminal damage. The court held that he had had (at least latent) knowledge that he was dealing with breakable material. Further, the causality was rather immediate. The court found the defendant to have been aware of the risk that harm would occur. Even though this means that we have to broaden the time-frame—from the critical moment to a slightly earlier period when he was not upset—it is still compatible with the assumption, discussed above, that awareness does not presuppose that the actor is actively thinking of a certain fact.¹⁷

However, that a perpetrator was in a disturbed state of mind at the time of his actions is not entirely irrelevant when we try to assess the degree of awareness and whether it is sufficient to meet the *dolus* requirements. Due to the high standards of proof (“beyond reasonable doubt”), courts must be convinced that the accused actually foresaw the risk of the actual harm that occurred. If we take the requirement for awareness of risk seriously, courts must specify *what risk* they are convinced the perpetrator foresaw. The awareness of risk must, thus, be qualified. It is not sufficient for courts to be satisfied that the accused was aware of a risk (of any kind).

In *Parker* [1977 1 WLR 600], the damage to the telephone was a fairly immediate and obvious consequence of his actions. However, it is possible that actions have rather long causal consequences, or that the consequences are not as

15 Alan White, *Misleading cases* 1991 p. 38 ff.

16 R. A. Duff, *Intention, Agency and Criminal Liability* 1990 p. 159.

17 Compare Ashworth, who seems to be somewhat sceptical of this kind of stretching of the awareness element. He claims that the reason for thus broadening the time span is mainly a practical one. If unawareness at the moment of the action, caused by bad temper, was accepted as defence, thus resulting in acquittal, the consequences would be socially undesirable. See Andrew Ashworth, *Principles of Criminal Law* 1995. p. 178 f. Simister and Sullivan are also sceptical of the ruling of the Court in the Parker case. See and compare Andrew Simister & GR Sullivan, *Criminal Law, Theory and Doctrine* 2007 p. 136.

foreseeable to the actor as they were in *Parker*. Even though the accused knows what he is doing, and is—at least latently—aware of the circumstances surrounding his act, he might still have difficulties foreseeing the particular kind of harm that his actions will cause. If his lack of ability to make an accurate assessment (of the risk involved) is caused by his impaired psychological condition, then this ought to be relevant to the assessment of culpability. The inability to come to a conclusion about what kind of risk he incurred can be explained by the fact that the perpetrator’s cognitive ability was limited or impaired. It is well known that stress, panic or anxiety, for example, affect our ability to foresee risks or make good judgements about what we ought to do in dangerous or risky situations. (Objective) carelessness displayed in acts ought not to be confused with the requirements for *mens rea*. Blameworthy lack of foresight is, in law, negligence. We generally have no problem accepting that a person, under such conditions, is *not* found to be equally culpable as a person acting intentionally or with full knowledge. My point here is that hot anger, affect or fury, in the same manner as stress, fear or anxiety, might delay our perceptions and our awareness of a specific risk. Acts with long or complex causal consequences can be especially difficult to judge. If this is so, then the first element of *dolus eventualis* might not be affirmed. This supposition is true regardless of the kind of disturbed state of mind the defendant was in. *I.e.* a person in affect may, in some situations, have even less ability to satisfy the first element of *dolus eventualis*.

A case from the Swedish Supreme Court (at least partially) confirms this conclusion. In *NJA 2005 p. 732* the facts were as follows: A bus driver (A) was halted by a person (B) who wanted to board the bus. According to the bus driver B was somewhat aggressive. A therefore stopped the bus and went alighted. He then pushed B in the chest with the consequence that B fell and broke his arm. From the court’s account of the facts, it is clear that A was very upset at the time. A was charged with assault. The Supreme Court held that the first requirement for the *dolus eventualis* formula is advertent recklessness. Merely taking an (objectively) unjustified risk is not sufficient. In this case, the bus driver was certainly aware that he was pushing the person and also that this might cause some pain. The court found—without reference to his disturbed state of mind—that A was not aware of the risk of *breaking B’s arm* through a fall. Therefore this was not advertent risk-taking with reference to the actual harm that occurred.

4.2 *The Requirement for an Indifferent Attitude and the Relevance of Affect*

What remains to examine here is how a specific state of mind can effect the assessment of the defendant’s attitude to the result that materialized.

The relevance of a perpetrator being in affect to the establishment of culpability has long been a subject of debate. There are a substantive number of cases in which it has been established that acting in affect (or likewise) neither precludes consciousness nor awareness of the risk. Since criminal intent, according to the *dolus eventualis* formula, requires evidence of

- (i) either that the defendant would have acted in the same way if he had been certain that the result would have materialized (hypothetical test),
- (ii) or that he was indifferent to the result materializing (indifference test),

the question is whether "a disturbed state of mind" can constitute such evidence.

Rulings from the Supreme Court give the impression that until 1980 judges were rather reluctant to accept acting in affect as sufficient evidence of either of the prerequisites for *dolus eventualis* mentioned above. At that time courts regularly used the hypothetical test to draw the line between *dolus* and *culpa*.

In several cases the Supreme Court held that even though the perpetrator had foreseen the risk and was in affect, a frantic state of rage etc., it could not nevertheless be concluded that he would have acted in the same way had he been certain that the result would have materialized. The rage, fury, etc. was seen as uncharacteristic of the agent rather than an expression of his 'will' or attitude at the time of his actions. Short reviews of the most important cases are presented below:

NJA 1968 p. 500. A had for some time been disturbed by teenagers who entertained themselves on a parking lot in his neighbourhood. A, whose character was abnormally pedantic and punctilious, had made earlier attempts to maintain order and remove the teenagers from the area. At the time of the crime, he taken his revolver with him and gone to the parking lot, where he got into an argument with two of the teenagers (B and C). A became extremely upset about what was said, and subsequently shot both B and C in the stomach. He was charged with attempted manslaughter, or alternatively aggravated assault. All instances found that A had been extremely agitated. An affidavit from a psychiatrist affirmed that A had acted impulsively in rage. According to the Supreme Court, acting in a disturbed state of mind (such as for example affect) did not rule out the possibility of acting with criminal intent. At the same time, all things considered, the court did not find that A had had any intent other than to cause bodily harm; it was not clear that he would have acted in the same way if he had been certain that the result (*i.e.* death) would have materialized. A was convicted of aggravated assault.

