

The Duress Defense’s Uncharted Terrain: Applying It to Murder, Felony Murder, and the Mentally Retarded Defendant

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I. INTRODUCTION

On July 23, 2001, Aaron Haynes coerced Terance Johnson into helping him and an associate rob a bank in Memphis, Tennessee.¹ Haynes had previously bullied, intimidated, and threatened to kill Johnson, including incidents in which Haynes had pointed a gun at Johnson, arranged to have Johnson beaten up, and repeatedly taken Johnson’s money from him by force.² On the day of the robbery, Haynes threatened to kill Johnson if Johnson did not follow Haynes’s instructions.³ Johnson complied with Haynes’s instructions, assisting Haynes and accomplice William Maxwell in robbing the bank.

During the bank robbery, Haynes shot and killed bank customer Sheryl Lynn White.⁴ Johnson played no direct role in Ms. White’s death. Haynes, Maxwell, and Johnson were all arrested and charged with bank robbery as well as felony murder for the death of Ms. White.⁵

1. Order Granting In Part and Denying in Part Government’s Motions in Limine at 1-2, *United States v. Johnson (Terance Johnson)*, 416 F.3d 464 (6th Cir. 2005) (No. 01-20247) [hereinafter *Terance Johnson* Evidentiary Order].

2. *Id.* at 3; Brief of Appellant at 12-13, *Terance Johnson*, 416 F.3d 464 (No. 01-20247) (citing trial transcripts); Order Denying Defendant’s Motions for a Downward Departure from Sentencing Guidelines and for Reconsideration at 10, *Terance Johnson*, 416 F.3d 464 (No. 01-20247) [hereinafter *Terance Johnson* Sentencing Order].

3. *Terance Johnson* Evidentiary Order, *supra* note 1, at 3.

4. *Terance Johnson* Evidentiary Order, *supra* note 1, at 2.

5. *Id.* at 1-2. The actual charges arose under 18 U.S.C. § 2113(a), (d), (h)(2) (2000) (bank robbery); 18 U.S.C. § 2113(e), (h)(2) (causing a death in the course of a bank robbery); 18 U.S.C. § 924(c)(1), (3) (2000) (using and carrying a firearm in relation to a bank robbery); and 18 U.S.C. § 924(j) and (j)(2) (causing a death through the use of a firearm). *Id.* Because all that is required for a conviction under § 2113(e) is proof that the defendant committed the predicate felony and a death (intentional or accidental) resulted, the § 2113(e) charge is equivalent to a traditional charge of felony murder. *See Terance Johnson* Evidentiary Order, *supra* note 1, at 6.

At the insistence of Aaron Haynes, Terance Johnson shot a bank security guard nonfatally. *Id.* at 2. Because the security guard did not die, there was no felony murder charge involving the guard. The government did not bring a separate assault charge

Terance Johnson is mentally retarded. Examinations held for the purposes of trial yielded an I.Q. score of sixty-six.⁶ His mental age ranges between six and ten years, and he has the functioning capacity of a child in grade school.⁷ Expert witnesses testified, and the district court found, that mentally retarded individuals like Johnson are “especially susceptible to coercion,” and “suffer from a diminished ability to think of and choose alternative courses of action.”⁸

Despite determining that Johnson was mentally retarded and that “Haynes coerced him to commit the robbery,”⁹ the district court excluded all evidence relating to Haynes’s coercion and Johnson’s retardation. Drawing upon the traditional rule that the common-law defense of duress does not apply to a charge of murder, the district court ruled that any evidence of duress was irrelevant as a matter of law to the felony murder charge.¹⁰ The question of duress might theoretically be relevant at sentencing under this approach. But since the relevant federal statute set a mandatory minimum sentence of life imprisonment,¹¹ that would not serve to help Terance Johnson. Thus, although there was no factual dispute that Haynes threatened to kill Johnson if Johnson did not obey his instructions and assist in robbing the bank, the criminal justice system was barred from considering this undisputed fact at any stage of the case.

The court also ruled that the duress defense involved an objective standard regarding the elements that the defendant (a) be faced with an immediate threat of death or serious bodily harm and (b) have no opportunity to avoid the danger.¹² That is, the defendant must not simply perceive a threat, but rather must be faced with an actual threat; according to the district court, even a mistaken perception that is nonetheless reasonable would be insufficient. Similarly, it would not be enough for the defendant to believe (even reasonably) that there is no

against Terance Johnson regarding the bank guard shooting, and during the course of the litigation this shooting played no part in the legal issues discussed in this article. *See id.* at 1-2 (stating the charges brought against Johnson).

6. *Terance Johnson* Evidentiary Order, *supra* note 1, at 3. An I.Q. of seventy or under indicates retardation.

7. *Terance Johnson* Sentencing Order, *supra* note 2, at 6.

8. *Id.* at 9, 11.

9. *Id.* at 12.

10. *Terance Johnson* Evidentiary Order, *supra* note 1, at 4-8.

11. *See* 18 U.S.C. § 2113(e) (2000).

12. For a discussion of the elements of the duress defense, see *infra* Part II.

opportunity to avoid the danger; rather, it must be the case that no such opportunity in fact exists.¹³

Rather than go to trial under these evidentiary restrictions, Terance Johnson entered into a conditional guilty plea. The defendant pled guilty to the charges, conditioned on his right to appeal the two evidentiary rulings described immediately above.¹⁴ The case went up to the U.S. Court of Appeals for the Sixth Circuit on two issues: (1) whether duress is an applicable defense to a charge of felony murder; and (2) whether evidence of a defendant's mental retardation is relevant to a defense of duress.

On August 5, 2005, the Sixth Circuit upheld the district court's rulings.¹⁵ The court left undecided the first question of whether duress could apply to felony murder. Instead, the court affirmed on the alternate ground that Terance Johnson had failed to present a prima facie case on the duress defense. Because Johnson was left alone with the gun for some period of time while Haynes parked the car, the Sixth Circuit decided that any reasonable jury would have to find that Johnson had a "reasonable opportunity" to escape Haynes's coercive influence. Since such a reasonable alternative is inconsistent with the elements of the duress defense, the Sixth Circuit concluded that Johnson lacked sufficient evidence to present that defense to the jury.¹⁶

13. *Terance Johnson* Evidentiary Order, *supra* note 1, at 13.

14. Plea Agreement at 1-2, *United States v. Johnson (Terance Johnson)*, 416 F.3d 464 (6th Cir. 2005) (No. 01-20247) [hereinafter *Terance Johnson* Plea Agreement].

15. *Terance Johnson*, 416 F.3d at 470.

16. *Id.* at 468-69. The opinion failed to address the amicus argument that because Haynes lived in Johnson's neighborhood and had been to his home many times, Johnson's reasonable fear of Haynes's retaliation for noncompliance would last past the day of the robbery itself, undercutting the utility of simply running away from the robbery scene.

The lack of a prima facie case on duress was an alternate ground relied upon by the district court to supplement its legal ruling that duress could not be asserted against a felony murder charge. *Terance Johnson* Evidentiary Order, *supra* note 1, at 9-12. This ruling on the government's motion in limine to exclude duress evidence came without an evidentiary hearing and precluded Johnson's entire defense. *See generally id.* It raises troubling procedural issues regarding the defendant's right to remain silent and put the government to its burden of proof; the right to present evidence and confront witnesses; and the right to a jury trial. Indeed, the mere requirement that defendant respond to this motion by proffering evidence raises troubling issues about defendant's right to silence, possible subversion of the normal rules limiting discovery in criminal cases, and defense counsel's work product privilege. Such issues have received some scholarly attention. *See* Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1272 (1987); Douglas L. Colbert, *The Motion In Limine: Trial Without Jury—A Government's Weapon Against The Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 52-54, 70-77 (1986). While intriguing, these issues are outside the scope of this article.

On the second issue, the Sixth Circuit ruled that evidence of mental retardation was not relevant to a duress defense.¹⁷ The court ruled that consideration of an individual defendant's retardation would defeat the objective nature of the "reasonable person" standard involved in the elements of duress.¹⁸ The panel opinion did not clarify whether this "objective" standard allowed for reasonable mistakes by a defendant regarding the existence of a threat or the impossibility of safely refusing the coercer's demands, nor did it refer at all to the district court's ruling that a reasonable mistake by a defendant would not be sufficient to meet the objective standard of the duress elements.

Both of these main issues are questions of first impression in the federal courts. No federal court has ruled on the applicability of duress to felony murder. A few state courts have so ruled, with mixed results.¹⁹ Prior to the August 2005 ruling in the *Terance Johnson* case, no federal court has ruled on the relevance (if any) of mental retardation in meeting the elements of duress. A few federal courts have ruled in the analogous area of "battered women's syndrome," with mixed results.²⁰

Scholarship on the defense of duress is sparse. Some attention has been given to the general question of whether there should be a duress defense to intentional murder,²¹ but none to the distinct question of whether it should be a defense to (non-intentional) felony murder, let alone the question of the relevance of mental retardation to the defense. This scholarship includes some discussion of cases involving the background of war, and the special type of duress that war provides.²² These cases raise the question of the relevance of coercion when military personnel follow orders—a question of increasing salience amid the recent controversies concerning the mistreatment of prisoners by U.S. military personnel.²³

17. *Terance Johnson*, 416 F.3d at 466.

18. *Id.* at 469.

19. See *infra* notes 117-126 and accompanying text.

20. See *infra* Part V.B.4.

21. See *Terance Johnson* Plea Agreement, *supra* note 14, and *infra* text accompanying note 29.

22. See Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 VA. J. INT'L L. 861 (2003); Valerie Epps, *The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself*, 37 NEW ENG. L. REV. 987 (2003).

23. Stephen Hedges, *Report Cites Larger Role of Military Intelligence in Prisoner Abuse*, CHICAGO TRIB., Aug. 26, 2004, at C1; Thomas Crampton, *U.S. Officers Tied to*

This article reexamines the defense of duress, both generally and in specific contexts raised by the *Terance Johnson* case. Part II provides general background on the defense, and distinguishes it from the related common-law defense of “necessity.” Part III argues for a reversal of the common-law rule categorically barring assertion of the defense to the crime of murder. It explains that while a threat to a defendant’s life may never justify the act of killing an innocent person, it may excuse a defendant from responsibility for that wrongful act. Part IV argues that even if the law bars the use of duress as a defense to murder, that rule should not apply to a charge of felony murder, especially where the coerced defendant played no direct part in the killing. Among other things, such a result follows from the basic rule that duress can excuse the predicate felony, and liability for the predicate felony is a prerequisite to felony murder liability. Part V argues that duress allows for reasonable mistakes regarding the presence of a threat and the absence of lawful alternatives. It also argues that evidence of mental retardation and other cognizable physical and mental disabilities should be relevant under the duress defense’s “reasonable person” standard.

II. BACKGROUND ON DURESS

A. General

“Duress,” which is usually used synonymously with “coercion,”²⁴ is a common-law defense available in the federal courts and those of many states.²⁵ It excuses criminal conduct where “the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law.”²⁶ Otherwise unlawful conduct caused by such duress will excuse the crime in question “unless that crime consists of *intentionally* killing an innocent third person.”²⁷

Iraqi Abuse, INT’L HERALD TRIB. (Paris), Aug. 26, 2004, at 1; *The Truth About Abu Ghraib*, WASH. POST, July 29, 2005, at A22.

24. See *United States v. Michelson*, 559 F.2d 567, 569 n.3 (9th Cir. 1977). “Duress” has also been used interchangeably with “compulsion” and “intimidation.” See 1A KEVIN F. O’MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 19.02, at 758-59, 765 (2000).

25. *United States v. Bailey*, 444 U.S. 394, 409-11 (1980).

26. *Id.* at 409. A leading criminal law treatise defines duress as: “A person’s unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury . . . is to engage in [unlawful] conduct . . . , and (2) which causes the defendant to engage in that conduct” 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.3, at 614 (1986).

27. LAFAVE & SCOTT, *supra* note 26, § 5.3, at 614 (emphasis added).

A common formulation of the elements of the defense includes:

- (1) an immediate threat of death or serious bodily injury to the defendant (or in some cases, someone close to the defendant);²⁸
- (2) a well-grounded fear that the threat would be carried out; and
- (3) no reasonable opportunity to avoid the threatened harm.²⁹

The defendant has an initial burden of producing sufficient evidence to raise the defense;³⁰ if he does so, most courts would give the prosecution the burden of persuading the jury that the defendant did not meet the elements of the defense.³¹

Some courts would add an additional element that (4) the defendant did not recklessly place himself in a situation where he would face the threatened harm,³² or (5) there is a direct causal link between the threatened harm and the criminal act.³³ While some cases discuss an additional element that the defendant promptly surrender himself to the authorities after avoiding the threatened harm, that element only applies where the defendant asserts the duress defense to a charge of unlawfully

28. See *United States v. Charleus*, 871 F.2d 265, 270 (2d Cir. 1989) (suggesting that the threat can be against a family member); *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) (same); *O'MALLEY ET AL.*, *supra* note 24, at 755 (Committee Comments on Seventh Circuit Pattern Jury Instructions) (stating that threat against third party is not limited to members of defendant's family).

29. See *United States v. Beltran-Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989) (citing *United States v. Jennell*, 749 F.2d 1302, 1305 (9th Cir. 1984)). Similar elements can be seen in other opinions. See *United States v. King*, 879 F.2d 137, 138-39 (4th Cir. 1989); *United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986); *United States v. Riffe*, 28 F.3d 565, 569 (6th Cir. 1994); *United States v. Toney*, 27 F.3d 1245, 1248 (7th Cir. 1994); *United States v. Rawlings*, 982 F.2d 590, 593 (D.C. Cir. 1993); *United States v. Scott*, 901 F.2d 871, 873 (10th Cir. 1990); *United States v. Lee*, 694 F.2d 649, 654 (11th Cir. 1983). For a listing of the elements as set out by pattern jury instructions in the various federal circuits, see *O'MALLEY ET AL.*, *supra* note 24, at 749-50 (1st Cir.), 751 (2d Cir.), 752 (4th Cir.), 753 (5th Cir.), 754 (6th Cir.), 758 (8th Cir.), 763 (9th Cir.), 770 (10th Cir.), 771 (11th Cir.), 772 (D.C. Cir.).

30. *Bailey*, 444 U.S. at 412-13 n.9.

31. See *Riffe*, 28 F.3d at 568, 568 n.2; *United States v. Mitchell*, 725 F.2d 832, 835-36 (2d Cir. 1983). *But see* *United States v. Domiguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991) (stating that a defendant has a "preponderance of evidence" burden of persuasion).

32. See, e.g., *United States v. Johnson (Terance Johnson)*, 416 F.3d 464, 468 (6th Cir. 2005); *United States v. Blankenship*, 67 F.3d 673, 677 (8th Cir. 1995); *Harper*, 802 F.2d at 117.

