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DURESS AND THE UNDERLYING FELONY

Russell Shankland*

In a robbery that turns unintentionally fatal, a person participating under duress would be convicted of felony murder in some states but would have a complete defense to the crime in others. This Comment explores the availability of the duress defense for felony murder. Six states prohibit the duress defense for all murder, felony murder included. Seven states bar the defense for murder generally, but make an exception for felony murder if the duress excuses the defendant's participation in the underlying felony. Two states treat duress as a defense for all cases of murder.

This Comment discusses the background of the felony-murder rule and the duress defense. It analyzes the rationales underlying the differing state approaches but finds that denying the duress defense to a coerced actor in a felony murder—regardless of the reasoning—produces unacceptable results. Where duress would serve as valid defense to the underlying felony, this Comment concludes that the duress defense should also excuse a coerced actor from liability for felony murder. In states that rely upon the common law duress defense, courts should recognize that the common law has evolved to embrace duress as a defense to felony murder. Furthermore, courts in those states, which have codified into statute the common law prohibition of the duress defense for all murder, should interpret their statutes to allow the defense by distinguishing felony murder from premeditated murder.

I. INTRODUCTION

On September 9, 2008, the Maryland Court of Special Appeals ruled in a case of first impression that duress can serve as a defense to felony murder if the duress negates the defendant's culpability for the underlying

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felony.[1] In *McMillan v. State*, two men recruited Nathaniel McMillan, the appellant, to assist in a home invasion because of McMillan's preexisting relationship with the targeted victim, Hermann Haiss.[2] On the day of the crime, McMillan's co-felons picked him up at his place of employment, and the three men drove to Haiss' house.[3] McMillan knocked on the victim's door. Recognizing him, Haiss answered the door, and McMillan's co-felons stormed into the house.[4] McMillan claims to have stayed outside, but inside, his co-felons forced Haiss to unlock his gun safe.[5] They stole Haiss's collection of firearms and bludgeoned him to death with a baseball bat.[6]

The State charged McMillan with first-degree felony murder.[7] In his defense, McMillan requested a jury instruction for the duress defense.[8] He claimed that his co-felons had promised him a ride home but instead took him, against his will, to the victim's house and demanded that he help them gain entry.[9] When McMillan objected, he said, his co-felons threatened, "[Y]ou get down or you lay down, you gonna be with that old man in the house or you gonna leave out the house with us, which one you wanna do?"[10] The trial judge rejected McMillan's request for a duress instruction.[11] The jury convicted him, and the court sentenced him to life imprisonment.[12]

On appeal, McMillan argued that his pretrial statements constituted sufficient evidence from which a jury could reasonably find that he was coerced into participating in the robbery.[13] Thus, the trial court erred in

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[1] McMillan v. State, 956 A.2d 716 (Md. Ct. Spec. App. 2009), *cert. granted*, 962 A.2d 370 (Md. Dec. 19, 2008) (No. 437).

[2] *Id.* at 721-24. McMillan's aunt and uncle lived next to Haiss. During McMillan's childhood, he had stayed with his aunt and uncle, and he had often played with Haiss's grandchildren. *Id.*

[3] *Id.* at 723.

[4] *Id.*

[5] *Id.* at 725.

[6] *Id.*

[7] *Id.* at 721.

[8] *Id.* at 726.

[9] *Id.* at 723-24.

[10] *Id.*

[11] *Id.* at 726-27. In ruling against the duress instruction, the trial judge did not contend that the defense was generally inapplicable to felony murder. The judge, instead, found no evidence of an impending threat of death or serious bodily harm. "[I]n order for duress to occur, there has to be a situation in which someone is, in effect, holding a gun to his head at the time he commits the crime." *Id.* at 726.

[12] *Id.* at 721.