NJA 1975 p. 230. A and B had been in a relationship for some time. One night A visited B's home while she was asleep. A woke her up and they started arguing, at which time B told A that the relationship was over. A, who was very upset, first hit B twice in the face and later placed a dog leash around her neck, and tightened it. B probably lost consciousness. During the episode he mentioned that "he'd better kill her". Later he voluntarily let go of the leash. A was charged with attempted murder. The Supreme Court stated that A obviously had intended aggravated assault, but that the circumstances did not allow for the conclusion that he would have acted in the same way if he had been certain that the result would have materialized. A was convicted of aggravated assault.

NJA 1976 p. 183. After having been drinking heavily, a party of five people (A-E) ended up in an apartment. During the evening the party continued to drink. Later B and C started to fraternise; they later ended up in the toilet. C's partner (A), was very much affected and made jealous by this. He fetched a knife and tried to get

into the toilet by using the knife to stab a hole. Soon after, B and C came out of the toilet (partially undressed). A and C later began to fight. According to A’s version of the events, C had attacked him using a broom which he pressed against his throat. A had then used his knife and stabbed C three times in the chest. C died from his injuries and A was charged with murder. After the incident A had no recollection of what had happened. The Supreme Court ruled that A’s consciousness was most likely diminished, and that in these circumstances intent to kill was not proven. A was acquitted.

NJA 1978 p. 244. A and B were in a relationship. One evening, after they had both been drinking, they began a quarrel after which B told A that she had met another man and that she wanted the relationship to end. A, who was jealous and had aggressive tendencies, became very upset. He first hit B in the face and later grabbed her hair and threw her to the floor. After this, he kicked her several times in the back and the stomach. Her spleen was so damaged that it had to be surgically removed. A was charged with aggravated assault. The Supreme Court held that A’s aggressiveness towards B had not been particularly serious prior to the night of the assault. According to the court, the facts of the case did not provide sufficient evidence that A’s disturbed state of mind, at the time of the incident, was of such a kind that it was unimportant to him what kind of damage he would cause B. A was convicted of assault.

The Supreme Court did not in any of the cases reviewed expressly state that affect or the disturbed state of mind had caused the perpetrator to act in the way he did (or that this state of mind had at least diminished the defendant’s ability to abstain from acting). Nevertheless, regardless of the affect at the time of the actions, it was not conclusive that the defendant would have acted in the same way in other—more normal—circumstances. *I.e.* acting in affect was not sufficient to give a positive answer the hypothetical test.

If we compare this view to the one put forward in two more recent cases (from 2002 and 2004 respectively), we find that nowadays the Supreme Court holds the view that “acting in a disturbed state of mind” *can* be one circumstance indicating that a perpetrator was indifferent to the result that materialized, and thus acted with criminal intent.

The rulings in the cases from 2002 and 2004 are of the utmost relevance to questions concerned with proving criminal intent since the Supreme Court used them to finally reformulate the *dolus eventualis* formula in accordance with an indifference test. In these precedents, the court (more or less) abandoned the hypothetical test, which had long been subjected to heavy criticism. As early as in the 1970s, courts had begun to sometimes conclude their assessment of guilt by stating that if the defendant had shown (utter or complete) indifference to the outcome of his actions, then this was intent in the form of *dolus eventualis*. Legal doctrine interpreted this indifference formula as a method of giving a positive answer to the hypothetical test: When a person is completely indifferent to the consequences of his actions, then he would have acted in the same way had he been certain that the result would have materialized. Hence, the indifference test was originally used to answer the hypothetical test and affirm criminal intent. However, it was not until 2004 that the Supreme Court explicitly

abandoned the hypothetical test in favour of the indifference test. Let us review the two cases that brought about the final change.

The first case (*NJA 2002 p. 449*) concerned a person who had tried to run a roadblock erected by the police. In doing so, he drove his car directly at a police officer who was standing in the middle of the road signalling him to stop. The officer just managed to escape from being hit by throwing himself to one side. The driver was charged with attempted aggravated assault, alternatively with causing a danger of personal harm. In their elaboration of a suitable test for *dolus eventualis*, the majority of the Supreme Court argued that if an agent was aware that the risk of a certain result was *considerable* and he was in a *very* disturbed state of mind, then these circumstances could be taken into account in order to classify him as indifferent to the consequences that materialized. The court found the defendant guilty of attempted assault.

The second case (*NJA 2004 p. 176*) concerned an HIV-infected person who had had sexual intercourse with numerous partners without using a condom. The HIV infection was never transmitted. He was charged with attempted aggravated assault, alternatively with causing danger of personal harm. The Supreme Court confirmed their earlier statement that the hypothetical test was impaired as criterion for separating *dolus* from *culpa*. They further explained that what signifies *dolus* is, firstly, that the perpetrator foresees the occurrence of the result, and, secondly, that he displays an indifferent attitude to the result that is materializing. Concerning the question of how this attitude on the part of the defendant could be proven, the Supreme Court repeated that a combination of a certain *degree of awareness of risk* and a *disturbed state of mind* are factors which can serve as guidelines when assessing the degree of indifference. The court did not find that the accused had been indifferent to the consequence of transmitting the HIV virus to his partners. He was convicted of causing a danger of personal harm.