33. See, e.g., *Terance Johnson*, 416 F.3d at 468; *Harper*, 802 F.2d at 117.

escaping from prison.³⁴ This special element in escape cases makes sense because escape is a crime continuing in nature; the criminal offense continues until such time as the defendant surrenders.

B. Duress Versus Necessity

The defense of “duress” is distinct from the defense of “necessity,” which is sometimes referred to as “justification.” Generally, duress has been limited to situations involving threats from human sources, while necessity can also encompass threats from natural sources, such as rabid dogs or violent storms.³⁵ This is also the approach taken by the Model Penal Code (MPC).³⁶

More importantly, the necessity defense contains a “balance of harms” element: the harm caused by the defendant’s illegal act must be less than the harm which would have resulted had the defendant obeyed the law—as in the case of a mountain hiker who breaks into another’s cabin to avoid being frostbitten by a blizzard.³⁷ By contrast, the duress defense does not include such a balance of harms. Thus, if the defendant cuts off an innocent victim’s arm to avoid having his own arm cut off by a third party, the duress defense is still available, even though the harm defendant caused (the loss of an innocent third party’s arm) is not less than the harm defendant sought to avoid (the

34. See *United States v. Solano*, 10 F.3d 682, 683 (9th Cir. 1993) (stating that the duress defense does not have an express duty to surrender to the authorities outside of prison escape cases); *United States v. Alicea*, 837 F.2d 103, 106 (2d Cir. 1988) (no express duty to surrender in a non-prison escape case, although in some cases such a duty might be implicit in the more general requirement that there be “no reasonable opportunity” to avoid the harm); *Bailey*, 444 U.S. at 410-11 (holding that this element of the defense exists “in the context of prison escape”); O’MALLEY ET AL., *supra* note 24, at 746, 752 (duty to surrender applies only in escape cases) (citing *United States v. Sarno*, 24 F.3d 618, 622 (4th Cir. 1994) and *United States v. Bifield*, 702 F.2d 342, 345-46 (2d Cir. 1983)).

35. *Bailey*, 444 U.S. at 409-10; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 23.01, at 299-300 (3d ed. 2001).

36. 1 MODEL PENAL CODE AND COMMENTARIES § 3.02 cmt. at 16 (Official Draft and Revised Comments 1985) [hereinafter *MPC 1985*] (explaining that the MPC “necessity” defense can apply to either natural or man-made threats, even where the man-made threats may create overlapping liability with the “duress” defense); 10A UNIFORM LAWS ANNOTATED: MODEL PENAL CODE § 2.09(4), at 132 (West 2001) [hereinafter *Uniform Laws, MPC*] (applicability of necessity defense does not preclude applicability of duress defense).

37. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989); see also *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984); DRESSLER, *supra* note 35, at 299-300. But see *United States v. LaFleur*, 971 F.2d 200, 204-05 (9th Cir. 1991) (including a “balance of harms” element in duress). Duress, by contrast, contains no such “lesser of two evils” element. *Id.* at 204 n.3; see also 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(a), at 73-74 (2d ed. 2003) (describing MPC approach, which eschews a “balance of harms” element for duress, as the majority approach).

loss of his own arm). Going further, if the defendant cuts off the arms of two innocent persons to avoid having his own arm cut off by a coercer, the duress defense is still available. Indeed, if a “lesser of evils” analysis were part of the duress defense, it would not be a separate defense, but rather merely a subspecies of the necessity defense confined to threats by human agents.

One may well wonder why the law would require a “choice of evils” analysis for necessity but omit one for duress. The American Law Institute has explained that where a human coercer makes a defendant choose to commit a crime which is an evil equal to or greater than the evil with which he himself is threatened, the “basic interests of the law may be satisfied by prosecution of the agent of unlawful force” (the coercer). Where a defendant creates an equal or greater harm in response to a natural threat, by contrast, “no one is subject to the law’s application.”³⁸ Because of this difference regarding a “lesser evil” requirement, necessity is considered a “justification” defense, while duress is merely an “excuse” defense.³⁹ This is the near-universal view of commentators as well.⁴⁰ “Justification” defenses focus on the criminal acts themselves, while “excuse” defenses focus on the defendants who commit them.⁴¹ If a defendant establishes a justification, it means that society does not condemn the act committed; on balance, the justice system decides that society is better off that the act occurred. If a defendant establishes an excuse, society still condemns the act, but finds a reason why that particular defendant need not be punished—the defendant’s insanity, for example.⁴²

The distinction carries with it several important legal consequences. The first concerns burdens of proof. Like most excuse defenses, duress is often an affirmative defense on which the defendant bears a burden of

38. *MPC 1985*, *supra* note 36, § 2.09 cmt. at 379.

39. DRESSLER, *supra* note 35, at 299-300; *see also* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL L. REV. 1331, 1348, 1356 (1989) (criticizing some courts which blur the distinction and noting that most states treat duress as an excuse).

40. *See* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not An Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 834-35 (2003) (stating that “[v]irtually no one argues that modern defenses of duress . . . can be rationalized as a defense of justification,” but explaining why some authors take a contrary view).

41. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN’S L. REV. 725, 726 (2004).

42. DRESSLER, *supra* note 35, at 298-302.

either production or persuasion. Commentators agree that placing the burden on the defendant is more appropriate for an excuse defense.⁴³ In contrast, where a justification defense like necessity is raised, there is a better argument for a rule requiring prosecutors to bear the burden of proving the absence of a necessity.⁴⁴

Another consequence of the excuse-justification typology concerns accomplice liability. If a principal charged with a crime is acquitted on the basis of a justification defense, a defendant alleged to have been an accomplice of that principal typically cannot be held liable either. The justification-based acquittal establishes that the principal did not commit an act which society condemns; by the same token, the alleged accomplice cannot be held liable for assisting him.⁴⁵ However, an excuse defense carries with it no legal benefit to an alleged accomplice. The principal's justification-based acquittal signifies only that the principal himself will not be held liable for his actions, not that the actions themselves are immune from condemnation. Thus, the principal's accomplice can still be found guilty for assisting the principal in committing the act.⁴⁶

Courts have sometimes confused duress and necessity.⁴⁷ For example, in the Sixth Circuit case of *United States v. Singleton*,⁴⁸ the defendant had claimed that his illegal gun possession was necessary and justified to protect him against a person who had threatened to kill him. Though the court repeatedly referred to a "justification" defense, it listed duress-style elements, and neglected to mention the "balance of harms" requirement (which was not at issue in that case).⁴⁹ Later, in

43. See, e.g., Joshua Dressler, *Justifications and Excuses: A Brief Review Of The Concepts And The Literature*, 33 WAYNE L. REV. 1155, 1167-73 (1987).

44. *Id.*

45. *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963); *United States v. Lopez*, 662 F. Supp. 1083, 1085 (N.D. Cal. 1987).

46. See, e.g., *Taylor v. Commonwealth*, 521 S.E.2d 293, 297 (Va. Ct. App. 1999); DRESSLER, *supra* note 35, § 170.05(D), at 218.

47. See *United States v. Bailey*, 444 U.S. 394, 410 (1980) (noting that common law distinguished between the two, but that "[m]odern cases have tended to blur the distinction between duress and necessity"); Dressler, *supra* note 39, at 1348 (criticizing courts which blur the distinction between the two and citing cases). In *Bailey*, the only distinction explicitly noted by the Supreme Court was the common law's historic dichotomy between human threats (duress) and natural threats (necessity). But the Court also cited with approval the MPC provisions on "duress" and "choice of evils," implicitly approving the more significant distinction based on the presence or absence of a "balance of harms" requirement. *Bailey*, 444 U.S. at 409-10 (citing, inter alia, *MPC 1985*, *supra* note 36, §§ 2.09, 3.02).

For that matter, courts have often confused the more general concepts of "justification" and "excuse." See Milhizer, *supra* note 41, at 726-27 (citing examples of courts confusing the two and emphasizing the need for the distinction to be retained).

48. *United States v. Singleton*, 902 F.2d 471 (6th Cir. 1990).

49. *Id.*

United States v. Riffe,⁵⁰ the Sixth Circuit analyzed a true duress defense by borrowing the *Singleton* elements, without noting that *Singleton* had used them for a “justification” (necessity) defense.⁵¹ Similarly, the Ninth Circuit has used classic duress elements (with no lesser evil element) in delineating what it termed a “justification” defense for felons claiming that their illegal gun possession was “necessary” to protect others.⁵² One of these Ninth Circuit opinions recently stated that the term “justification” could encompass necessity and duress, as well as self-defense.⁵³ The court did not seem to draw a distinction between the defenses of duress and necessity, although the case did not raise that issue.⁵⁴

C. *The (Absent) “Balance Of Harms” Element*

In the above instances, courts incorrectly used duress-style elements for defense claims of necessity, erroneously failing to include the “balance of harms” analysis. Where it made a difference in the outcome, this mistake would likely have the effect of assisting defendants by relieving them of the burden of showing that their conduct was the lesser evil. But courts have erred in the other direction as well, to the detriment of defendants. In true duress cases, courts have sometimes erroneously imposed a requirement that the defendant’s acts constitute a lesser evil than disobeying the law⁵⁵—a requirement appropriate for a justification defense like necessity but inappropriate for an excuse

50. *United States v. Riffe*, 28 F.3d 565 (6th Cir. 1994).

51. *Id.* at 569. Despite the occasional instance of terminological confusion, the Sixth Circuit has nonetheless emphasized the need to keep the concepts of necessity and duress separate, and to use the corresponding terms correctly. *United States v. Newcomb*, 6 F.3d 1129, 1133 (6th Cir. 1993).

52. *See United States v. Beasley*, 346 F.3d 930, 933 n.2 (9th Cir. 2003) (citing *United States v. Wofford*, 122 F.3d 787, 790 (9th Cir. 1997)).

53. *Id.* at 934-35.

54. *Id.* At issue in *Beasley* was merely the question of which party had the burden of proof on the defense. *Id.* at 933-36.

55. *See, e.g., United States v. LaFleur*, 971 F.2d 200, 204-05 (9th Cir. 1991). Inexplicably, the Ninth Circuit in *LaFleur* relied on two previous Ninth Circuit cases which explicitly state the correct rule that the “lesser evil” element is *not* present regarding duress, but rather only regarding necessity. *See id.* at 204 n.3 (citing *United States v. Dorrell*, 758 F.2d 427, 430, 430 n.2 (9th Cir. 1985) and *United States v. Contento-Pachon*, 723 F.2d 691, 693, 695 (9th Cir. 1984)).

defense like duress. This was the approach taken by the federal district court in the *Terance Johnson* case.⁵⁶

The ruling in the *Terance Johnson* case illustrates the importance of this point. If the duress defense contains a balance of harms element, its applicability in homicide cases is drastically curtailed. If someone is ordered at gunpoint to kill an innocent third person, such a killing could not be excused, no matter how frightening, intense, immediate, or painful the coercion, because no innocent person's life is worth more than another's. Aside from the rare case where the coercer threatens to kill two or more people if a third person is not killed, the lesser evil requirement would disqualify the duress defense. Thus, the mistaken importation of a balance of harms element from necessity into duress carries with it real consequences.

The confusion stems in part from a misstatement of the rule in an early version of the influential LaFave and Scott treatise, *Substantive Criminal Law*.⁵⁷ Describing the defense available to someone who commits a crime "under pressure of an unlawful threat from another human being," that treatise at one time stated:

The rationale of the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, *his conduct* which violates the literal language of the criminal law *is justified because he has thereby avoided a harm of greater magnitude*.⁵⁸

A number of courts have cited this language and applied it to duress defenses,⁵⁹ including the trial court in the *Terance Johnson* case.⁶⁰ However, this passage from the treatise was corrected in the most recent current version. In May 2003, seventeen years after the first edition, it

56. *Terance Johnson* Evidentiary Order, *supra* note 1, at 5 (citing *LaFleur*, 971 F.2d at 204-05).

57. LAFAVE & SCOTT, *supra* note 26.

58. *Id.* § 5.3, at 614-15 (footnotes and internal quotes omitted) (emphasis added).

59. See *LaFleur*, 971 F.2d at 204-05; *State v. Jeffrey*, 50 P.3d 861, 864 (Ariz. Ct. App. 2002); *State v. Rouleau*, 528 A.2d 343, 347 (Conn. 1987); *State v. Aponte*, 784 A.2d 991, 1001 (Conn. App. Ct. 2001); *State v. Boone*, 544 A.2d 217, 222 (Conn. App. Ct. 1988); *People v. Lemons*, 562 N.W.2d 447, 453 (Mich. 1997); *Alford v. State*, 866 S.W.2d 619, 624 n.9 (Tex. Crim. App. 1993); *Arnold v. Commonwealth*, 560 S.E.2d 915, 918 (Va. Ct. App. 2002); *Pancoast v. Commonwealth*, 340 S.E.2d 833, 836 (Va. Ct. App. 1986). Interestingly, several Texas appellate courts have recently (and more aptly) cited this language as applicable to the defense of necessity. See *Dotson v. State*, 146 S.W.3d 285, 292 (Tex. App. 2004); *Aldrich v. State*, 53 S.W.3d 460, 467-68 (Tex. App. 2001); *Arnwine v. State*, 20 S.W.3d 155, 159 (Tex. App. 2000).

60. *Terance Johnson* Evidentiary Order, *supra* note 1, at 5 (citing *LaFleur*, 971 F.2d at 204-05).

was substantially updated, revised, and expanded by original author Wayne R. LaFave (original co-author Austin Scott had passed away in the interim).⁶¹ The relevant passage on duress now reads:

The rationale of the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law *is excused because he lacked a fair opportunity to avoid acting unlawfully*.⁶²

Note that the word “excused” now replaces “justified,” and the language concerning the defendant’s lack of a “fair opportunity to avoid acting unlawfully” replaces that concerning a “balance of harms” analysis.⁶³

The MPC takes the more modern approach, reserving the balance of harms element for the justification defense of necessity, and requiring for duress only that the defendant suffer threats of such a nature that a “person of reasonable firmness” would accede to the coercer’s demands.⁶⁴

The approach is similar in the federal courts.⁶⁵ Federal circuit cases discussing duress elements generally do not list a lesser evil

61. LAFAVE, *supra* note 37, at XI.

62. *Id.* § 9.7(a), at 73 (footnotes and internal quotes omitted) (emphasis added).