[13] *Id.* at 729.

denying his request for a duress instruction.[14] In turn, the State of Maryland challenged the availability of the duress defense for murder no matter the circumstance.[15] A defendant can only rely on duress, according to the State, where the crime did not involve the taking of an innocent life.[16]

The Maryland Court of Special Appeals granted neither McMillan nor the State what each sought. Even though the common law generally bars the duress defense for murder, the court concluded that where "duress would serve as a defense to the underlying felony, [duress] is also available as a defense to a felony-murder arising from that felony."[17] It relied on dicta from a prior Maryland Court of Special Appeals decision,[18] analysis from legal commentators,[19] and cases from other jurisdictions. Although the court approved of the defense generally, it found that McMillan was not entitled to a jury instruction as to duress. According to the Court of Special Appeals, the trial court had properly weighed whether McMillan produced "'some evidence' of imminent threat."[20]

In allowing the defense, the court aligned Maryland with six states that deny the duress defense for murder generally but allow it for the special case of felony murder.[21] The Maryland approach, however, does not represent the unanimous approach used by states. On December 30, 2008, the Michigan Court of Appeals, in an unpublished opinion, also examined the availability of the duress defense for felony murder.[22] The Michigan

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[14] *Id.*

[15] *Id.*

[16] *Id.* The State relied on *Frasher v. State* for the premise that duress operates as a "defense as to all crimes except taking the life of an innocent person." 260 A.2d 656, 661 (Md. Ct. Spec. App. 1970).

[17] *McMillan*, 956 A.2d at 734.

[18] *Id.* at 733. The court cited *Wentworth v. State*, 349 A.2d 421 (Md. Ct. Spec. App. 1975), which, in dicta, approvingly quoted WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW (1972): "[D]uress cannot justify murder—or, as it is better expressed (since duress may justify the underlying felony and so justify what would otherwise be a felony murder), duress cannot justify an intentional killing of (or attempt to kill) an innocent third person." *Wentworth*, 349 A.2d at 427.

[19] *McMillan*, 956 A.2d at 734. The court favorably referenced several passages by Professors LaFave and Scott. It also cited William Blackstone's rationale for barring duress for murder and then explained why the circumstances changed for felony murder. *Id.* at 733-34, 738.

[20] *Id.* at 740.

[21] People v. Anderson, 50 P.3d 368, 379 (Cal. 2002); People v. Sims, 869 N.E.2d 1115 (Ill. App. Ct. 2007); People v. Serrano, 676 N.E.2d 1011 (Ill. App. Ct. 1997); State v. Hunter, 740 P.2d 559 (Kan. 1987); State v. Lundgren, No. 90-L-15-125, 1994 Ohio App. LEXIS 1722 (Ohio Ct. App. Apr. 22, 1994); Tully v. State, 730 P.2d 1206 (Okla. Crim. App. 1986); Pugliese v. Commonwealth, 428 S.E.2d 16 (Va. Ct. App. 1993).

[22] People v. Carp, No. 275084, 2008 Mich. App. LEXIS 2585 (Mich. Ct. App. Dec. 30, 2008).

court analyzed the same legal commentators and cases from outside jurisdictions as did the Maryland court in *McMillan* but reached the opposite conclusion.[23] It sided with the six states that have affirmatively ruled that duress can *never* serve as a defense to felony murder.[24] In addition to the Maryland and Michigan approaches, a third approach exists. Both Arkansas and Delaware allow duress as a defense to all forms of murder, felony murder included.[25]

A mere fifteen states have ruled directly on the applicability of the duress defense for felony murder. Yet, many other states have touched on the issue only to dispose of their cases on alternative grounds, such as the defendant's failure to meet the elements of duress even if it were available.[26] Because so few states have acted definitively, this Comment endeavors to provide guidance for courts encountering the issue in cases of first impression. To accomplish this goal, the Comment begins by reviewing the histories and rationales underlying both the felony-murder rule and the duress defense. Next, it explores the three prevailing approaches used by the various states. It examines how prohibiting the defense fails to comport with the identified policies and leads to several unacceptable outcomes. The Comment concludes by first recommending that states that rely on the common law duress defense recognize its development to allow the defense for felony murder and then urging that states that have duress statutes interpret those statutes in light of contemporary standards of justice.

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[23] *Id.* at *11-13.