It is noteworthy that in the latter case, the Court did not specifically use the reinforcing terms “considerable” (risk) or “very” (disturbed state of mind). One interpretation of the Supreme Court’s changed use of the terms could be that it is no longer considered to be necessary that a defendant should have foreseen the risk of the result to a particularly high degree and, further, that the degree of his agitation is of no immediate relevance. Low expected likelihood combined with a rather low degree of affect could, at least theoretically, render a guilty verdict, in that the perpetrator was in fact indifferent to the consequences of his actions.

If we compare the cases from 2002 and 2004 with the cases from the 1960s and 1970s reviewed above, it is possible to trace a gradual shift in opinion as to whether a person’s state of mind tells us anything about his attitude toward the results of an action. Exactly how this shift came about is somewhat unclear, but it can perhaps be explained by the gradual introduction of the indifference criterion in the *dolus eventualis* formula.

To avoid misunderstandings, I would like to stress that I am not concerned with the question of whether a disturbed state of mind is—or should be regarded as—an accurate criterion for exculpating defendants from crimes that require *dolus*. I feel that it is not, and I am inclined to believe that the whole idea of trying to assess a person’s “state of mind” as an indication of a certain attitude is rather a failed one. Instead, my main concern here is with the fact that the

Supreme Court, in its guiding precedents on the doctrine of guilt from 2002 and 2004, explicitly mentions “a disturbed state of mind” as factual evidence of an indifferent attitude towards the actual harm occurring (even though the expected likelihood was not particularly high). With this in mind, I will try to analyze how the shift in opinion came about and how it could perhaps be justified.

It is probable that the view of the significance of the fact that the perpetrator was upset changed around the same time in the 1970s as courts started to answer the hypothetical test with an indifference formula.¹⁸ In some cases where the Supreme Court applied some sort of indifference test, it is clear that certain states of mind—*e.g.* affect, frantic rage, panic or unreflecting fury—were used to ascribe to the agent an indifferent attitude towards the results of an action. Certain states of mind were thought to imply that the offender had an indifferent attitude. Apparently, this way of reasoning seems to contradict the earlier expressed view that a disturbed state of mind was not sufficient for a positive answer to the hypothetical test. All the cases in which the Supreme Court gradually started to apply the indifference test concerned causing violent death through assault. The defendants had all been in a state of strong affect, and acting brutally and ruthlessly. All defendants were found guilty of crimes requiring *dolus*. These rulings of the Supreme Court confirm that *dolus*, at least, can be proven regardless of the existence of a disturbed state of mind (such as affect, rage or fury). If this description is correct, it seems that it is easier to find a person in a disturbed state of mind *indifferent to the result of his actions* (and thus acting with *dolus*), than to *answer the hypothetical test positively* under the same circumstances. What might possibly represent a problem with this conclusion is that the Supreme Court, in their re-drafting of the *dolus eventualis* formula in *NJA 2004 p. 176*, made it explicitly clear that both tests sought to answer the same question.

One possible explanation for this gradual change in opinion about the relevance of a disturbed state of mind could be a difference in perspective when answering the two tests. When courts tried to answer a hypothetical question about what a person might have done in other circumstances, it was natural to look at the result of the action *ex post* and try to evaluate whether or not the act was typical of the perpetrator. The hypothetical test was formulated and adopted in period when special prevention dominated penal theory. Hence, much interest was directed toward the actor and his general character (long-term attitudes). Criminals with a bad character were thought to be in need of correction; people of good character, on the other hand, were not necessarily thought to be so. For the latter category, some crimes committed in agitation were viewed as inconsistent with the person’s general character or behaviour. The anger or agitated state of mind had, more or less, caused the person to act out of character. An accused with a good character would not have acted in the same way if the circumstances had been different. This could explain why courts sometimes disregarded hot anger, affect and so forth, as reasons for ascribing to

18 The indifference formula was summed up colloquially as the accused “had been completely indifferent to the results”, “shown utter indifference to the outcome” or “at least displayed indifference”. See *e.g.* *NJA 1975 p. 594*, *NJA 1985 p. 757*, *NJA 1990 p. 210* and *NJA 1996 p. 509*.

the accused a guilty mind, equally blameworthy to other forms of criminal intent.

With an indifferent test the perspective is somewhat different. Using this test, courts try to elucidate what attitude the agent had to the result occurring at the time of his action. Since this test asks for an attitude *towards* something, which at time of the action has not yet occurred, the assessment is more future-oriented or forward-looking. It becomes natural to focus on the actual deed itself and what reasons the defendant had *ex ante* for acting (or abstain from acting). The idea behind this way of reasoning must be that the perpetrator’s feelings—at the critical moment—are supposed to actually affect how the perpetrator evaluates the circumstances surrounding a deed. That he has feelings of anger etc. is supposed to tell us something about the (short-term) attitude of the perpetrator to the result. Since the perpetrator was in a disturbed state of mind, he is more or less presumed to having been governed by his (overwhelming) feelings. Hence, he did not see the materializing of the result as a relevant reason to abstain from acting (or to act differently).

In order to justify this way of reasoning we must presume that feelings interact and with our attitudes towards effects, which is most certainly true. Further, we must assume that some attitudes can exist very momentarily. The perpetrator’s feelings, at the critical moment, display indifference to the protected interest behind the law, even though he might not have such an attitude before or after his action. This momentary indifference is equivalent in blameworthiness to other forms of *dolus* (*i.e.* intention and knowledge).

The reasoning seems straightforward enough, but there are several limitations.

Firstly, feelings can no doubt create a state of mind within a person. Nevertheless, establishing that someone has experienced certain feelings (and acted on them) is never sufficient to conclude that the harm was caused with criminal intent. We require facts showing that the defendant had a certain attitude of indifference. The claim that a disturbed state mind can prove (or indicate) an attitude of indifference presupposes that the current feelings has actually affected or caused the outcome of the defendant’s balancing of reasons. The emotions must have been thought through and adopted in order for them to constitute an attitude.¹⁹ Therefore, there must never be any doubt that the feelings of the perpetrator have actually guided his actions in a controlling manner. *I.e.* the emotions must have effected the perpetrator’s balancing of reasons. In order to reach such a conclusion, competing reasons for acting (or omitting to do something)—whatever they are—must be considered. As soon as there is any doubt on this issue, the assumption of an indifferent attitude ought to be quashed.