63. Notwithstanding the incorrect general statement of the underlying rationale for the duress defense, even the earlier LaFave and Scott version of the treatise recognized that duress could be a defense to felony murder. *See* LAFAVE & SCOTT, *supra* note 26, § 5.3(b), at 434-35 (noting that duress is a defense to “a killing done by another in the commission of some lesser felony participated in by the defendant under duress,” and specifically citing the example of a defendant who is coerced into assisting a bank robbery in which the coercer kills a bank customer). Inexplicably, the district court in the *Terance Johnson* case quoted this specific language on felony murder in its opinion, while simultaneously relying on the more general “balance of harms” language from the same section of the LaFave-Scott treatise to support its conclusion that duress could never be a defense for Johnson (a defendant assertedly coerced into a bank robbery where the coercer killed a bank customer). *See Terance Johnson* Evidentiary Order, *supra* note 1, at 6-8.

64. *Uniform Laws, MPC, supra* note 36, § 2.09(1), at 131. A majority of the modern state criminal codes take the MPC approach here. LAFAVE, *supra* note 37, § 9.7(b), at 81.

65. *See* *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991); *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984); O’MALLEY ET AL., *supra* note 24, at 747 (distinguishing duress from justification

requirement.⁶⁶ The pattern jury instructions in the various federal circuits omit any reference to a balance of harms analysis in describing the defense of duress, reserving that element for the defense of necessity.⁶⁷

Most federal circuits do not have a separate pattern jury instruction for the distinct defense of necessity,⁶⁸ but federal cases do recognize the defense in most circuits. Where federal courts explicitly recognize necessity as a distinct defense, they usually add the unique element that the evil sought to be avoided by the unlawful action is greater than the evil of violating the criminal statute at issue.⁶⁹

III. DURESS AS A DEFENSE TO HOMICIDE

A. *The Traditional Rule*

The general common-law rule is that duress cannot be a defense to murder.⁷⁰ Most states follow this common-law rule, either by statute,⁷¹ or through case precedent.⁷² Federal courts also follow this common-

defenses of self-defense and necessity, and defining the latter as “the forced choice of a lesser of two evils”). *But see LaFleur*, 971 F.2d at 204-05.

66. *See supra* text accompanying note 55.

67. O’MALLEY ET AL., *supra* note 24, at 749-72 (listing the pattern jury instructions of the various circuits).

68. Most circuit pattern jury instructions contain a special instruction for duress but nothing regarding necessity or justification. However, the Eleventh Circuit’s pattern instructions contain a special instruction entitled “Duress and Coercion (Justification or Necessity),” suggesting that no distinction is recognized. COMMITTEE ON PATTERN JURY INSTRUCTIONS, JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS 65 (2003).

69. *See, e.g.*, *United States v. Newcomb*, 6 F.3d 1129, 1136 (6th Cir. 1993); *Aguilar*, 883 F.2d at 693.

70. *See WILLIAM BLACKSTONE*, 2 COMMENTARIES ON THE LAWS OF ENGLAND *30 (William Carey Jones ed. 1916) (“[T]hough a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent.”); *Regina v. Howe*, [1987] 1 A.C. 417, 424 (H.L.) (Eng.); 40 AM. JUR. 2D *Homicide* § 115 (2003).

71. *See* ARIZ. REV. STAT. ANN. § 13-412(C) (2001); COLO. REV. STAT. ANN. § 18-1-708 (West 2004); GA. CODE ANN. § 16-3-26 (2003); IND. CODE ANN. § 35-41-3-8 (LexisNexis 2004); KAN. STAT. ANN. § 21-3209 (1995); LA. REV. STAT. ANN. § 14:18(6)(1997); ME. REV. STAT. ANN. tit. 17-A, § 103-A (1983); MO. ANN. STAT. § 562.071 (West 2004); OR. REV. STAT. § 161.270 (2003); WASH. REV. CODE ANN. § 9A.16.060 (West 2004); *see also* CAL. PENAL CODE § 26 (West 1999) (disallowing duress defense for capital crimes); IDAHO CODE ANN. § 18-201 (4) (2004) (same); 720 ILL. COMP. STAT. ANN. 5/7-11 (West 1993) (same); MONT. CODE ANN. § 94-3-110 (2005) (same); NEV. REV. STAT. ANN. § 194.010(8) (LexisNexis 2004) (same).

72. *See, e.g.*, *Pittman v. State*, 460 So. 2d 232 (Ala. Crim. App. 1984) (duress not a defense to murder); *Brewer v. State*, 78 S.W. 773 (Ark. 1904) (same); *Luther v. State*, 342 S.E.2d 316 (Ga. 1986) (legislature’s exclusion of murder from crimes to which coercion defense applies did not violate equal protection); *People v. Doss*, 574 N.E.2d

law rule.⁷³ It is also the rule in the U.S. military justice system.⁷⁴ Internationally, the law divides up among civil law and common-law countries: virtually all civil law nations permit duress as a complete defense to all crimes, including homicide, while virtually all common-law jurisdictions preclude the defense as it relates to the killing of innocent persons.⁷⁵ The United States is unique among common-law nations in that some of its states, following the MPC approach, allow duress as a defense to murder.⁷⁶ Of course, even states which reject the defense at the guilt phase will recognize duress as a mitigating factor during sentencing.⁷⁷

However, some states have rejected the common-law rule and have allowed duress as a murder defense.⁷⁸ England, the source of our common-law rules regarding duress, has held that while the defense is not available for the actual killer, it can be asserted as a defense to another defendant who participates in the overall homicide.⁷⁹

806 (Ill. App. Ct. 1991); *McCune v. State*, 491 N.E.2d 993 (Ind. 1986); *Kee v. State*, 438 N.E.2d 993, 994 (Ind. 1982) (defense not available for attempted murder); *State v. LeCompte*, 327 N.W.2d 221 (Iowa 1982) (same, for aiding and abetting murder); *State v. Chism*, 436 So. 2d 464 (La. 1983) (accessory after the fact to murder); *State v. Capaci*, 154 So. 419 (La. 1934) (capital offenses); *Wentworth v. State*, 349 A.2d 421 (Md. 1975); *People v. Dittis*, 403 N.W.2d 94 (Mich. Ct. App. 1987) (first degree murder); *Watson v. State*, 55 So.2d 441 (Miss. 1951); *State v. Perkins*, 364 N.W.2d 20 (Mont. 1985) (first degree murder); *State v. Finnell*, 688 P.2d 769 (N.M. 1984) (first degree murder and attempted murder); *State v. Cheek*, 520 S.E.2d 545 (N.C. 1999); *Pugliese v. Commonwealth*, 428 S.E.2d 16 (Va. 1993); *State v. Ng*, 750 P.2d 632 (Wash. 1988); *Burnett v. State*, 997 P.2d 1023 (Wyo. 2000).

73. See, e.g., *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991); *United States v. Buchanan*, 529 F.2d 1148, 1153 (7th Cir. 1975).

74. MANUAL FOR COURTS MARTIAL UNITED STATES R.C.M. 916(h) (2000) (stating duress “is a defense to any offense except killing an innocent person”).

75. Brooks, *supra* note 22, at 867.

76. See *id.* at 867 n.19.

77. See, e.g., *State v. Getsy*, 702 N.E.2d 866 (Ohio 1998). This approach was not available in the *Terance Johnson* case, because a conviction under 18 U.S.C. § 2113(e) (2000) carries a minimum mandatory life sentence.

78. See, e.g., ALASKA STAT. § 11.81.440 (2004); HAW. REV. STAT. § 702-231 (1993); N.J. STAT. ANN. § 2C:2-9 (West 2005) (defense only available to reduce degree of crime to manslaughter); UTAH CODE ANN. § 76-2-302 (2003); *Whitus v. State*, 116 S.E.2d 205, 205-06 (Ga. 1960) (defense available by statute where threat is imminent); *Tully v. State*, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986) (defense available for felony murder); *Commonwealth v. Berger*, 612 A.2d 1037, 1042 (Pa. Super. Ct. 1992) (defense is available for first degree murder under appropriate factual circumstances); *Paris v. State*, 31 S.W.855, 858 (Tex. Crim. App. 1895) (defense available where person making threat is “actually present”).

79. See *Regina v. Howe*, [1987] 1 A.C. 417, 427 (H.L.) (Eng.).

A middle ground taken by some jurisdictions is to allow duress to mitigate murder to manslaughter. Some states have statutes to this effect.⁸⁰

The exception for murder stems from the policy judgment that a defendant cannot value his own life more than an innocent person's, and thus has no right to kill an innocent person just to save his own.⁸¹ This policy judgment—that a defendant under duress cannot value an innocent victim's life more than his own—certainly smacks of a balance of harms analysis. As noted above, most courts and commentators would restrict a balance of harms element to the justification defense of necessity, and not apply it to the excuse of duress. Thus, the common-law exception that disallows a duress defense to murder is potentially a contradiction. Some could argue that the exception shows that a balance of harms approach should apply to duress as well as necessity. This is the approach taken by the trial court in the *Terance Johnson* case.⁸² As a matter of simply describing the common law, however, it is best seen as a special case of the lesser evil rationale. The common law took the position as a general matter that the duress defense could be available even where the illegal act is a greater harm than that threatened to the defendant by the coercer. But the majority view was to draw the line at excusing a coerced defendant who actually kills an innocent person.⁸³

B. *The Need for a More Flexible Approach*

Many prominent commentators have criticized this rule on both pragmatic and philosophical grounds.⁸⁴ The pragmatic argument is that it is unrealistic to expect such a rule to actually deter people from killing, and to give up their lives, when they are truly in a kill-or-be-killed situation. While heroism does occasionally occur, it cannot be legislated.

The philosophical argument is that the rationale that all innocent lives have equal worth demonstrates only that coerced killing of an innocent is not *justified*: the act itself is not, on balance, defensible from a moral or societal perspective. This rationale, however, does not bar the

80. See, e.g., ARIZ. REV. STAT. ANN. § 13-1103 (2001); MINN. STAT. ANN. § 609.20(3) (West 2003); WIS. STAT. ANN. § 939.46(1) (West 2005); see also Gerald A. Williams, Note, *Tully v. State of Oklahoma: Oklahoma Recognizes Duress as a Defense For Felony-Murder*, 41 OKLA. L. REV. 515, 526-27 (1988) (noting the advantages of this approach).

81. BLACKSTONE, *supra* note 70; Epps, *supra* note 22, at 989.

82. *Terance Johnson* Evidentiary Order, *supra* note 1, at 5.

83. See *Regina v. Howe*, [1987] 1 A.C. 417, 439 (duress defense exception for homicide relies upon “the special sanctity that the law attaches to human life”).

84. See, e.g., Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); Dressler, *supra* note 39, at 1371-74.

conclusion that the person committing the admittedly unjustifiable act should be *excused*.⁸⁵ If a legally insane person's disability causes him to kill an innocent person without cause or provocation, the law excuses the defendant even though it does not condone the act. There is no reason duress could not be handled similarly.

There is good reason for skepticism with respect to the traditional common-law rule. From a utilitarian perspective, it seems unlikely that the rule does any real good. No evidence exists to suggest that the rule barring the duress defense to homicide actually deters persons from killing when they are truly in peril of their lives and no reasonable alternative exists (as is required by the classic elements of duress). Of course, true duress-murder situations seem to be relatively rare,⁸⁶ and prosecutions of same rarer still, making an empirical study of such cases difficult. But common sense does suggest real doubt as to the deterrent effect of this rule. Where a coerced defendant sincerely believes that he must kill an innocent third party or else be killed, it seems that the last thing on the defendant's mind would be speculation on whether he would face prosecution if he survived the experience.

The rule also seems overly harsh. Affording an excuse defense to at least some persons in this situation does not convey the message that society condones the killing of innocent third parties. Instead, it merely signifies that individuals under extreme coercion, like defendants who are insane, involuntarily intoxicated, or extremely young, are not considered to be deserving of punishment, even when the acts they commit are worthy of condemnation. While it may be true in many situations that a person threatened with death ought to have the fortitude to resist killing an innocent third party, can it really be that there are never any situations in which the defendant's eventual submission to the threats is understandable enough to allow an excuse under the law? Put another way: Isn't the level of punishment deserved by a defendant in this situation dependent upon the facts? If so, then ought not such a fact-sensitive question be committed to the sound discretion of a jury?

The current common-law rule, with its blanket condemnation of all persons who succumb to legitimate duress, is woefully unrealistic about

85. Dressler, *supra* note 39, at 1373-74.

86. Brooks, *supra* note 22, at 868-69.

human nature. It not only “asks us to be virtuous,” but actually “*demand*s our virtual sainthood.”⁸⁷

This is not to say that society ought to condone the taking of an innocent life wherever the killer has a reasonable self-preservation argument. The essence of an excuse defense is that society condemns the act but declines to punish the actor as a criminal. If the law were to recognize a jury question on the issue of whether duress could excuse a homicide, lesser remedies would still be available for society to express its condemnation. These remedies could range anywhere from criminal liability for a lesser offense (for example, a recklessness or negligence based offense), to civil tort liability, to the informal, nonlegal punishment which comes from a damaged reputation and lessened social standing.

Nor would the excuse be granted lightly under our current criminal justice system. Using the classic elements of the defense, a judge or jury would have to find that there was a real and imminent threat, a well-founded fear that the threat would be carried out, and no reasonable opportunity to avoid committing the crime under the circumstances. Further, most courts would also require that the defendant was not reckless in placing himself in the situation giving rise to the coercion. Commentators agree that juries are suitably skeptical about claims of duress, and are not predisposed toward relieving killers or their accomplices of criminal liability absent compelling circumstances.⁸⁸ Allowing a duress argument to go to the jury in homicide cases will not cause blameworthy defendants to escape punishment, because juries will still require that the evidence support a finding of genuine and unavoidable coercion.

Indeed, the legitimacy of the criminal justice system itself argues for reform of the all-or-nothing common-law rule. The MPC rule would allow an excuse wherever the circumstances were such that “a person of reasonable firmness in [the actor’s] situation would have been unable to resist.”⁸⁹ Adhering to the traditional common-law rule requires condemning at least some defendants despite the fact that a reasonable person in that defendant’s position would not have been able to resist. It seems awkward, to say the least, for a judge or juror to condemn an accused for

87. Dressler, *supra* note 39, at 1373; *see also* MPC 1985, *supra* note 36, § 2.09 cmt. at 375:

Where it would be both “personally and socially debilitating” to accept the actor’s cowardice as a defense, it would be equally debilitating to demand that heroism be the standard of legality. The proper treatment of the hero is not merely to withhold a social censure; it is to give him praise and just reward.

88. *See, e.g.,* Alan Reed, *Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT’L L. & POL’Y 51, 63 (1996); Dressler, *supra* note 39, at 1373-74.