[24] State v. Encinas, 647 P.2d 624 (Ariz. 1982); People v. Al-Yousif, 206 P.3d 824 (Colo. Ct. App. 2006); Moore v. State, 697 N.E.2d 1268 (Ind. Ct. App. 1998); State v. Rumble, 680 S.W.2d 939 (Mo. 1984) (en banc); State v. Perkins, 364 N.W.2d 20 (Neb. 1985); State v. Ng, 750 P.2d 632 (Wash. 1988) (en banc).

[25] MacKool v. State, 213 S.W.3d 618 (Ark. 2005); State v. Heinemann, 920 A.2d 278 (Conn. 2007).

[26] In *State v. Proctor*, the Iowa Supreme Court acknowledged that "'whether a defendant in a *felony* murder case is entitled to a compulsion instruction when the defendant claims he was compelled to commit an underlying felony'" was a question of first impression in Iowa. 585 N.W.2d 841, 843 (Iowa 1998). Although the court reviewed decisions from other states and commentary by LaFave and Scott, it did not decide the issue. Instead, it said that even if it accepted that duress could serve as a defense, the defendant did not establish his entitlement to a compulsion defense. *Id.*; *see also* State v. Bockorny, 863 P.2d 1296, 1298 (Or. Ct. App. 1993) (assuming, without deciding that duress would be available for felony murder, the defendant did not show that "at the time she committed her criminal acts, she was compelled to do so").

II. THE COMMON LAW OF FELONY MURDER AND DURRESS

A. BACKGROUND OF THE FELONY-MURDER RULE

In the early development of English common law, murder represented a very specific act: the unlawful killing of another person with "malice aforethought."[27] *Malice* meant the intent to kill.[28] *Aforethought* required that the killing be premeditated.[29] Over time, judges expanded the boundaries of common law murder and distinguished two categories of malice: express malice and implied malice.[30] Where a killer displays a purposeful intent to kill, he acts with express malice.[31] Implied malice, alternatively, exists where the killer does not intend to kill but the circumstances of the killing demonstrate that he acted with a malignant heart.[32]

Based on the concept of implied malice, several English legal commentators theorized that one who inadvertently kills in the course of an unlawful act is guilty of murder.[33] In 1628, Sir Edward Coke opined:

> [I]f A. meaning to steal a deere in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in the bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy .... [Yet,] if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure.[34]

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[27] *See* Turner v. Commonwealth, 180 S.W. 768, 769 (Ky. 1915) (citing William Blackstone as saying that malice aforethought was the grand criterion that distinguished murder from other killing); State v. Jones, 14 So. 218, 219 (La. 1893) ("It is firmly settled that malice aforethought must be specially charged in an indictment for murder."); State v. Curtis, 70 Mo. 594, 598 (Mo. 1879) (finding that no homicide can be classified as murder unless it was "committed 'willfully and with malice aforethought'").

[28] Territory v. Halliday, 17 P. 118, 120 (Utah 1888) (remarking that murder requires "a special malice which aims at the life of a person"); WAYNE R. LAFAVE, CRIMINAL LAW § 14.1a (4th ed. 2003).

[29] *Curtis*, 70 Mo. at 598 (defining "aforethought" as "premeditated" or thought of before hand); LAFAVE, *supra* note 28, § 14.1.

[30] Rodriquez v. Territory, 125 P. 878, 880 (Ariz. 1912); LAFAVE, *supra* note 28, § 14.1; Donald Baier, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 ARIZ. L. REV. 701, 703 (1994).

[31] *Rodriquez*, 125 P. at 880 ("It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."); Baier, *supra* note 30, at 703.

[32] *Rodriquez*, 125 P. at 880 ("It is implied where no considerable provocation appears or where the circumstances attending the killing show an abandoned and malignant heart."); Baier, *supra* note 30, at 703.

[33] Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 77-105 (2004) (detailing the legal scholarship of Michael Dalton, Edward Coke, Mathew Hale, and William Blackstone).

[34] *Id.* at 82-83.