Secondly, acknowledging that attitudes consist of feelings and emotions might easily lead one’s thinking and reasoning astray. An emotion is always directed towards something. You are, *e.g.*, angry with someone or something etc. It is therefore possible for a person to develop a hostile attitude, based on these emotions, to the *object* (a person or a thing). This attitude is directed towards the

¹⁹ See *supra* footnote 2, and the description of attitudes in comparison to emotions.

object. Nevertheless, when establishing culpability in terms of intent we are not looking for an attitude to the object, but rather for an attitude to the *result* of the actions. A hostile or indifferent attitude to a person—originating from anger—cannot automatically be equated with an indifferent attitude to the results of actions. It is therefore important to distinguish various types of indifferent attitudes.

Likewise, it can never be sufficient for intent that a defendant has a general predisposition to be indifferent to the harm that has occurred in a specific situation. Such traits belong to ascribing the perpetrator a certain character (dispositional attitude). When we try to establish culpability we are only interested in the episodic (indifferent) attitude of the defendant. The disturbed state of mind must, therefore, have clearly materialized in the perpetrator’s mind at the time of his action.

Thirdly, not every conceivable disturbed state of mind can indicate indifference towards a result. If we are to arrive at the conclusion that the perpetrator has an indifferent (or hostile) attitude, then the emotions overwhelming him must in some way be negative, villainous, wicked or hostile. Otherwise we cannot assume that the emotions express an attitude equivalent in blameworthiness to other forms of intent. We are looking for an attitude which demonstrates that the perpetrator either approves of or accepts the result. Hence, a person upset by fear, sorrow, panic etc. probably cannot be said to be indifferent to the consequences of his act.

Fourthly, if we arrive at the conclusion that certain attitudes ascribed to the perpetrator can be derived from his feelings or emotions, then we must be very specific about *what* result or consequence his indifference is directed towards. At this stage the two elements of *dolus eventualis*—cognitive state of mind and attitude—join together. A (very) high expected likelihood that the result will occur is strong evidence of an indifferent attitude on the part of the offender. However, the opposite is not necessarily true. This is also where we find one of the major problems with emphasizing the emotional aspect of *dolus*. No matter how strong the emotion a person experiences, a wicked mind or attitude must never be allowed to compensate for a loss in the cognitive aspect of criminal intent. It is possible to argue that a person did foresee a risk of something (*e.g.* physical injury, pain etc.), and that the emotions that encompassed his actions can be taken as evidence that he would not have abstained from his action. Nevertheless, the crucial question is what risk the perpetrator actually foresaw (and, if he did so, what extent of risk did he foresee). Awareness of risks in general, taken together with the existence of *e.g.* a state of rage, affect etc., can never be sufficient to conclude that a perpetrator has accepted, or approved of, the actual outcome of his actions.²⁰ Assigning too much emphasis to the state of mind of the perpetrator might lure us into thinking an indifferent attitude is in itself sufficient to constitute criminal intent. It is not.

20 In the case *NJA 2005 p. 732*, the Supreme Court explicitly stressed that a minimum requirement for *dolus eventualis* is that the perpetrator foresaw a specific risk (*i.e.* conscious risk-taking towards the actual result) and that the guidelines expressed earlier concerning facts indicating criminal intent (ruthless risk-taking, disturbed state of mind etc.) were assigned the indifference test—not the question of whether the actor foresaw the risk.

It seems that in neither of the cases from 1970s and 1980s, in which the indifference test was introduced, did the Supreme Court pay much attention to the fact that the accused was upset at the time of the offence. Whether someone is found to have been indifferent to a result (thus acting with intent) is usually determined from the existence of other evidence (degree of foresight, quality of the risk-taking etc.). *I.e.* a disturbed state of mind does not ultimately determine the assessment of guilt. Why the Supreme Court has bothered to re-state a disturbed state of mind as one—out of three—possible circumstances that indicate an indifferent attitude, is somewhat unclear.

5 Affect as an Extenuating, or Partially Excusing, Circumstance

What my analysis has shown so far is that the law takes a rather careful position when it comes to accepting “acting in affect” as something that could exculpate the defendant. Mental conditions such as “rage”, “acting impulsively in a bad temper” or “affect” neither preclude actual consciousness nor actual awareness of risk. When the disturbed state of mind is deemed somehow villainous, it can, nevertheless, be a reason for inculcating the accused; at least anger or affect is supposed to indicate an indifferent attitude equivalent to other forms of intent. It is perhaps surprising, therefore, to find that when one turns to excuses and mitigating circumstances, the same emotional states of mind reappear as being of relevance; this time “being upset”, “in a hot temper” and so forth, can be a reason for extenuation. Thus, there appears to be an intrinsic contradiction (or perhaps an asymmetry) in how we evaluate the relevance of acting in affect. What was previously a reason for ascribing someone a more blameworthy attitude now seems to be something that could diminish culpability or degree of blameworthiness. Let us therefore examine what rationale underpins this practice.

5.1 *Excessive use of Violence and Difficulties in Coming to one’s Senses – Excusable Excess*

The doctrine of excuses is derived from the principle of conformity. The basic idea behind this principle is that a person should not be considered responsible for a crime if he was unable to conform to the law. The standards for excusing excessive use of force or violence are set rather high.

Firstly, the law only speaks of excusable excess in certain specific situations, namely when it is *a priori* justified to use a certain amount of violence, force, infliction of damage and so on (due to the provisions for self-defence, necessity, acting by order etc.). Secondly, if the perpetrator has used excessive violence, responsibility is only excluded if the actor had difficulties in coming to his senses (Penal Code, Chapter 24 Section 6). The message in this regulation is: Your actions were wrong, but we will not hold you responsible since you could not conform to the law.