89. *Uniform Laws, MPC, supra* note 36, § 2.09(1), at 131.

acting in a way that the judge or juror himself would have acted under the same circumstances. Requiring judges or jurors to do this undermines the credibility of our criminal justice system. As the American Law Institute put it:

[L]aw is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.⁹⁰

Consistent with these weaknesses in its practical and philosophic underpinnings, the current rule can lead to unjust and inconsistent results. A duress defense may relieve a coerced defendant of aggravated assault liability even where the defendant deliberately caused grievous bodily harm, but would not be available to a second coerced defendant who reluctantly participated in a felony and took great care to prevent harming anyone (if another participant killed someone). Perversely, the first defendant, the one with the greater mens rea and more blameworthy conduct, goes free, while the other is guilty of murder—in most states, capital murder. The second defendant is less in need of deterrence, rehabilitation, or incapacitation, and is less deserving of retribution, yet is the only one who is convicted and punished. Moreover, the difference in treatment is attributable to the acts of a third party over whom the defendant has no control.⁹¹

To take another example: with the exact same conduct, circumstances, and mens rea, two defendants under duress may each intentionally cause grievous bodily harm to two different victims. If the first victim recovers, that defendant would have a complete defense. If the second victim dies after a six-month struggle, the second defendant would be guilty of murder. Liability goes from zero to the maximum, all depending on the vagaries of the victim's physiological powers of recovery. This should not be the result. The law should not be a crap shoot.

Of course, in certain cases the criminal law does allow liability to turn on the results caused, as distinct from merely examining the conduct and

90. *MPC 1985*, *supra* note 36, § 2.09 cmt. at 374-75.

91. It is true that a third party's actions may normally affect a defendant's liability when that defendant is an accomplice. However, an accomplice acts with the specific intent that the third party (the principal) carry out the crime in question, and performs acts of his own free will designed to assist the principal in carrying out that crime. None of this is true of the coerced defendant.

mens rea of the accused. For example, consider two equally drunk and irresponsible defendants who get behind the wheel and drive in exactly the same reckless manner, causing identical automobile accidents, with one accident causing serious injury to the victim and the other killing the victim. The second defendant, but not the first, could be convicted of negligent homicide.

However, the first defendant would still be liable for driving while intoxicated, reckless endangerment, and, possibly, some form of assault. The difference in medical result changes the punishment as a matter of degree only. But in the duress example above, the difference in outcome is more than a matter of degree. The defendant unlucky enough to have been coerced into beating the “thin-skulled victim” risks capital liability, while the defendant lucky enough to have been coerced into attacking the more resilient “thick-skulled victim” has no criminal liability whatever. Such stark differences between the results in these two cases are arbitrary. They do not further the legitimate goals of any rational criminal justice scheme.

Perhaps what lies beneath the rule’s seeming harshness is skepticism about the impossibility of desistance. Courts may believe that instances in which a defendant has no reasonable alternative to killing an innocent third party are truly rare; most of the time, there is a potential way out which the defendant should have explored. A bright-line rule could better encourage persons placed under duress to resist unlawful pressure and find that way out. This brings two responses to mind. First, whether a defendant has a reasonable alternative to killing an innocent third party is precisely the kind of fact-intensive judgment that should be made by a jury, which is not likely to be overly receptive to excusing the murder of an innocent person. Second, there must be a minority of cases, however small, in which desistance truly is impossible; in those cases, the absolute bar of the duress defense remains unjust.

The most dramatic example of this comes from the International Hague Tribunal.⁹² In *Prosecutor v. Erdemovic*,⁹³ a Serb soldier in the former Yugoslavia was ordered along with other soldiers to massacre Muslim civilians. Alone among the soldiers, he protested the order and attempted to disobey. His commanding officer informed him that he could obey the order or be executed himself; either way, the Muslim

92. The Hague Tribunal is an international court convened to adjudicate cases stemming from the conflict within the former Yugoslavia during the 1990s. Its full title is “The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.” Brooks, *supra* note 22, at 862 n.1.

93. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment (Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm>.

civilians would die.⁹⁴ Erdemovic reluctantly obeyed the order, attempting to shoot in such a way as to minimize the damage done, but inevitably ended up killing multiple civilians.⁹⁵ He later confessed his story to a journalist, expressed remorse, and provided crucial testimony to corroborate the existence of the secret massacre.⁹⁶ The prosecution conceded that Erdemovic would probably have died had he disobeyed the order, and that his disobedience would probably not have saved the civilians.⁹⁷ Nonetheless, the court followed the common-law rule barring duress as a defense to murder, holding that his duress could mitigate his sentence only.⁹⁸ Erdemovic received a ten-year sentence.⁹⁹

Quoting Blackstone, the plurality opinion relied on the moral principle behind the traditional common law that a man under duress “ought rather to die himself, than escape by the murder of an innocent.”¹⁰⁰ It also emphasized the unique importance in international war crime trials of encouraging humane conduct.¹⁰¹ The court was unmoved by the utilitarian argument that the innocent victims would have died anyway regardless of whether the defendant had relented. As the plurality opinion put it, the rule “does not depend on what the reasonable person is expected to do”; rather, it depends on “an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law.”¹⁰²

While a moral bright line may indeed have value in this area, I believe that value is outweighed by the futility, and unfairness to defendants, of holding defendants to unrealistically, unreasonably high standards which few judges or jurors could maintain. In addition, this “absolute moral

94. Brooks, *supra* note 22, at 863-65.

95. *Id.* at 865.

96. *Id.*

97. *Id.* at 867.

98. *Id.* at 867-68.

99. *Id.* at 866. He ultimately served only five years. *Id.* at 886.

100. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 71 (Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmc971007e.htm>, (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *28 (London, W. Clowes and Sons 1857)), cited in Brooks, *supra* note 22, at 876-79.

101. *Id.* ¶ 75 (stating that the war crimes tribunal must “facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by [recognizing] the normative effect which criminal law should have upon those subject to them”).

102. See Brooks, *supra* note 22, at 879 (quoting from the opinion).

postulate” is not maintained in the American common-law tradition regarding a highly analogous situation, as set out below.

C. *The Analogous Rule Regarding Necessity*

The common law had an analogous exception barring the use of the necessity defense on a charge of homicide. It too has received a fair amount of (deserved) criticism, and does not appear to command majority support among modern American jurisdictions.¹⁰³

The classic case is *Dudley and Stephens*,¹⁰⁴ a nineteenth-century English case. In *Dudley*, a shipwreck forced the defendants and the victim onto a life raft far out at sea for weeks with severely limited supplies. Facing starvation, the defendants killed a sickly cabin boy and ate him.¹⁰⁵ The jury found that the killing may have been the defendants’ only hope for survival, but the trial judge ruled that the killing was murder.¹⁰⁶ The Queen’s Bench upheld the defendants’ murder conviction, stating flatly that the taking of an innocent life could never be justified by the necessity of saving another life or even several other lives.¹⁰⁷ The defendants were sentenced to death, but were paroled by executive clemency after serving six months in jail.¹⁰⁸

This decision has been roundly criticized.¹⁰⁹ An analogous American shipwreck case, almost as famous as *Dudley*, reached a different conclusion on the law. In *United States v. Holmes*,¹¹⁰ the defendant threw several lifeboat passengers overboard to their deaths in order to save a greater number of lifeboat passengers from being drowned in a storm. The court ruled that such an intentional sacrifice of human life could have been justifiable if it had been done by drawing lots.¹¹¹ This appears to be the modern American approach.¹¹² The MPC allows the necessity defense to be applied to a homicide charge as long as more people were saved than killed.¹¹³

103. LAFAVE, *supra* note 37, § 10.1(c), at 124 n.41.

104. Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273.

105. *Id.* at 273-74.

106. *Id.* at 277.

107. *Id.* at 288.

108. Milhizer, *supra* note 41, at 795 nn.391-92.

109. *Id.* at 794-95, 890-91 (describing general consensus that the decision was result-oriented).

110. United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

111. *Id.* at 367. The defendant’s conviction in that case was based in part on his failure to cast lots, as well as his failure to rank civilian passengers ahead of the crew. *Id.*

112. LAFAVE, *supra* note 37, § 10.1(c), at 123-24, 124 n.41.

113. See MPC 1985, *supra* note 36, § 3.02 cmt. at 14-15.

Of course, the fact that the necessity defense may be asserted against a homicide charge does not necessarily argue that the duress defense also be allowed against homicide. The necessity defense—at least, where it is properly defined—applies only to situations in which the harm avoided is greater than the harm committed. In the case of homicide, that means, as the MPC requires, that the necessity defense could only be asserted where the defendant saved more lives than he killed. Because the duress defense has no such requirement (again, at least where it is properly defined), one could justify a homicide rule allowing a defense of necessity but not duress. At a minimum, however, the two are analogous as areas of the law where the traditional common-law rule rigidly allowed nothing less than heroic self-sacrifice, and where that rule has since been widely criticized as too rigid.

D. Using Duress to Mitigate to Manslaughter

Allowing duress to reduce a charge from murder to manslaughter is an improvement over the traditional rule, but is still overly harsh. A number of states take this approach.¹¹⁴ The theory behind such an approach is an analogy to “diminished capacity.”¹¹⁵ Diminished capacity is an imperfect form of the insanity defense: The doctrine allows defendants to introduce evidence that, while they may have not met the legal definition of insanity at the time of the offense, they were nonetheless suffering emotional or mental distress or impairment so severe that they could not have had the requisite mens rea to commit the crime, or were otherwise deserving of leniency.¹¹⁶ The doctrine is recognized in many states, but not all.¹¹⁷ As applied to homicide, it often allows a defendant to defend successfully against a charge of murder, with the result that the defendant is convicted of the lesser-included offense of manslaughter.¹¹⁸

While the doctrine can be viewed narrowly as applying only where the severe distress or impairment actually negates the requisite mens rea for the crime in question, it can also be viewed more broadly. Specifically, the doctrine can be seen simply as creating a mitigating factor

114. See, e.g., ARIZ. REV. STAT. ANN. § 13-1103(A)(4) (2001); MINN. STAT. ANN. § 609.20(3) (West 2003); WIS. STAT. ANN. § 939.46(1) (West 2005).

115. Williams, *supra* note 80, at 526-27.

116. See LAFAVE, *supra* note 37, § 9.2, at 12-13 (citing cases).

117. *Id.* at 13. Indeed, the doctrine is approved in a minority of states. *Id.* at 13 n.3.

118. *Id.* at 13.

warranting a reduction from the charged offense to a lesser-included offense, regardless of whether the “diminished capacity” actually prevented the defendant from forming the requisite criminal intent in his mind.¹¹⁹

For example, the MPC defines “murder” as a killing done either “purposely,” “knowingly,” or “recklessly under circumstances manifesting extreme indifference to the value of human life.”¹²⁰ These are the three mental states sufficient for murder liability. But the MPC allows murder to be reduced to manslaughter wherever the killing is committed “under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”¹²¹ This provision combines both the notions of “heat of passion” killings and “diminished capacity.”¹²² It is followed in several states.¹²³ Notably, the MPC provision does not require that the “extreme mental or emotional disturbance” in fact vitiate the actors’ purpose, knowledge, or “extreme indifference” to human life; it simply states that such disturbance mitigates the crime to manslaughter. By analogy, some jurisdictions allow a jury to decide that the emotional and mental pressure suffered by a coerced defendant, while not enough to excuse the killing entirely, ought to at least mitigate the crime from murder to manslaughter.¹²⁴

The theoretical argument against this approach is that a defendant’s passion is not a reason to absolve him from liability for murder (as opposed to the lesser crime of manslaughter) unless that passion is provoked by the victim, as is the case in a traditional heat of passion killing. As originally stated by the Rhode Island Supreme Court a century ago:

One’s own passion is not a defense to reduce a crime unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. *Passion induced by a third person would be no defense to a homicide.* So fear induced by one person is no defense to a defendant who kills another under its influence.¹²⁵

Some modern courts have raised similar objections.¹²⁶

Given the unfairness involved in denying a duress defense to homicide generally, allowing mitigation to murder is a step in the right direction.

119. See DRESSLER, *supra* note 35, § 26.01, at 361-62.

120. *Uniform Laws, MPC, supra* note 36, § 210.2(1), at 305.

121. *Id.* § 210.3(1)(b), at 356.

122. DRESSLER, *supra* note 35, § 26.03, at 368-69.

123. See ARK. CODE ANN. § 5-10-104(a)(1) (1997); N.J. STAT. ANN. § 2C:11-4(b)(2) (West 2005); UTAH CODE ANN. § 76-5-205.5(1) (2003).

124. See generally *supra* note 80 (listing state statutes which take this approach).

125. *State v. Nargashian*, 58 A. 953, 955 (R.I. 1904) (emphasis added).

126. *Williams, supra* note 80, at 527, 527 n.92 (citing *Wright v. State*, 402 So. 2d 493 (Fla. Dist. Ct. App. 1981) and *People v. Gleckler*, 411 N.E.2d 849 (Ill. 1980)).

However, most of the objections to the general common-law rule barring any use of the defense against homicide still apply to this rule. Providing for manslaughter convictions is unlikely to actually deter the criminal conduct in question. The rule still requires an unrealistic level of heroism from persons undergoing true coercion, and still requires judges and jurors to hold defendants to a standard most of them could not manifest were they faced with the same pressures. And it still leads to arbitrary differences in outcome, such as those between a defendant who intentionally causes grievous bodily injury under duress (complete defense), one who kills under duress despite taking precautions to avoid harm (murder conviction), and those between two coerced defendants with identical conduct and mens rea but with differing results (mere injury versus death).

IV. THE SPECIAL CASE OF FELONY MURDER

A. General

Regardless of the soundness of the rationale for excluding a duress defense from murder cases, the rationale does not apply to felony murder.¹²⁷ Where the defendant merely assists in the underlying felony during which a co-defendant kills the victim, without actually directly harming the victim, the defendant does not choose to take an innocent life to save his own. What about such cases where the defendant plays no role in the actual killing, but is merely present at the underlying

127. A felony murder charge requires no showing of any mens rea at all with respect to the killing itself. It is enough merely for the prosecutor to prove that the defendant took part in the underlying felony (directly or as an accomplice), and that the victim died as the result of the felony. *See, e.g.*, *People v. Dillon*, 668 P.2d 697, 719 (Cal. 1983); *State v. Cooke*, 874 A.2d 805, 811 (Conn. App. Ct. 2005). Even if it was another participant in the felony who actually killed the victim, the defendant is still guilty of felony murder by virtue of his participation in the predicate felony. *See, e.g.*, *Chamberlain v. State*, 881 So. 2d 1087, 1104-05 (Fla. 2004); *People v. Morgan*, 364 N.E.2d 56, 59-60 (Ill. 1977); *People v. Bustos*, 29 Cal. Rptr. 2d 112, 115 (Ct. App. 1994); *People v. Carines*, 597 N.W.2d 130, 136-37 (Mich. 1999). In such situations, using a felony murder charge instead of or in addition to another homicide charge gives the prosecutor the ability to secure a conviction without having to persuade the jury that the defendant caused the death purposely, knowingly, recklessly, or negligently.

While a felony murder charge can be used even in situations where the defendant personally killed the victim, and did so with some level of mens rea, references to felony murder in this section refer (unless otherwise stated) to situations where someone besides the defendant unexpectedly kills the victim.

felony due to the coercion of another?¹²⁸ Ought not the duress defense apply in at least those instances as an answer to a homicide charge?

This is an issue of first impression in the federal criminal justice system. Aside from the district court decision in the *Terance Johnson* case, no court has squarely held one way or the other on the question of whether duress is available as a defense to felony murder.¹²⁹ As noted above,¹³⁰ the Sixth Circuit opinion in that case did not address the issue.

As the leading LaFave treatise on criminal law indicates, the normal restriction on the availability of duress for *intentional* murder does not apply to felony murder:

As stated above, duress is no defense to the *intentional* taking of a life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress. Thus, if A compels B at gunpoint to drive him to the bank which A intends to rob, and during the ensuing robbery A kills a bank customer C, B is not guilty of the robbery (for he was excused by duress) and so is not guilty of felony murder of C in the commission of robbery. The law properly recognizes that one may aid in a robbery if he is forced by threats to do so to save his life; he should not lose the defense because his threateners *unexpectedly* kill someone in the course of the robbery and thus convert a mere robbery into a murder.¹³¹

Other commentators share this view.¹³²

128. Where the coerced defendant *is* directly involved in the killing of the victim, and duress is held not to be a defense to ordinary homicide, I would argue that the result should turn on the mens rea (if any) with which the defendant killed the victim. If the coerced defendant killed the victim purposely or knowingly, the law would hold the defendant liable not only for felony murder, but also directly liable on a regular murder charge, because the defendant chose to kill. But where the defendant directly killed the victim unintentionally, the coerced defendant's liability should correspond with his level of fault. Thus, if he was reckless with regard to the chance that his actions would kill the victim (for example, he fired warning shots into a crowded bank while under duress by bank robbers), he should be liable for reckless homicide, or its equivalent in the jurisdiction in question. If he was merely negligent with regard to the chance that his acts would be fatal (for example, he drove a getaway car at an excessive speed while under duress, running over a pedestrian), he should be convicted of negligent homicide or its equivalent. If he was without fault in causing the death, his duress should be a complete defense to the charge of felony murder. See *infra* Part IV.C. (proposing a similar approach matching liability to mens rea in an analogous context).

129. But see *Hall v. Kelso*, 892 F.2d 1541, 1546 n.4 (11th Cir. 1990) (noting briefly in dicta that the rationale "that one should sacrifice one's own life before killing or helping to kill an innocent victim, is inapplicable in the felony murder context").

130. See *supra* pp. 161-62.

131. LAFAVE, *supra* note 37, § 9.7(b), at 494-95 (emphasis added). A sufficient amount of coercion can give the accused the defense of duress "unless that crime consists of *intentionally* killing an innocent third person" *Id.* at 491 (emphasis added). Under Professor LaFave's formulation quoted here, the result may change if the killing is not "unexpected." See *infra* Part IV.B.

132. See ROLLIN M. PERKINS, CRIMINAL LAW 952 (2d ed. 1969); Williams, *supra* note 80, at 528-29.

Few states have addressed this issue. Courts in three states have held that duress is not a defense to felony murder.¹³³ In two of these states (Missouri and Washington), the court avoided detailed analysis of the issue because of a statute which stated generally and without elaboration that the duress defense was not available to “murder.”¹³⁴ Because the courts viewed the language as unambiguous, they declined to engraft an exception onto the statute for felony murder.¹³⁵ In the third state (Ohio), the court ruled that duress was no defense to a felony murder charge, but would bar conviction for capital murder.¹³⁶

However, a slightly greater number of states have held that duress can be a defense to felony murder where the defendant is compelled to commit a felony in which a death occurs, and duress would be a defense to the underlying felony.¹³⁷ Courts in these six states usually reason syllogistically that since the duress would be a defense to the underlying felony, and liability on the underlying felony is a prerequisite to felony murder liability, duress must be a defense to felony murder.¹³⁸ Several also quote the old LaFave and Scott treatise, which directly addresses this point.¹³⁹ One Kansas state court noted that the common law’s rationale for the homicide exception to duress—that one should not be able to choose to sacrifice the life of an innocent third party to save

133. See *State v. Rumble*, 690 S.W.2d 939, 942 (Mo. 1984); *State v. Woods*, 357 N.E.2d 1059, 1065 (Ohio 1976); *State v. Moretti*, 120 P. 102, 103-04 (Wash. 1912). The older decisions in *Woods* and *Moretti* have been recently reaffirmed. See *State v. Getsy*, 702 N.E.2d 866, 884 (Ohio 1998) (citing *Woods*, 357 N.E.2d at 1065); *State v. Ng*, 750 P.2d 632, 636 (Wash. 1998) (citing *Moretti*, 120 P. at 102).

134. See *Rumble*, 680 S.W.2d at 942 (citing MO. REV. STAT. § 562.071.2 (1978), which states that the duress defense “is not available . . . as to the crime of murder”); *Moretti*, 120 P. at 103-04 (citing REM. & BAL. CODE § 2256, which states that the duress defense applies “[w]hensoever any crime, except murder, is committed”).

135. See *Rumble*, 680 S.W.2d at 942; *Moretti*, 120 P. at 104.

136. *Woods*, 357 N.E.2d at 1065 (noting duress would be a defense to the capital offense of “aggravated murder”).

137. See *People v. Anderson*, 50 P.3d 368, 379 (Cal. 2002); *People v. Serrano*, 676 N.E.2d 1011, 1015 (Ill. App. Ct. 1997); *State v. Hunter*, 740 P.2d 559, 568-69 (Kan. 1987); *People v. Merhige*, 180 N.W. 418, 422 (Mich. 1920); *People v. Pantano*, 146 N.E. 646, 647 (N.Y. 1925); *Pugliese v. Commonwealth*, 428 S.E.2d 16, 26 (Va. Ct. App. 1993).

138. See *Anderson*, 50 P.3d at 379; *Serrano*, 676 N.E.2d at 1015; *Pugliese*, 428 S.E.2d at 26.

139. See *Serrano*, 676 N.E.2d at 1015 (attributing the language to *Hunter*); *Hunter*, 740 P.2d at 568-69, (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 49, at 377 (1972)); *Pugliese*, 428 S.E.2d at 26 (same).

one's own—simply did not apply to *felony* murder charges where the defendant did not personally kill the victim.¹⁴⁰

People v. Merhige is a good example. Not only is it the first American opinion to address the issue, but it also has facts remarkably similar both to the *Terance Johnson* case and the hypothetical used by the LaFave treatise. In *Merhige*, three armed men robbed a bank, and the defendant claimed he had been coerced at gunpoint by the others to participate in the bank robbery. A bank customer was killed by one of the bank robbers who had allegedly coerced him. The Michigan Supreme Court held that the defendant was entitled to assert a duress defense because duress could affect his criminal responsibility for the underlying felony.¹⁴¹

B. Policy Considerations

Superficially, at least, this more lenient approach has some compelling commonsense appeal. If Coercer compels at gunpoint a hapless Defendant into assisting Coercer with a bank robbery, and no one is killed, the Defendant has a complete defense to the bank robbery. Should the result change if Coercer kills a teller without any direct participation by Defendant? If Defendant would have a complete defense to the underlying bank robbery, does it make sense to hold the defendant liable for a killing committed during that bank robbery by a third party over whom Defendant had no control?

Again, some paradoxical results occur if a duress defense were barred in this situation. A defendant forced at gunpoint to commit any predicate offense which would qualify for felony murder would be guilty of murder if the coercer unexpectedly killed an innocent third party, even if the defendant faced a real and imminent threat that he would be killed, and even if the defendant took elaborate pains to ensure that no one would be harmed. At the same time, a duress defense would completely relieve a coerced defendant of aggravated assault liability who deliberately and methodically beat an innocent victim within, as the saying goes, an inch of the victim's life.

Further, the more restrictive approach presents potential jury confusion where the jury is submitted both the underlying felony count and the felony murder count. Consider the thought process of the jurors as they follow the court's instructions. If the jury found the elements of duress present, they would be instructed to acquit on the underlying felony count. They would then be instructed to convict on the felony murder

140. *Hunter*, 740 P.2d at 568-69.

141. *Merhige*, 180 N.W.2d at 422.

count if they found that a killing occurred in furtherance of the underlying felony (of which they have just acquitted the defendant). The potential for jury confusion is great.

As noted above, allowing a duress defense to felony murder charges would not “open the floodgates” to killers evading responsibility through flimsy claims of duress. If it is proven that a defendant participated in a felony leading to a death, jurors are not overly receptive to arguments for escaping responsibility for that death.¹⁴²

C. *A Middle Ground Approach?*

A number of middle-ground options exist as well. For example, the law could allow the accused to assert a duress defense only if the defendant did not know that someone was likely to be killed or, alternatively, only if the defendant did not have reason to believe that someone was likely to be killed.¹⁴³ The Sixth Circuit considered this approach at oral argument in the *Terance Johnson* case. It is consistent with some of the writings of commentators who have distinguished felony murder from intentional murder with regard to the duress defense.¹⁴⁴ The opinions I have found recognizing duress defenses to felony murder charges have either expressly indicated that the killings were unexpected by the defendant, or have been silent on the subject.¹⁴⁵

142. See Dressler, *supra* note 39, at 1373-74; Reed, *supra* note 88, at 63.

143. If the defendant actually acted with the purpose or knowledge that the victim would be killed, he could be charged with murder, separate and apart from any felony murder charge. This is so even if it was someone else who actually “pulled the trigger”; the defendant would be liable for his part in the killing under an accomplice liability theory.

144. For example, the LaFave criminal law treatise states that a coerced robber should not lose the duress defense “because his threateners *unexpectedly* kill someone in the course of the robbery.” LAFAVE, *supra* note 37, § 9.7(b), at 76 (emphasis added). This passage has been cited by a number of courts ruling that a duress defense can apply to felony murder. See, e.g., *Serrano*, 67 N.E.2d at 1015; *Hunter*, 740 P.2d at 642. But the same section of the LaFave treatise also states the rule in ways which allow a duress defense without any explicit requirement that the killing be unexpected. The treatise claims duress is a defense to “a killing done by another in the commission of some lesser felony participated in by the defendant under duress.” LAFAVE, *supra* note 37, § 9.7(b), at 76. Further, it states that the defendant under duress has a defense “unless the crime consists of intentionally killing an innocent third person.” *Id.* at 72. It does not appear that Professor LaFave specifically addressed the intermediate situation where the killing was not unexpected, but the defendant did not actually intend to kill.

145. See, e.g., *Serrano*, 676 N.E.2d at 1015 (coercer committed murder “unexpectedly”); *Hunter*, 740 P.2d at 642 (citing LaFave and Scott’s discussion of killing occurring “unexpectedly”); *Merhige*, 180 N.W. at 419-20 (bank robbers were

This intermediate approach on the use of duress as a defense to felony murder would be an improvement on the current rule, but does not go far enough. For the same reason that a duress defense ought to be available to a defendant who knowingly kills a third party, it ought to be available to someone who participates in an underlying felony expecting that someone will likely get killed. Even assuming a regime in which duress is barred as a defense to direct, knowing killings, this intermediate rule still goes too far. A defendant who intentionally participates in a predicate felony while expecting that someone likely will be killed has a mens rea of intent only regarding the felony itself. Regarding the killing, he has a mens rea of negligence, or, perhaps, recklessness. At most, such a defendant ought to be liable for negligent or reckless homicide, and not felony murder—which in most jurisdictions is first degree murder, and in death penalty jurisdictions is almost always capital murder.

It is true that such a rule would eliminate the harshness of treating as a murderer those who honestly had no expectation that someone would be killed. But it still exhibits almost all the flaws of the more general rule barring duress as a defense to felony murder. Liability of the defendant still turns on the actions of a third party over whom the defendant has no control. The defendant is still liable for felony murder, but relieved of liability for the prerequisite predicate felony. Jurors would be confused by instructions which, if they find the duress elements met, require them to convict for felony murder based on the defendant's commission of the underlying felony, for which they have just acquitted him.

If the duress defense were indeed limited to felony murder situations in which the defendant did not expect that someone would get killed, a jury would have to decide the factual question of whether the defendant expected that a death would result. The jury would have to be instructed regarding this factual question. In essence, so limiting the application of the duress defense would add an additional element to the duress defense in the special case of a felony murder prosecution.

The instructions would have to address the tricky issues arising in defining the standard to be used. Would the jury have to determine whether the defendant thought that a killing was “substantially likely,” or “more likely than not,” or merely that there was a “reasonable probability” of a killing? Or would a better formulation be to borrow from the standard definition of “recklessness” that the defendant “consciously disregarded” a “substantial and unjustified risk” that

strangers to coerced defendant cab driver, who knew no details of what robbers planned); *People v. Pantano*, 146 N.E. 646, 647 (N.Y. 1925) (defendant “had no connection with” the murder, and merely provided useful information to bank robbers while under duress).

death would result?¹⁴⁶ Perhaps the above subjective formulations should be eschewed in favor of an objective standard, like whether the defendant “knew or should reasonably have known” that a death was likely to result? Of course, such fine tuning would add to the jury’s burden of deciding whether the defendant had a “well-founded fear” of death or serious bodily injury, and reasonably believed that there was no lawful alternative. But that extra fine tuning would be necessary if this middle-ground approach were to be adopted.

V. THE RELEVANCE OF DEFENDANT’S MENTAL INFIRMITY

Another issue arising in duress situations is the standard by which the judge or jury assesses whether the defendant was under sufficient threat, as well as whether the defendant had no viable way of safely avoiding the criminal acts. Is a defendant’s sincere but mistaken belief that he was in imminent danger sufficient? What about a sincere but mistaken belief that there was no opportunity to avoid the danger while still complying with the law? The answer depends on whether the mistaken belief was reasonable.

The Sixth Circuit did not address this question in its opinion in the *Terance Johnson* case. The district court in that case held that such a sincere but mistaken belief was insufficient as a matter of law to support a duress defense, because the duress defense entails an objective rather than a subjective standard.¹⁴⁷ Moreover, it seemed to hold that the defendant must make a *prima facie* case that he was faced with an *actual* threat, and that there was *actually* no opportunity to avoid the danger while still complying with the law. That is, the district court held that even a *reasonable* mistaken apprehension of imminent danger, or a *reasonable* mistaken perception that there was no safe alternative to obeying the coercer’s illegal commands, would be insufficient to support the defense.¹⁴⁸ In so ruling, the court correctly held that duress involves

146. See, e.g., *MPC 1985*, *supra* note 36, § 2.02(2)(c), at 226.

147. *Terance Johnson* Evidentiary Order, *supra* note 1, at 12-14.