What circumstances could then constitute reasons for excusing unjustifiable, excessive behaviour? Firstly, it is required that the defendant was in distress and that the situation could qualify as one that objectively justifies people in similar

situations using a certain amount of violence. This tells us that the specific situation must be rather extreme. In situations where people are exposed to danger, threats, or are ordered to do things, they generally do not have the same ability to make their own sound judgements about what (is the best thing) to do. In other words: the ability to make sound judgements can, to some extent, be presumed to be impaired in such circumstances. In their assessment of whether the accused had (such) difficulties in coming to his senses (which presuppose a normative evaluation), courts are instructed to take into consideration (a) the character of the danger, (b) the time at the person’s disposal to consider his actions and to restrain himself, as well as (c) his individual abilities.²¹

If a person *e.g.* suffers from anxiety, is easily scared or easily aggravated this could be relevant to the question of whether or not he can be excused.²² The assessment assumes the perspective of the accused and his particular dispositions, and is thus strictly subjective.²³ From this we can conclude that acting while in a disturbed state up mind—even if this is characterized as affect or hot temper—*can* result in the accused being excused provided that the circumstances surrounding the crime are of a special kind (*i.e.* self-defence, necessity etc.) and the accused had actual difficulties in coming to his senses.

It is noteworthy that if this assessment is strictly subjective, only focusing on the individual’s general capacities (character), it seems that we are not interested in what reasons the agent had for being upset. Nor does the law (in theory) set particularly high standards for exercising self-restraint in these situations. This seems to suggest that we treat a person who acts excessively as someone whose abilities is diminished and that this could excuse him. His difficulties in coming to his senses are treated more or less as a trait of character relevant to the assessment of criminal responsibility. This depiction of excusable excess, as indicating a diminished capacity due to bad character is, nevertheless, somewhat misleading. The law concerning excess as an excuse must viewed in context – *i.e.* as a norm complementing primary rules concerning justification (*i.e.* self-

21 As a comparison, German law takes a somewhat more restrictive approach to excess as an excuse. It seems that this defence is only applicable in cases of self-defence (German Penal Code Section 33). Excessive self-defence is an excusatory defence when a person exceeds the limits of self-defence *out of* confusion, fear or terror (in German: “Verwirrung, Furcht oder Schrecken”). Thus, the German approach has limited the possible states of mind that could suffice, to so-called asthenic states of mind (*i.e.* weak states of mind). Sthenic states of mind, *e.g.* rage, anger, fury etc., are not relevant. The reasons for excusing the defendant are entirely based on an assumption of diminished capacity, which follows from the prerequisite that the exceeding of the limits was caused by the state of mind (“*aus* Verwirrung...”). For further reading, see Claus Roxin, *Strafrecht, Allgemeiner Teil – Band 1* 1994 p. 829 ff. and Michael Bohlander, *Principles of German Criminal Law* 2008 p. 121 f.

22 Nils Jareborg, *Allmän kriminalrätt* 2001 p. 361.

23 In the assessment of whether the accused had difficulties in coming to his senses, Swedish law is not clear about whether his reasons (for having these difficulties) should relate only to the situation at hand (*i.e.* self-defence, necessity etc.) and the circumstances surrounding it, or if other reasons can interfere (*e.g.* being drunk, angry with something else etc.). One reason to focus only on the circumstances that justify a certain use of violence is that the provision stating excuse is only applicable in cases when the deed is partially justified. On the other hand, the provision in the Penal Code, Chapter 24 Section 6 does not mention any circumstances other than the defendant “having difficulties in coming to his senses”.

defence, necessity, acting on orders etc.). In cases of excess, we presuppose that the accused has been (more or less) forced to act in an extreme situation. The actions of the agent were partially justified, but he has exceeded his right to use force or violence. Under these (extreme) circumstances we can excuse him, if he had certain difficulties in coming to his senses. Thus, there is no requirement that the (presumed) disturbed state of mind caused him to lose his self-control.²⁴ What diminishes his culpability is primarily the situation at hand. The fact that the defendant was angry, or upset in other ways, cannot be ignored since it probably affected his ability to come to his senses. Nevertheless, a disturbed state of mind is not the primary reason for accepting excess as an excuse. Nor is the state of mind conclusive in the question of whether or not the defendant should be excused.²⁵

To what extent courts really accept previous provocation or a bad temper as sufficient reasons for a reduced ability to come to one's senses is an open question. There are reasons to suspect that courts are rather careful in their practices.²⁶ If this is the case, it is probably a manifestation of a moral claim that we, as human beings, are *a priori* responsible both for who we are and the choices we make. We are eagerly expected to control ourselves. Having bad character traits (*e.g.* aggressiveness, hot temper etc.) is, therefore, not easily accepted as extenuating regardless of the difficulty of the situation.²⁷

To sum up: a hot temper or being in affect can sometimes (in certain qualified situations) influence the appraisal of whether someone has had difficulties in coming to his senses. Whether the perpetrator had good or understandable reasons for being angry or upset does not play a decisive role.

5.2 *Affect as a Reason for Extenuation*

If the defendant's reasons for acting in anger or "out of character" are not justifiable or completely excusable, this does not automatically mean that we are indifferent to the fact that the agent was affected by strong emotions. Reasons exist for not completely disregarding why the offender was upset. Suppose, for example, that the defendant had good reason to respond to having been wronged. Would this not be a motive for acknowledging these reasons for acting when assessing *e.g.* his degree of blameworthiness?