148. See *id.* at 13 (the element of immediate threat “does not require that the defendant *perceive* the threat as immediate, but that the threat actually *be* immediate”). Further, the court stated “the defendant must show that was in a situation in which he *had* no opportunity to avoid the danger, not that he *believed* himself to be unable to avoid the danger.” *Id.* The court also called into question that part of the Sixth Circuit Pattern Jury Instruction which required the government to prove “that it was not reasonable for the defendant to think that committing the crime would avoid the threatened harm.” *Id.*

an objective standard, but took the definition of “objective” too far. While an unreasonable mistaken perception of danger would not suffice for the defense, a reasonable mistaken perception of danger would.

A. Objective Versus Subjective Standard for Duress

Some authority does exist for the “actual danger only” position among older state cases, but it is a minority position. At the time of the adoption of the MPC, for example, three states took this approach, and three states had statutes which implied that the danger must have been real.¹⁴⁹ However, fourteen other states made clear that the danger need not be real so long as the defendant’s perception of it was reasonable.¹⁵⁰ The American Law Institute considered this question and opted for the majority approach.¹⁵¹ Commentators describe this as the prevailing rule.¹⁵²

As a policy matter, it would be misguided indeed to require an actual danger, rather than a reasonable perception of one, on the part of the defendant. Consider a case in which a person jokingly but convincingly threatens serious bodily harm if the defendant does not immediately break a store window, or one in which the defendant, due to limited English proficiency, mistakenly understands a nonthreatening request to break the window as a threatening one. On these facts, the defendant would not actually be under an unlawful and present threat, despite having reasonable grounds for believing himself to be under such a threat. Would it make sense to punish the defendant’s coerced vandalism?

The same analysis applies with respect to the separate duress element that there be no reasonable, lawful opportunity to avoid the threatened harm. Consider a defendant under an actual and immediate threat who unknowingly passes by undercover police officers who could easily assist him. Or suppose a blind defendant walks right by uniformed police officers on his way to carry out the coercer’s unjust demands. In point of fact, the defendant does have a reasonable, legal opportunity to disobey the coercer while avoiding bodily harm, but, through no fault of his own, he is unaware of that opportunity. The point of all these hypotheticals is that the inquiry should not be on the actual presence or

149. See MPC 1985, *supra* note 36, § 2.09 cmt. at 370.

150. *Id.*

151. *Id.* § 2.09 cmt. at 375.

152. See LAFAVE, *supra* note 37, § 9.7(b), at 78 (“Doubtless . . . the danger need not be real; it is enough if the defendant reasonably believes it to be real”); 1 WHARTON’S CRIMINAL LAW § 52, at 334-35 (15th ed. 2003) (“[T]here need not be actual danger of harm, the actor’s reasonable belief of harm is sufficient.”).

absence of these duress elements, but rather whether the defendant's belief that the elements are present is reasonable.

This is the approach taken in the federal system. Federal courts are generally in agreement that duress should be determined according to an objective standard: They agree that an unreasonable belief in the need to disobey the law does not suffice to establish the defense. The belief in the danger, and the need for complying with the coercer's unlawful demands to avoid that danger, must be "reasonable" or "well-founded."¹⁵³ The reasonable belief in the need to disobey the law to avoid serious injury is both a necessary and sufficient condition of the defense. For this reason, the pattern jury instructions from almost all of the federal circuits include an explicit requirement that the defendant have a "reasonable" or "well-grounded" belief in the danger.¹⁵⁴ Where that requirement is met, the defense applies. Most states take this view as well.¹⁵⁵ Similarly, the MPC would allow a reasonable but mistaken belief in the threat to suffice for a claim of duress.¹⁵⁶

While a reasonable belief in the presence of the duress elements should clearly be sufficient for the defense, it is by no means clear that it should be necessary for it. If a defendant sincerely believes that he is in danger and his only safe way out is to follow the coercer's instructions,

153. See, e.g., *United States v. Keller*, 376 F.3d 713, 718 (7th Cir. 2004); *United States v. Cotto*, 347 F.2d 441, 446 (3d Cir. 2003); *United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002); *United States v. Riffe*, 28 F.3d 565, 569 (6th Cir. 1994); *United States v. Johnson*, 956 F.2d 894, 897-98 (9th Cir. 1992); *United States v. Scott*, 901 F.2d 871, 873 (10th Cir. 1990); *United States v. King*, 879 F.2d 137, 139 (4th Cir. 1989); *United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986); *United States v. May*, 727 F.2d 764, 765 (8th Cir. 1984). Sounding a similar note, the U.S. Supreme Court has emphasized that the defense cannot hold "if there was a reasonable, legal alternative to violating the law." *United States v. Bailey*, 444 U.S. 394, 410 (1980).

154. O'MALLEY ET AL., *supra* note 24, at 745-71 (listing duress elements for the various federal circuits).

155. See, e.g., *Nall v. Commonwealth*, 271 S.W. 1059, 1059-60 (Ky. 1925); *State v. St. Clair*, 262 S.W.2d 25, 28 (Mo. 1953); *State v. Van Dyke*, 825 A.2d 1163, 1170 (N.J. Super. Ct. App. Div. 2003); *Commonwealth v. DeMarco*, 809 A.2d 256, 262 (Pa. 2002); *cf. State v. B.H.*, 834 A.2d 1063, 1071 (N.J. Super. Ct. App. Div. 2003) (explaining that, since the fear must not only be reasonable but actually perceived by the defendant, that test has both subjective and objective components).

156. *MPC 1985*, *supra* note 36, § 2.09 cmt. at 380. A "reasonableness" standard is central to the MPC's definition of duress in a different manner. The Code defines duress as the use or threat of such force against the accused "that a person of reasonable firmness in his situation would have been unable to resist." *Uniform Laws, MPC*, *supra* note 36, § 2.09(1), at 131.

the defendant needs no rehabilitation and deserves no retribution for his mistake, even if his mistake was unreasonable. And how would deterrence, either specific or general, be served by punishing him for his honest but unreasonable mistake?¹⁵⁷

As with all negligence-based crimes, there is the deterrence rationale that the law should encourage people to be careful and to discourage a lack of care. This might justify a rule which would take away a duress argument from persons who acted in good faith but with an unreasonable belief that committing an illegal act was necessary to save themselves from serious bodily injury. However, such a rationale would more suitably justify punishing the negligent duress-perceiver in a manner corresponding to punishments for other negligence-based crimes, such as negligent destruction of property or criminally negligent homicide, as opposed to punishments for serious intent-based felonies such as murder, kidnapping, assault, or robbery.

This is similar to the approach taken by the MPC with respect to necessity and duress. Where a defendant, otherwise eligible for the necessity defense, is negligent in assessing the necessity for his conduct, or in causing the situation giving rise to the necessity of breaking the law, he will be liable for a negligence-based crime.¹⁵⁸ Correspondingly, where the defendant acts recklessly in assessing the necessity, or recklessly causes the situation giving rise to the necessity, he will be liable for any recklessness-based crime.¹⁵⁹ Thus, the punishment is proportionate to the actual culpability of the defendant.

The MPC rule regarding duress is similar, with one exception. Where a defendant otherwise eligible for the duress defense is negligent in placing himself in a situation likely to result in the duress, the defendant will be liable for a negligence-based crime.¹⁶⁰ This is analogous to the MPC rule on necessity. However, if the defendant is *reckless* in placing himself under the duress, the defense is completely unavailable, and the defendant can be convicted even of intent-based crimes committed under the duress.¹⁶¹ In its commentaries on the MPC, the American Law Institute acknowledges that this rule is an exception to its general approach of matching offense liability with the actual level of mens rea held by the defendant: It allows conviction of a crime of purpose where

157. Granted, applying such a subjective duress standard to a serious offense like homicide may seem unduly lenient. But applied to minor offenses like the window-breaking hypotheticals above, this kind of subjective standard seems more tenable.

158. MODEL PENAL CODE § 3.02(2), at 42-43 (Official Draft and Explanatory Notes 1985).

159. *Id.*

160. *Id.* at § 2.09(2), at 37.

161. *Id.*

the actor's culpability was limited to recklessness.¹⁶² It was thought the rule would apply mostly to "persons who connect themselves with criminal activities, in which case it would be very difficult to assess claims of duress."¹⁶³ Generally, the harsher treatment was justified by the difference in mere "inadvertence" and the more serious "conscious risk creation" involved in recklessness.¹⁶⁴

Although the MPC is not completely consistent in matching liability to culpability, its general preference for such proportionality is sound. The best approach to the objective versus subjective debate would be that recklessness or negligence in misperceiving the power or imminence of the threat, or the availability of reasonable alternatives to obeying the threat, should result in liability for recklessness-based or negligence-based crimes, as the case may be. Failing that, the current state of the law reaches an acceptable compromise in holding that a reasonable belief in a sufficiently powerful coercive threat is both necessary and sufficient.

B. The "Objective" Standard and Individual Defendant Characteristics

Establishing that a "reasonable defendant standard" applies, and that it allows for reasonable mistakes by defendants, does not end the inquiry. In applying this standard, what individual characteristics of the defendant, if any, may a court or jury consider? For example, if the defendant is twelve years old, do we judge his perception of the danger from the standard of a generic reasonable defendant, or a reasonable twelve-year-old defendant? What if the defendant is retarded, like Terance Johnson?

1. Sixth Circuit Opinion

The Sixth Circuit in the *Terance Johnson* case ruled that evidence of the defendant's mental retardation was not relevant to the duress defense.¹⁶⁵ Thus, neither psychiatric testimony offered by the defendant, nor any other testimony regarding the nature and extent of the

162. *MPC 1985, supra* note 36, § 2.09 cmt. at 379 & n.48.

163. *Id.* at 379.

164. *Id.* at 380.

165. *United States v. Johnson (Terance Johnson)*, 416 F.3d 464, 466 (6th Cir. 2005).

defendant's intellectual impairments, could be introduced.¹⁶⁶ In its three-paragraph discussion of this issue, the Court cited two reasons for its conclusion.¹⁶⁷

First, the Sixth Circuit rejected any analogy to a “physical debilitation” like “blindness, deafness, partial paralysis, a missing limb, or the like.”¹⁶⁸ Mental retardation, the Court held, is more “difficult to identify, more difficult to quantify, and more easily feigned.”¹⁶⁹ The Court cited no authority—legal, medical, or otherwise—for this empirical assertion (for which there was neither argument nor evidence in the record). It did cite the common-law civil tort rule that “an adult suffering from a mental deficiency is nevertheless held to a reasonable person standard.”¹⁷⁰

This analysis is incomplete in several respects. First, the line between mental retardation and “physical” disabilities is overstated and out of date. The modern medical understanding of retardation characterizes it as an identifiable condition with physiological causes and manifestations. The known causes for the varieties of mental retardation are trauma, toxins, metabolic disorders, prenatal or neonatal nutritional deficiencies, infectious diseases, or genetic conditions.¹⁷¹ While there are many different causes, they all manifest in a “common pathway of various pathological processes that affect the functioning of the central nervous system.”¹⁷² The onset must occur before age eighteen, and the effect is permanent—one does not “get over” being retarded.¹⁷³ The condition is rare, with less than three percent of the population classified as retarded.¹⁷⁴

Retardation is far from being difficult to identify or quantify. A subject with an I.Q. of seventy or below is considered mentally retarded if she also manifests significant limitations in certain identified

166. *Id.* at 470 (affirming district court ruling excluding such evidence).

167. *Id.* at 469.

168. *Id.*

169. *Id.*

170. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 283B cmt. b (1965)).

171. *See, e.g.*, MEDLINE PLUS MEDICAL ENCYCLOPEDIA: MENTAL RETARDATION, <http://www.nlm.nih.gov/medlineplus/ency/article/001523.htm> (last visited Nov. 7, 2005). Indeed, the record in the *Terance Johnson* case contains undisputed testimony that Terance Johnson suffered prenatal drug abuse by his mother and physical abuse by his father against the fetus while his mother was pregnant with him. Joint Appendix at 93-94, *Terance Johnson*, 416 F.3d 464 (No. 04-5611).

172. *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., Text Revision 2000)) [hereinafter DSM-IV-TR].

173. *Id.* at 308, 309 n.5 (citing MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

174. *Id.* at 309 n.5 (citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2592 (B. Sadock & V. Sadock eds., 7th ed. 2000)).

“adaptive functions” such as communication, self-care, or interpersonal skills.¹⁷⁵ Indeed, courts have identified recognized I.Q. tests, and uniformly use the I.Q. score of seventy as the cutoff for retardation.¹⁷⁶ A similar cutoff is used by the Social Security Administration in determining who is qualified for disability benefits.¹⁷⁷ Most experts testify that retardation cannot be feigned.¹⁷⁸ Courts have much experience in determining who is or is not mentally retarded. Indeed, in the *Terance Johnson* case, the defendant’s mentally retarded status was undisputed.

Also out of date is the reliance on common-law civil tort principles as codified in the Second Restatement of Torts. The medical understanding of mental retardation has changed since 1965, when the Second Restatement was published. The Restatement of Torts drafters are now actively considering a rule recognizing the salience of a mental or emotional disability which has a clear “organic cause.”¹⁷⁹ Such disabilities, like mental retardation, may be considered more physical than mental. And the common law in other civil causes of action is even more receptive to consideration of mental retardation, as contract cases considering duress defenses show.¹⁸⁰ At any rate, since the primary purpose of civil law is to compensate the plaintiff rather than punish the defendant, and the civil defendant’s liberty is not at stake, a defendant-strict standard in civil law should by no means close the inquiry.

Second, the Sixth Circuit noted that a “reasonable retarded person” standard is “unknown to our criminal jurisprudence, state or federal.”¹⁸¹ Such a standard, reasoned the court, would “collapse into a subjective, individualized inquiry in each case.”¹⁸² Further, it would require a jury to undertake the impossible task of determining which lawful alternatives a defendant subjectively considered before deciding to obey the coercer’s unlawful demands.¹⁸³

175. *Id.* at 308 n.3 (citing DSM-IV-TR, *supra* note 172, at 42).

176. *Id.* at 309 n.5 (citing KAPLAN & SADOCK, *supra* note 174, at 2591-92).

177. *See id.* at 309 n.5.

178. This was the consistent testimony of the defense and prosecution medical experts in the *Terance Johnson* case. Joint Appendix at 95, *United States v. Johnson*, 416 F.3d 464 (6th Cir. 2005) (No. 04-5611); *see, e.g., Atkins*, 536 U.S. at 309 n.5 (noting in one instance of expert testimony that an I.Q. score of fifty-nine was not an “aberration” or “malingered result”).