Swedish law sometimes treats criminal acts, committed in affect or other disturbed states of minds, more leniently when it comes to sentencing. Thus, a disturbed state of mind, or the (unjustifiable) loss of self-control, seem to be

24 Compare what has been said in *supra* footnote 23 on the applicability of the defence of excessive self-defence.

25 What could perhaps be disputable is why this argument does not work analogously when we assess guilt (*mens rea*). As explained above, disturbed state of mind seems to suffice as evidence of an indifferent (or hostile) attitude that is equally as blameworthy as other forms of intent.

26 Compare *NJA 1977 p. 655, NJA 1988 p. 495, NJA 1994 p. 48, NJA 1995 p. 661, RH 1984:129 and RH 1993:163.*

27 See also William Wilson, *Central Issues in Criminal Theory* 2002 p. 328.

features that can have an effect on the assessment of the degree of blameworthiness. I will briefly examine this practice of extenuation.²⁸

Extenuation comes in, at least, two forms. People acting in a disturbed of mind are often said to act impulsively (in haste, without motive etc.). This could be a reason for the court choosing a different label for the crime. The most obvious example of this form of extenuation is reducing the crime of murder to that of manslaughter.²⁹ Changing the label to a less serious offence, means that the scope of the sentence (expressed through the attached penal scale) is limited. Another possible example could be the reduction of aggravated assault to assault.

It should be emphasized that extenuation of this kind does not automatically follow from the fact that the action was carried out in affect, impulsively or in haste. Rather, extenuation is offered because acts of this kind are typically surrounded by (other) circumstances that influence the seriousness of the crime. A prerequisite for reducing murder to manslaughter is that the crime—*all aspects considered*—is thought to be less serious. It is not sufficient for the offender to be less blameworthy and it is never conclusive that the defendant has acted in affect.³⁰ Nevertheless, when reviewing precedents on intentional killing from the Supreme Court, one gets the distinct impression that the perpetrator’s state of mind is still an important reason for extenuation in relation to crimes against the person.³¹ Acting in affect, hot anger or senseless rage, thus prevails as a (conclusive) reason for extenuation.

When we compare *extenuation* in terms of reducing murder to manslaughter to excess as an *excusing* circumstance, we find one important difference. In situations where the impulsive character of the action affects the labelling of the crime (by reducing it), it is not necessary for the situation preceding the crime to be justified in any way (*e.g.* by necessity). On the other hand, when, *e.g.*, murder

28 There are other states of mind that can also be (at least partially) grounds for extenuation very similar to the case when someone is provoked to anger or affective actions. The Penal Code, Chapter 29 Section 3 specifically mentions cases where the accused, as a consequence of mental disturbance or emotional excitement (*e.g.* depression, personal problems, or extreme fatigue), has had a markedly diminished capacity to control his actions. This section further mentions manifestly deficient development or capacity for making judgements. All these limitations in capacity can be affected by strong emotional states of mind. Since most crimes are examples of a lack of judgment, many of these grounds for extenuation must be applied with great caution. Since I am mainly concerned with “acting in affect” in this essay, I will pay no further attention to these possibilities of extenuation. Compare below footnote 33 about the concept of “tiefgreifende Bewußtseinstörung” in German law.

29 In the Penal Code of 1864 killing in haste was *a priori* considered to be labelled as manslaughter. This opinion was changed with the new Penal Code of 1965, according to which killing constitutes manslaughter “if in view of the circumstances that led to the act or for other reasons, the crime (...) is considered to be less serious. (Penal Code, Chapter 3 Section 2.)

30 For a similar approach to reducing murder to manslaughter in Scottish law, see Gerald H. Gordon & Michael G. A. Christie, *The Criminal Law of Scotland* 2000 p. 291.

31 See *e.g.* NJA 1975 p. 594, NJA 1987 p. 33, NJA 1995 p. 464. Reasons for *extenuation* due to a disturbed state of mind can be outweighed by aggravating circumstances surrounding the crime, see *e.g.* NJA 1989 p. 97 and NJA 1994 p. 310. For further reading and comments, see Per Ole Träskman, JT 1995/96 p. 434 ff.

is reduced to manslaughter because the crime was considered less serious, the reasons for extenuation can never lead to an acquittal or complete exoneration. The circumstances only constitute a partial excuse, warranting a reduction of the punishment.

In neither of the two cases examined is “the disturbed state of mind” a conclusive reason for extenuation. If the perpetrator’s state of mind influences judgement about extenuation, the reasons he was upset do not seem to be directly relevant. We do not require (morally) good or otherwise justifiable reasons for someone to be angry or in affect. An affected person can indeed have very poor reasons for being angry or agitated, but he can nevertheless be excused; the only prerequisite is that he has had *difficulties in coming to his senses* in a situation of presumed difficulty. A person with a hot temper, who kills a person on impulse, can be accused of manslaughter even though no morally acceptable reasons for him to be upset exist at the time; the only requirement is that the crime is considered to be less serious. One conclusion, therefore, is that a disturbed state of mind plays no decisive role as an independent reason for extenuation. Nevertheless, such consideration can have an effect on the assessment of whether the defendant suffered difficulties in coming to his senses, or if the crime, all things considered, is deemed less serious.

Finally, I will turn to the question of *provocation*. Often when a defendant has committed a crime in a disturbed state of mind, some understandable reasons for his mental state can be found. Provocation can be such a reason and thus a ground for extenuation. However, the question of *why* the defendant deserves mitigation remains unsolved.

The reasons why people acting under provocation deserve a more lenient sentence have long been the object of debate among legal scholars. Several explanations can be found in legal doctrine. It is important to stress that provoked behaviour need not necessarily be an act carried out in affect. The law on provocation covers a wider range of situations. Since my main concern here is with situations in which the offender acts “in affect”, I will focus on cases where the perpetrator, having been previously provoked to anger, reacts by committing a criminal act. Let us begin by examining different approaches to how provocation could be justified as a reason for extenuation.