179. RESTATEMENT (THIRD) OF TORTS, § 11 cmt. e (Tentative Draft No. 1, 2001).

180. *See infra* Part V.B.6.

181. *Terance Johnson*, 416 F.3d at 469.

182. *Id.*

183. *Id.*

This analysis is also incomplete. It is not necessary to christen a formal “reasonable retarded person” standard for duress to allow consideration of the fact that the defendant is retarded and has a significantly impaired ability to assess threats and consider lawful alternatives. More important, the reason such a consideration is “unknown to criminal jurisprudence” is simply that no court has had to deal with the issue before. Citing an absence of precedent for a question of first impression is dangerously close to circular reasoning.

Moreover, consideration of the retarded status of the defendant would not in fact require a subjective inquiry. The inquiry would still be an objective one. The jury would not have to guess what alternatives the defendant actually considered. Rather, it would have to consider whether it was objectively reasonable to expect a retarded defendant, with a diminished ability to consider alternatives, to come up with safe, lawful alternative courses of action under those circumstances. The extent of a retarded defendant’s diminished ability to assess threats and consider alternatives would be indicated through expert testimony. Such an inquiry would indeed require an “individualized inquiry in each case,” but that is true with every jury question involving an objective standard. Indeed, it is the very function of the jury to make such “individualized” determinations.

Like the question of the applicability of the duress defense to felony murder charges, the relevance of mental retardation to the duress defense is also a question of first impression in the federal system. No state or federal court prior to the *Terance Johnson* case had ruled on whether evidence of the defendant’s mental retardation is relevant to a claim of duress. Nor has any court ruled on whether other biographical characteristics, such as the defendant’s age or gender, can be relevant to the duress defense. The closest federal authorities available are criminal cases dealing with the admissibility of various types of psychiatric evidence other than retardation, or cases considering retardation in related contexts such as coercive interrogations.

2. *In General*

Generally, as long as a defendant is legally sane, the fact that he suffers from mental retardation will not by itself excuse him from responsibility for his criminal conduct.¹⁸⁴ This characteristic distinguishes retarded defendants from juvenile defendants, who, depending on their exact age,

184. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-35 (1985).

are often presumed not responsible for their criminal acts.¹⁸⁵ Because medical testimony concerning the mentally retarded often speaks of the retarded as having the intellectual capacity of a child, an analogy between the two seems natural enough. However, arguments to treat retarded defendants like child defendants in this manner have been “universally unsuccessful.”¹⁸⁶

Deciding that mental retardation does not per se excuse a criminal defendant is not the same as deciding that evidence of the defendant’s mental retardation cannot be relevant. Indeed, as part of a “diminished capacity” defense, some states allow consideration of this evidence in determining whether the defendant in fact acted with the requisite mens rea, while others either prohibit such evidence, or limit its consideration to murder cases.¹⁸⁷ Federal courts recognize a diminished capacity defense to homicide and other crimes, including the ability to introduce psychiatric evidence regarding a defendant’s mental impairments, but only to negate a “specific intent” element.¹⁸⁸ Indeed, this rule of law arose during the *Terance Johnson* case. Prior to ruling that evidence of defendant’s mental retardation was irrelevant to the duress defense, the

185. *Id.* at 434-35.

186. *Id.* at 435. A similar distinction is made in tort law. Courts hearing civil negligence claims generally hold children to the standard of a reasonable child of the corresponding age. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 283A (1965). Tort law also generally allows consideration of a party’s physical disability, but not of a mental or emotional disability. *See id.* § 283C, § 283C cmt. b. The distinction is based at least in part on concerns that mental or emotional disabilities, and their causal effect on the tortious conduct, are harder to prove, define, and quantify. *See id.* Blurring the distinction somewhat is the rule that involuntary intoxication can be taken into account in deciding the standard of care. *Id.* § 283C cmt. d. Moreover, courts have recently begun to consider the salience of a mental or emotional disability which has a “clear organic cause.” RESTATEMENT (THIRD) OF TORTS, § 11 cmt. e (Tentative Draft No. 1, 2001). Such disabilities might be considered more physical than mental. With each passing year, medical science discovers physiological roots for ailments once thought to be purely psychological in nature, further blurring the line. Of course, given that tort law’s primary purpose is to ensure that those who are wrongfully injured receive compensation, rather than to punish those deserving of punishment, tort law is not the best area in which to seek guidance. For more information on tort law’s reluctance to take mental disabilities into account, see KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 57-59 (2002).

187. DRESSLER, *supra* note 35, § 26.02, at 363-65; *see supra* Part III.D. (describing the use of “diminished capacity” to mitigate murder to manslaughter).

188. *See, e.g.*, *United States v. Ettinger*, 344 F.3d 1149, 1152 (11th Cir. 2003); *Mallett v. United States*, 334 F.3d 491, 495 (6th Cir. 2003); *United States v. Twine*, 853 F.2d 676, 679, 681 (9th Cir. 1988); *Hughes v. Mathews*, 576 F.2d 1250, 1256-57 (7th Cir. 1978).

district court had ruled it irrelevant to a defense of diminished capacity, because the felony murder theory at issue was not a “specific intent” type of offense.¹⁸⁹

Only recently, the U.S. Supreme Court recognized the special status of the mentally retarded in the criminal law, invalidating the execution of the mentally retarded.¹⁹⁰ In so ruling, the Court emphasized that the mentally retarded have, “by definition . . . diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁹¹ Commentators have echoed this emphasis, noting that the mentally retarded have characteristics making them uniquely vulnerable to coercion.¹⁹² Thus, a mentally retarded defendant may have a compromised ability to assess whether a threat is real or imminent, to decide whether obeying the coercer’s unlawful command is truly necessary, and to conceive of and weigh alternative responses to the coercer in order to decide whether there is a reasonable opportunity to avoid the harm without acceding to the coercer’s demands. Further, this lessened ability to meet the elements of the duress defense is something beyond the defendant’s control, based on a permanent disability. Should a jury be informed of this before it assesses the defendant’s duress defense? To help answer this question, we should look at what other courts have said in analogous situations.

3. *Federal Cases on Duress*

While there are no federal opinions directly addressing this issue, federal appellate courts dealing with claims of duress have on at least two occasions noted without criticism the admission of such evidence at the trial court level.¹⁹³ In the analogous context of claims that a

189. See, e.g., *Knox v. State*, 901 So.2d 1257, 1268 (Miss. 2005); *McConnell v. State*, 107 P.3d 1287, 1292 (Nev. 2005); *State v. Ammons*, 2005 WL 1378775, at *4 (Tenn. Crim. App. June 9, 2005).

190. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

191. *Id.* at 318.

192. See, e.g., *Morgan Cloud et al., Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 511-12 (2002) (the retarded are “unusually susceptible to the perceived wishes of authority figures” and have “a generalized desire to please”); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2044 (1998) (the “mentally handicapped” are “especially vulnerable” to the pressures of custodial interrogation).

193. *Perry v. Leeke*, 488 U.S. 272, 274 (1989) (describing how lower court, considering defendant’s duress defense to a rape charge, admitted evidence that defendant was “mildly retarded” and “could be easily influenced by others”); *Bliss v. Lockhart*, 891 F.2d 1335, 1340, 1343 (8th Cir. 1989) (upholding grant of habeas relief in sexual assault case, where evidence showed defendant, who had been under duress from

confession was the product of unconstitutional duress, the U.S. Supreme Court has noted that a suspect's "mental condition" is "surely relevant to an individual's susceptibility to police coercion."¹⁹⁴ For that reason, federal courts have held that when the interrogating police know that a suspect suffers from some "mental incapacity," including, specifically, mental retardation, a lesser quantum of coercion is necessary to invalidate a confession.¹⁹⁵

An analogous issue arose in the decades-old case of *United States v. Hearst*, a famous case involving a duress defense to bank robbery charges.¹⁹⁶ There, the Ninth Circuit ruled psychiatric testimony was admissible to prove the defendant's claim (who was not mentally retarded or emotionally disturbed) that she had been coerced into participating in the bank robberies.¹⁹⁷

4. Federal Cases on "Battered Women's Syndrome"

The more recent federal cases which have issued rulings on anything analogous to a duress defense for a mental condition have dealt with the issue of "battered women's syndrome." In *United States v. Johnson*,¹⁹⁸ the Ninth Circuit considered the relevance of evidence that the female defendants, low-level members of a drug ring, had developed battered women's syndrome through repeated beatings at the hands of the drug ring's bodyguards, enforcers, and collectors.¹⁹⁹ The court ruled that

a domineering and abusive husband, was retarded and functioned on an eight-year-old level).

194. *Colorado v. Connelly*, 479 U.S. 157, 165 (1986). *Connelly* concerned a mentally ill defendant, but the logic also applies to someone with mental retardation. See Cloud et al., *supra* note 192, at 511-12 (detailing how the retarded are unusually susceptible to coercive interrogation techniques); White, *supra* note 192, at 2044 (same).

195. *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002); *Nickel v. Hannigan*, 97 F.3d 403, 410 (10th Cir. 1996); *United States v. Sablotny*, 21 F.3d 747, 751-52 (7th Cir. 1994).

196. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977). The case involved the famed daughter of newspaper magnate William Randolph Hearst, the basis for the award-winning motion picture *Citizen Kane*. Patricia Hearst's apparent abduction by a radical domestic terrorist group called the Symbionese Liberation Army became a nationwide cause celebre. Public interest in the case grew greater still after she appeared to be participating in bank robberies conducted by the radical group. Her eventual apprehension (or rescue, depending on one's point of view) sparked a national debate on whether persons could be "brainwashed." See CHRISTOPHER CASTIGLIA, *BOUND AND DETERMINED* 88-90, 97-99 (1996).

197. *Hearst*, 563 F.2d at 1336, 1343.

198. *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1992).

199. *Id.* at 897-903.

evidence of a defendant's "special vulnerability" to coercion could be relevant to a duress defense.²⁰⁰ It explained that any experiences the defendants had which affected the defendants' anticipation that threats would be carried out could be considered in evaluating the duress element that the fear of the coercer be "well-grounded."²⁰¹

In so ruling, the Ninth Circuit relied heavily on the MPC. The federal duress elements of a "well-grounded fear" and no "reasonable" opportunity to escape were "in harmony" with the MPC's standard that "a person of reasonable firmness in [the actor's] situation would have been unable to resist."²⁰² The court quoted the MPC commentary's explanation that while the individual temperament of a defendant could not be considered in applying this "reasonable firmness" standard, one could nonetheless consider "[s]tark, tangible factors that differentiate the actor from another, like his size, strength, age, or health."²⁰³ The Ninth Circuit then added gender to the list of such "stark, tangible factors."²⁰⁴ While cautioning against any "substantial expansion of the [duress] defense . . . [unless] linked to gross and identifiable classes of circumstances," it concluded that battered women formed such a class.²⁰⁵ It was therefore permissible to consider an individual defendant's "experience and psychological makeup."²⁰⁶ Given that mental retardation is a more well-recognized and well-defined condition than the more recent and more controversial battered women's syndrome, *Johnson* would seem to support consideration of a defendant's retardation where the defendant claims coercion. Retardation fits into the gross and identifiable class of circumstances mentioned in *Johnson*.

Other circuits have cited *Johnson* on this ground, with mixed results. In *United States v. Sachdev*,²⁰⁷ the First Circuit cited *Johnson* in the analogous context of a downward Federal Sentencing Guidelines departure for duress: "There may be room to consider whether a

200. *Id.* at 897-908.

201. *Id.* at 898.

202. *Id.* (quoting *MPC 1985*, *supra* note 36, § 2.09(i)).

203. *Id.* (quoting *MPC 1985*, *supra* note 36, § 2.09 cmt. 3).

204. *Id.*

205. *Id.* at 900.

206. *Id.*; *see also* *People v. Sanchez*, 446 N.Y.S.2d 164, 165 (Sup. Ct. 1982) (testimony concerning "the intelligence level of the defendant" would aid the jury in determining his ability "to resist acts or threats of duress which could affect his conduct"); *State v. Woods*, 357 N.E.2d 1059, 1065 (Ohio 1976) (in evaluating duress defense to murder case, the question is not "what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health, and mental condition of the person affected . . . may be considered"); *State v. Williams*, 937 P.2d 1052, 1058 (Wash. 1997) (individual defendant's experience of abuse could overcome weakness regarding the immediacy of the coercer's threat).

207. *United States v. Sachdev*, 279 F.3d 25 (1st Cir. 2002).

defendant falls into a group well recognized to have particular vulnerability to coercion or duress . . . such as those suffering from battered person's syndrome."²⁰⁸ While this decision is open to the consideration of mental impairment even under an "objective" standard of duress, its salience is limited in that it arose only in the context of sentencing.

In *United States v. Smith*,²⁰⁹ the Second Circuit referenced *Johnson* and quoted the MPC section 2.09 standard of a "person of reasonable firmness."²¹⁰ The court appeared to agree with the district court's ruling that psychiatric testimony regarding the defendant's "unusual susceptibility to coercion" was *not* relevant to the duress defense, but only for sentencing purposes.²¹¹ However, the court also stated that psychiatric testimony should have been allowed on the question of whether the defendant's individual behavior was consistent with duress—even though there was no evidence or claim that the defendant suffered from some mental or emotional defect.²¹² It is not clear what the Second Circuit would say about the admissibility of psychiatric evidence where such a defect (such as retardation) was in fact present.

The Fifth Circuit developed a clearer but more restrictive view in *United States v. Willis*.²¹³ In *Willis*, the circuit court held that evidence of the defendant's battered women's syndrome would *not* be admissible for duress claims, because duress was a purely "objective" test.²¹⁴ The court in *Willis* correctly interpreted the Second Circuit decision in *Smith* as in accord with its own.²¹⁵ However, the Second Circuit incorrectly interpreted the Ninth Circuit opinion in *Johnson* as being in accord with its decision as well.²¹⁶ To the extent it suggests that psychological

208. *Id.* at 29 n.2; *see also* State v. B.H., 834 A.2d 1063, 1071 (N.J. Super. Ct. App. Div. 2003) (finding that the standard for duress would be "the reasonable person suffering from battered women's syndrome as a result of a history of battering").

209. *United States v. Smith*, 987 F.2d 888 (2d Cir. 1993).

210. *Id.* at 890-91.

211. *Id.* at 891-92.

212. *Id.* at 891.

213. *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994).

214. *Id.* at 176-77.

215. *Id.* at 176.

216. *Id.* In *Willis*, the Fifth Circuit read the Ninth Circuit's *Johnson* opinion as holding that evidence of battered women's syndrome could be relevant only at sentencing. *Id.* It is true that the Ninth Circuit noted as a procedural matter that the case was before it only as to sentencing. *United States v. Johnson*, 956 F.2d at 897. However, the court in *Johnson* also made several approving references linking battered women's syndrome to MPC commentaries on duress which dealt explicitly with the

ailments of the individual defendant cannot be considered, *Willis* represents authority against the relevance of defendant's retardation. On the other hand, because battered women's syndrome is a newer, more controversial condition than mental retardation, and one less clearly defined and quantified, *Willis* is arguably distinguishable.

The Ninth Circuit's reliance in *Johnson* on the MPC, particularly the "stark, tangible factors" language, is instructive. State courts have relied upon the same language, and in one case allowed evidence of the defendant's mental retardation for a claim of duress. In *Commonwealth v. DeMarco*,²¹⁷ the Supreme Court of Pennsylvania construed Pennsylvania's duress statute, which followed the MPC language of "a person of reasonable firmness in the defendant's situation."²¹⁸ The court quoted the "stark, tangible factors" language from the MPC commentaries and concluded that while a court cannot consider a defendant's "particular characteristics of temperament, intelligence, courageousness, or moral fortitude," it could consider the fact that a defendant suffers from a "gross and verifiable mental disability."²¹⁹ Thus, it allowed consideration of the defendant's borderline mental retardation.²²⁰ Other state court decisions have followed a similar path.²²¹ This is consistent with the general approach of allowing evidence of a defendant's physical disabilities to be considered regarding "reasonableness" standards. On the other hand, in *State v. Van Dyke*, an intermediate appellate court in New Jersey quoted the same "stark, tangible factors" language and concluded that evidence of a defendant's "mental health" had properly been excluded from jury consideration.²²²

question of guilt. *See id.* at 898, 900 (referring to the "stark, tangible factors" language and explaining how "the continued use of unlawful force . . . break[s] down the personality" of the [defendant], rendering [her] "submissive"). The court then recognized battered women as a "gross and identifiable class[]" and linked that class to an "expansion of the defense" of duress. *Id.* at 900. Finally, by way of analogy, the court approvingly discussed cases recognizing the subjugation of abused women, which involved determinations of liability, not sentencing. *Id.* (citing *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (5th Cir. 1987) and *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984)). Thus, I read *Johnson* as endorsing the relevance of battered women's syndrome evidence in evaluating a duress defense at the guilt or innocence phase as well as the sentencing phase.

217. *Commonwealth v. DeMarco*, 809 A.2d 256 (Pa. 2002) (citation omitted).

218. *Id.* at 262.

219. *Id.* (quoting MODEL PENAL CODE, § 2.09 cmt. at 7 (Tentative Draft No. 10) (1960)).

220. *Id.* at 263; *see also* *Tully v. State*, 730 P.2d 1206, 1211 (Okla. Crim. App. 1986) (describing how trial testimony included psychological profile of defendant as easily manipulated and terrified by coercer).

221. *See, e.g.,* *People v. Sanchez*, 446 N.Y.S.2d 164, 165 (Sup. Ct. 1982) (noting that evidence of mental retardation would aid the jury in determining "the ability of the defendant to resist" threats).

222. *State v. Van Dyke*, 825 A.2d 1163, 1170-72 (N.J. Super. Ct. App. Div. 2003).

According to the MPC, consideration of the “stark, tangible factors” of the defendant’s “situation” under section 2.09 can also include both age and health.²²³ Mental retardation involves elements of both age and health. Mentally retarded defendants are often diagnosed as having the mental age of a child.²²⁴ And mental retardation is certainly a medical condition which falls within the category of “health.”

5. Cases Involving Criminal Negligence

An obvious analogy would be that of criminal negligence, normally defined as a gross deviation from the standard of care of a reasonable person. Would evidence of a defendant’s mental retardation be relevant for a jury deciding guilt of a defendant charged with a criminal negligence-based offense? Little case law exists on this question. One Alaska decision has stated that the “peculiarities of a given individual—his or her intelligence, experience, and physical capabilities” are irrelevant to the question of criminal negligence “since the standard is one of the reasonably prudent person.”²²⁵ The court specifically used as examples mental retardation, bad eyesight, and bad hearing as conditions which would be irrelevant as a matter of law to determining criminal negligence.²²⁶ A Connecticut Supreme Court decision hints at a similar result, specifying that outside the context of an insanity defense, evidence of a defendant’s mental capacity would be relevant to the issue of whether defendant acted recklessly, or to any other “specific intent” element.²²⁷ This might be read as implying that such evidence would be irrelevant to a determination of whether the defendant was negligent, or acted reasonably, as would be the case with the key elements of the duress defense.

However, the MPC takes a different approach. The MPC explicitly states that criminal negligence is to be judged according to the “care that

223. MPC 1985, *supra* note 36, § 2.09, at 375.

224. See, e.g., *Terance Johnson* Sentencing Order, *supra* note 2, at 6 (finding, based on psychiatric testimony, that Terance Johnson has an intellectual and emotional age between six and ten years). This similarity may not justify giving mentally retarded defendants the same presumption of incapacity which children receive. See *supra* Part V.B.1. However, the two seem sufficiently analogous that they ought to be treated in parallel when applying the defense of duress.

225. *Edgmon v. State*, 702 P.2d 643, 645 (Alaska Ct. App. 1985).

226. *Id.*

227. *State v. Burge*, 487 A.2d 532, 539 (Conn. 1985).

a reasonable person would observe in the actor's situation."²²⁸ In interpreting the word "situation," the MPC commentaries distinguish between significant disabilities such as a defendant who is blind, experiences a heart attack, or has just suffered a blow, from mere matters of individual temperament or intelligence.²²⁹ Although there are no major cases in MPC jurisdictions which directly apply this distinction to mental retardation, it seems that mental retardation resembles the disabilities mentioned above more than an instance of individual temperament or intelligence.²³⁰ While the MPC commentaries might be read to favor consideration of retardation, the two reported decisions dealing with criminal negligence discussed above point in the opposite direction.²³¹

6. Duress as an Excuse for Contract Liability

Another obvious analogy comes from contract law. The law has long recognized a duress defense to contract liability. If a party to a contract was induced to enter into the contract through physical, psychological, or even economic coercion, the party can rely on such coercion to excuse himself or herself from liability.²³² Where the coercion is nonphysical in nature, the level of pressure required is "an improper threat . . . that leaves the victim no reasonable alternative" to entering into the contract.²³³

While reported cases on the issue do not abound, it appears that courts adjudicating contract disputes consider evidence of the defendant's mental impairment a relevant factor when weighing a claim of duress (sometimes also referred to as "undue influence").²³⁴ These cases reflect consideration of the duress defense as distinct from the related contract law defense of lack of capacity to enter a contract, as would arise where the party seeking relief was a minor or mentally incompetent.²³⁵ Of

228. *MPC 1985, supra* note 36, § 2.02(d), at 226.

229. *Id.* § 2.02 cmt. at 242.

230. *But cf. Edgmon*, 702 P.2d at 645 (stating in dicta in non-MPC jurisdiction that defendant's retardation would not be relevant to criminal negligence but would be relevant to a recklessness mens rea).

231. *Id.* at 645; *Burge*, 487 A.2d at 539.

232. RESTATEMENT (SECOND) OF CONTRACTS, §§ 174-175 (1979).

233. *Id.* § 175(1).

234. *See, e.g., Russo v. Miller*, 559 A.2d 354, 358 (Me. 1989) (seller's personal susceptibility to duress, heightened by the mental incapacity evidenced by her history of psychiatric treatment, combined with other factors to unduly influence the seller); *Eckstein v. Eckstein*, 379 A.2d 757, 764-65 (Md. Ct. Spec. App. 1978) (considering wife's mental and emotional illness in voiding a divorce decree executed under duress).

235. *See Russo*, 559 A.2d at 358.

course, mental disability is always relevant in deciding whether a party had the capacity to enter into a contract or to write a will.

A somewhat analogous contract case involving a claim of economic coercion lends support to this view. In *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*,²³⁶ the court analyzed whether a given amount of fiscal pressure would be sufficient to support a contract defense of duress. The court allowed evidence of the shaky financial status of Totem Marine to show that it was particularly vulnerable to economic coercion by the much larger Alyeska Corporation.²³⁷

7. Policy Considerations

In sum, there is no federal case law directly on point, and all analogous case law is in conflict. There is undeniably room for argument. In my view, the best approach is to allow consideration of the defendant's mental retardation, as well as other recognized mental and emotional disorders. Mental retardation profoundly compromises an accused's ability to decide whether a threat is real and imminent, and whether a reasonable alternative exists to heeding it—probably the two most important elements of the duress defense. In criminal law, it is simply unfair to hold a defendant to a standard which he is not capable of meeting.

A reasonable contrary argument would distinguish duress from other excuse defenses like diminished capacity or insanity. A diminished capacity or insanity defense says, in effect, that there is something wrong with the defendant that justifies treating him or her more leniently. The theory of duress, however, is that any person under the same external circumstances would act similarly. This theory may suggest a rule admitting no special considerations for individual defendants, no deviations from the platonic ideal of the generic "reasonable person."

But some of the same duress hypotheticals used earlier to illustrate the need to allow for reasonable mistakes by defendants also serve to illustrate the problem with this argument. If a person with limited English proficiency misunderstood a joking threat as a serious one, we would need to take her linguistic handicap into account to properly assess whether her fear was "well-grounded." Similarly, if a blind

236. 584 P.2d 15 (Alaska 1978).

237. *Id.* at 22-24.

person failed to see uniformed police officers next to her as she walked to the bank, we would need to take her blindness into account in deciding whether she failed to avail herself of a “reasonable opportunity” to avoid having to obey the unlawful demand. In both cases, there is a “stark, tangible factor” (as the MPC commentaries would put it) or a “gross, identifiable class of circumstances” (as the Ninth Circuit in *United States v. Johnson* would put it) which renders the defendant incapable of meeting the standard of an ordinary American. Basic considerations of justice thus argue for allowing the jury to consider the hypothetical defendants’ blindness and limited English proficiency. In my view, there is no principled distinction between these situations and the case of a defendant (like Terance Johnson) who is indisputably mentally retarded. In other words, if we allow “circumstances” to include the fact that the defendant is blind, or a foreigner, or retarded, then we can indeed say that an ordinary reasonable person under the same circumstances would act the same way, and the theoretical objection evaporates.

Ultimately, we should imagine a continuum of causes potentially affecting our application of an objective “reasonableness” standard for duress. At one end are matters of individual temperament: the unusually cowardly person, the unusually impulsive person, the unusually nonobservant person, etc. These idiosyncratic characteristics may indeed affect a defendant’s decisions in ways relevant to a duress defense. The coward may give in to unlawful demands where the threat is more unclear, more remote, or simply less scary than would a “normal” person. Similarly, the impulsive defendant may jump to the conclusion that he must follow the unlawful demands, and the nonobservant person may fail to see fairly obvious ways out of the dilemma. Both MPC and non-MPC jurisdictions would agree that such idiosyncratic characteristics should not be considered in excusing defendants under the duress defense. For one thing, such concepts as “unusually cowardly” are ill-defined; for another, they are by and large matters within our control.²³⁸ Moreover, considering such highly individualized personality flaws erodes any notion of an objective standard in the law to which all persons must aspire.

238. I do not argue that retarded persons have less courage than the ordinary reasonable person. Retardation primarily compromises cognitive skills, and may not have any effect at all on a person’s general strength of will. Rather, the focus is on the elements of duress which directly involve cognitive functions: the ability to assess whether a threat is real, serious, and imminent, and the ability to assess whether there are reasonable, safe, and lawful alternatives to carrying out the coercer’s unlawful demands. Jurors should consider a duress defendant’s retardation only insofar as the cognitive disability affects those two elements of the duress defense.

At the other extreme are the notions of extreme age and extreme physical disability. A seven-year-old and a frail ninety-three-year-old may very well be less able to resist intimidation and coercion, or nimbly escape the coercer's clutches. A blind person may be unable to see that the coercer's threat is hollow. A paraplegic may be physically less able to escape the coercer. If called upon to decide, most jurisdictions would likely allow such biographical characteristics to be factored in. They are well-defined matters beyond a defendant's control. More importantly, our intuitive sense of justice seems to cry out for consideration of such factors; the equities, if you will, favor the defendant.

Mental retardation may lie somewhere in between these two extremes. While reasonable minds may differ as to which side of the line retardation falls, I believe it is more like the latter category than the former. It is a well-defined matter, beyond the defendant's control. The condition of being retarded makes one a peculiarly vulnerable, and peculiarly inviting, target for the kind of intimidation and coercion contemplated in the duress defense. At an intuitive level, holding a mentally retarded defendant to the standard of an ordinary reasonable person—a standard often impossible for such a defendant to meet—simply seems unjust.

VI. CONCLUSION

Although it has been around for centuries, the defense of duress is surprisingly ill-defined. Basic questions concerning its contours appear to be unresolved. Should the duress defense ever apply to homicide? Can it apply to unintentional homicides like felony murder, at least where the defendant played no direct role in the killing? Does its "objectively reasonable" standard allow for consideration of a defendant's physical disabilities? What about mental or emotional disabilities?

The *Terance Johnson* case does not resolve these questions, but merely dramatizes them. Courts and legislatures should follow the modern trend and make clear that a sufficiently compelling defense of duress may be considered by a factfinder in any case, even where the charge is intentional homicide. While the traditional rule shows admirable respect for the sanctity of human life in stating categorically that the act of taking an innocent life to save one's own life can never be *justified*, it is unrealistic and overly harsh in stating that no amount of coercion can ever warrant leniency toward or excuse of an individual defendant.

Regarding the remaining issues, decisionmakers have a blank slate on which to write. They should take care to think about the policies behind the analogous, traditional common-law approaches from which they might draw inspiration. The law should make clear that duress may be asserted in cases of unintentional homicide like felony murder where the defendant does not choose to take an innocent life to save his own. This follows logically from the basic rule that duress can serve as a defense to the underlying felony, and felony murder liability depends on liability for that underlying felony. It also follows from the fact that the rationale for the rule barring duress as a homicide defense is that the defendant *chose* to take an innocent life. Alternatively, the law should allow such a defense wherever the facts indicate that the defendant was not reckless (or perhaps not negligent) in getting involved in the underlying felony or creating the specific conditions which caused the victim's death. A final, least favorable alternative, used in some jurisdictions, would be to allow the duress to mitigate the charge to manslaughter.

Whether applied to homicide or other crimes, the duress defense should take account of well-recognized physical and mental disabilities suffered by a defendant which affect his ability to meet the elements of the duress defense. Such disabilities include mental retardation, which demonstrably impairs a defendant's ability to assess threats and consider alternatives to obeying those threats. As with the rule regarding duress and homicide, a contrary result holding a retarded defendant to an "ordinary reasonable person" standard would be unrealistic and unfair.