German law on provocation treats the problem as question of diminished responsibility. According to the German Penal Code, Section 21, a sentence can be mitigated if a defendant has had substantially diminished capacity to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation. The cause of this diminished capacity must be *a serious mental disorder*.³² This concept derives from the assumption that the mental state of the offender is supposed to be pathological. It is, however, interpreted rather broadly and, thus, covers people acting in affect.³³ It is not clear exactly how serious,

32 In German: “Schwere seeliche Abartigkeit” (StGB § 20).

33 German law, in order to allow extenuation, does not require the defendant to be without fault when he became furious or angry; *i.e.* the disturbed state of mind can be self-induced by the perpetrator. On the other hand, not every form of affect will meet the requirement of

continuous or pathological the mental disturbance of the perpetrator has to be. Bohlander describes affect as “an explosive reaction based on an extreme emotional state where no deliberate decision-making occurs anymore” (e.g. extreme rage, hate, shock, fear or panic). At the same time, the identified state of mind includes some instances of the battered-women syndrome and provocation in general.³⁴ The German position regarding affect and provocation is apparently based on the impaired volition theory; affect is understood as a partially excusing circumstance.

The common law doctrine of provocation is also derived from the assumption that extenuation is deserved because the actor was upset, and thus suffered from an impaired ability. Historically, common law regarded provocation as relevant only in cases of homicide. “Hot anger” was then a prerequisite for a reduced sentence.³⁵ Today, provocation still provides a *defence* only in a case of murder. However, for other offences the fact that the defendant was provoked may be a relevant factor when deciding on an appropriate sentence.³⁶

The doctrine of provocation in common law, similar to the German position, takes the view that a provoked agent was controlled by his emotions and that this state of mind diminished his ability to conform to the law. Nevertheless, acting in a rage or hot anger is not sufficient. A normative (objective) prerequisite limits the applicability of provocation as a reason for extenuation: the defendant’s behaviour (as a victim of provocation) must be such that a reasonable person might also react in the same way.³⁷

This impaired volition theory has been criticised on several grounds. Narayan and von Hirsch present several arguments as to why this approach is problematical.³⁸ Firstly, it might lead to unfair results as the norm does not allow extenuation to people who are calm and balanced, but who, nevertheless, have (very) good reasons for aggravation or anger. The calm and balanced person, who reacts to having been wronged by committing a crime, can never claim mitigation on the grounds of provocation. A person lacking such good reasons for being provoked can nevertheless do so. Secondly, since the standard of a reasonable person rules out extenuation in cases where people truly suffer from impaired abilities, but at the same time lack good reasons for being angry, the range of applicability becomes too narrow (provided that the theory is based on the idea of impaired volition). Thirdly, the lack of a prerequisite requiring that the victim has indeed been wronged makes the impaired volition theory morally

“tiefgreifende Bewußtseinstörung”. See Claus Roxin, *Strafrecht, Allgemeiner Teil – Band 1* 1994 p. 734 ff.

34 Michael Bohlander, *Principles of German Criminal Law* 2008 p. 133.

35 Andrew von Hirsch & Nils Jareborg, *Provocation and culpability. Responsibility, Character, and the Emotions* (Ed. Ferdinand Schoeman) 1987 p. 242 f.

36 Jonathan Herring, *Criminal Law – Texts, Cases and Materials* 2008 p. 238 f.

37 See Andrew Simister & G R Sullivan, *Criminal Law, Theory and Doctrine* 2007 p. 351 ff.

38 For further reading, see Uma Narayan & Andrew von Hirsch, *Three Conceptions of Provocation*. *Criminal Justice Ethics* 1996 p. 15-24.

empty. It could thus lead to extenuation despite there having been no preceding blameworthy behaviour (by a provocateur).

The doubts expressed about the impaired volition theory seem to rest on the same reasons that support the rather careful practice in Swedish law when it comes to accepting acting in an affect as a point of relevance. As has been discussed previously in this essay, Swedish law takes the position that hot-headedness or acting in affect does not normally affect the actor's awareness (but albeit, and indeed often, his judgement). Furthermore, courts are rather restrictive in their use of excess as a complete excuse. Nevertheless, provocation is accepted as a reason for extenuation. So how can the Swedish approach be justified?

If the disturbed state of mind is elicited by another's grossly offensive behaviour, provocation can be a relevant argument for reducing the sentence (Penal Code, Chapter 29 Section 3). Instead of relying on the impaired volition theory the Swedish provocation doctrine derives from an assumption that the defendant (*i.e.* the provoked) has morally acceptable reasons for reacting in the way he did.³⁹ He is entitled—and, to some extent, expected—to be angry or upset; we therefore show sympathy with the provoked person.⁴⁰ It is important to notice that this theory does not in any way attempt to justify the *actions* of the agent. Thus, it is not a question of (partial) justification. The actions of the provoked are indeed condemned. However, the law expresses understanding of the agent's conflict of interests: feeling anger and resentment *versus* restraining oneself from expressing these (*e.g.* violent acts). This is a moral conflict, and it is not primarily a question of whether or not the provoked had the ability to control himself. It is not even a prerequisite that the offender was actually upset or angry at the time of his actions. Instead, the assessment mainly focuses on whether the accused had good reasons for feeling angry (being in affect, distress etc.) as well as on his inclination to react. The law takes a rather strict view on allowing provocation as a reason for extenuation.

Jareborg and Zila claim that the Swedish regulation on provocation in some respects resembles the doctrine of excess as an excuse.⁴¹ This is, of course, true since mitigation in sentencing is concerned with the question of whether the defendant can be fully blamed; provocation in Swedish law is thus treated as a partial excuse. On the other hand, there is a difference as provocation requires morally acceptable reasons for the actor to react in the way he did, whereas a person acting excessively will be excused only if he was in an extreme situation, and—because of his individual abilities and predispositions—in fact had

39 Nils Jareborg & Josef Zila, *Straffrättens påföljdslära* 2007 p. 113. Jareborg and von Hirsch have also developed a theory concerning how these acceptable reasons for reacting can be derived from a principle of resentment, see Andrew von Hirsch & Nils Jareborg, *Provocation and culpability*. Responsibility, Character, and the Emotions (Ed. Ferdinand Schoeman) 1987 p. 248 ff.

40 Uma Narayan & Andrew von Hirsch, *Three Conceptions of Provocation*. Criminal Justice Ethics 1996 p. 19.

41 Nils Jareborg & Josef Zila, *Straffrättens påföljdslära* 2007 p. 113.

difficulties in coming to his senses. In the latter case, the reasons for his difficulties need not necessarily be "good". Extenuation due to provocation emphasizes the actor's reasons for being provoked. Compared to the defence of excusable excess, the reasons for anger, affect or a disturbed state of mind must, in order to suffice, be good or morally acceptable. The asymmetry can perhaps be explained by the fact that situations allowing a defence of excess presuppose very good reasons for reacting (*e.g.* self-defence, necessity, following an order); therefore there is a margin of discretion when assessing whether or not the excessive behaviour ought to be sufficient to completely excuse the accused.

6 Conclusions

What conclusions can be drawn from this analysis? Are affect, hot anger and other expressions of a disturbed state of mind relevant factors when establishing criminal liability? I suppose that "yes, but..." and "no, but..." would be equally good answers to this question. That the actions by the defendant occurred when he was "in affect" or in a state of "hot anger" sometimes appear to be relevant, but there is still always the "but". The significance of emotions accompanying actions varies from context to context. The various states of mind can also be of different characters; not every (disturbed) state of mind is relevant when establishing responsibility.

The actual practical relevance of establishing "a state of mind" can be disputed. When evaluating criminal responsibility, judges appear to take a moderate approach to accepting that the "state of mind" is conclusive. Most actions undertaken in hot anger or in distress are still considered to be (appropriate) *actions* for which we are responsible. Experiencing emotions (even strong ones) is part of being conscious. Emotions also affect the process of decision-making. In normal circumstances, courts do not consider that the existence of strong feelings signifies the absence of general *awareness* or deliberation. In order to exclude the possibility that the defendant was generally aware or conscious, the emotional state of mind must be, more or less, pathological.

The analysis, nevertheless, shows that the emotional state of mind can affect the assessment of *culpability*. Most important in this regard is the fact that emotions can limit a person's ability to apprehend, foresee and contemplate the risks as well as the (causal) consequences of his actions. Strong emotional movement can, therefore, influence *cognitive ability*. This, in turn, can affect the assessment of a person's guilt and, thus, the agent's responsibility.

Emotional states of mind can also be used to ascribe someone a certain *attitude*. Some emotions (but definitely not all) are thought to be evidence of a more blameworthy, episodic attitude of indifference. The emotions must then be of a negative character (*e.g.* displaying anger, rage, fury or hostility). Furthermore, they must have been carefully thought through by the person. If this is so, it might be fair to assume that the accused has adopted a hostile or indifferent attitude sufficient to prove intent. The problem is that the presence of attitudes is very difficult to prove. There is never an easy (mechanical) answer to the question of whether an attitude has existed, judging only on the basis of the

accused being in affect (or otherwise in a disturbed state of mind). It is equally important to observe that even though we manage to establish a certain attitude in the agent (no matter how villainous it is), it can never be of any relevance when assessing the cognitive element of *dolus eventualis* (i.e. that the defendant foresaw the risk of the harm that occurred).

Furthermore, a disturbed state of mind seems—in special circumstances—to be of some relevance in assessing whether the offender should be *excused*. We are not then primarily interested in whether the accused was in affect or not. Instead, we ask if the agent had difficulties in coming to his senses. The regulation allows us, to some extent, to take into consideration the defendant's ability to conform to the law. Judges, however, seem to take a rather careful attitude to completely excusing offenders on this ground.

Finally, certain behaviour can be partially excused if the offender had good reasons for being *provoked*. Such reasons have nothing to do with impaired ability or capacity. Rather, they emanate from the fact that the actor's sense of anger, outrage etc., is an appropriate emotional response to the provocative behaviour.

What has been said so far demonstrates that being agitated or in affect *can* influence the assessment of criminal responsibility in several ways. Whether or not this has any practical relevance depends on how inclined judges are to refer to anger, affect or other emotions as evidence of something (e.g. an indifferent attitude, a lack of awareness, a lack of foresight, lack of ability etc.).

One could, perhaps, wonder whether we still take too lightly the emotions people experience and their impact on behaviour. Perhaps, it would be fairer to take into consideration that certain behaviour is "out of character", "impulsive" or guided by strong emotions that affected the judgement of the perpetrator. My view is that the reluctance to pay further attention to agitation (and its effects) is justified. My analysis has shown that the validity of the assumption that being "in affect" is equivalent to having an impaired mind or a diminished (physical) capacity, is rather uncertain. The philosophy of action and mind tells us that the influence of strong emotions does not, *prima facie*, deprive human behaviour of its characteristics of being controlled and advertent. Even if we were to assume that strong emotions of anger impair a person's abilities, we would still face great practical problems. Indeed, it is still only with great difficulty that we manage to assess emotions and their impact, and we do not possess the tools for assessing emotions with any accuracy. Whether or not a defendant is considered to deserve exoneration or extenuation, could become arbitrary and, thus, lead to unfair as well as socially undesirable consequences. On the basis of this, it must be seen as wise to abstain from reading too much in to the fact that a person was agitated at the time he committed a crime.

If I am correct, then my conclusion should work the other way around. That is, we should perhaps be equally hesitant about accepting affect, anger, rage and so on, as relevant when assessing a guilty mind and a perpetrator's villainous attitude. It, therefore, seems fair to question the adequacy of formulating a judgement about the attitude of a perpetrator based solely on the accused being in a disturbed state of mind.