Under Coke's analysis, the first shooter commits murder because his unlawful intent amounts to implied malice.[35] Meanwhile, the second shooter, who was engaged in lawful conduct, avoids criminal liability with a defense of *per infortunium*.[36] Two centuries later, Sir William Blackstone adapted Coke's doctrine in defining the basis of the felony-murder rule. Blackstone wrote, "[W]hen an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, it will be murder."[37]

Forty-eight states currently recognize some version of the felony-murder rule.[38] State approaches vary, but the offense has three general elements. First, the defendant must commit or attempt to commit the felony.[39] Second, a human being must be unlawfully killed.[40] Third, that killing must occur during the commission of the felony.[41] Many states limit the felonies which trigger felony murder to those offenses which are dangerous to human life.[42]

Although murder traditionally requires that a defendant commit a killing with a culpable mental state, felony murder requires no culpable mental state as to the killing.[43] The defendant's mens rea for the felony substitutes for his mens rea for the murder.[44] Some scholars insist that since

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[35] *Id.*

[36] *Id. Per infortunium* is Latin for "by misadventure." BLACK'S LAW DICTIONARY 1175 (8th ed. 2004). Under early English common law, a person who killed another by misadventure still needed royal pardon to avoid liability. *Id.*

[37] Binder, *supra* note 33, at 95-96.

[38] Thomson Reuters, 50 State Statutory Surveys, Criminal Law: Crimes: Felony Murder (West 2009) (available in Westlaw "SURVEYS" database). The District of Columbia also has a felony-murder statute. D.C. CODE ANN. § 22-2101 (LexisNexis 2001). Only Hawaii and Kentucky do not.

[39] 40 C.J.S. *Homicide* § 51 (2009).

[40] *Id.*

[41] *Id.*

[42] LAFAVE, *supra* note 28, § 14.5(b). Two approaches exist among the states for determining which felonies are dangerous to human life. The first approach limits the felony-murder rule to those felonies which are inherently dangerous. The determination happens in the abstract, based on the elements of the felony. The second approach focuses on the dangerousness of the felony as committed. The important inquiry is whether, given the specific facts of the case, the danger to human life was foreseeable. *Id.*

[43] Baier, *supra* note 30, at 704; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 459 (1985) ("[T]he felony-murder rule viewed from a general culpability perspective effectively eliminates a mens rea element in convicting a felon for a killing occurring during the commission of a felony.").

[44] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 472 (6th ed. 1995) (explaining that felony murder relies on the concept of transferred or

felony murder does not require a culpable state of mind, it operates as a strict liability offense.[45] It makes a felon responsible for any death, accidental or otherwise, that occurs during the course of his felony.[46] Other commentators assert that felony murder simply creates a per se culpability rule.[47] Because felonious conduct is inherently dangerous, felony murder infers the mens rea of negligence or recklessness for any killing which occurs in the course of a felony.[48]

By enforcing the felony-murder rule, the government hopes to deter dangerous conduct.[49] The rule, in theory, serves two distinct deterrent purposes. First, it seeks to prevent reckless or negligent killing during the commission of a felony.[50] If a felon understands that carelessness carries with it elevated punishment, he might conduct his crime more cautiously. He might elect not to use a weapon, for example, or might try to dissuade others from using force.[51]

Second, the felony-murder rule aims to deter criminals from committing the felony itself, especially when dangerous.[52] Proponents of the rule believe that threatening severe punishment for any accidental death will inspire potential felons to reconsider engaging in the felony.[53] Two

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constructive intent, where the intent for the underlying felony transfers to the act of killing to provide culpability for the homicide). *But see* Roth & Sundby, *supra* note 43, at 453-59 (criticizing the felony murder's transferred intent as an unjust legal fiction used to improperly broaden murder liability, because intent to burglarize, for example, cannot be equated with the malice aforethought required for murder).

[45] Roth & Sundby, *supra* note 43, at 453-59 (positing that eliminating the mens rea requirement for felony murder results in a rule that operates as a strict liability crime).

[46] *Id.*

[47] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 987-88 (2008).

[48] *Id.* at 988 ("A legislature may conclude that certain conduct poses a significant enough risk of death that its commission implies negligence or recklessness."). *But see* Enmund v. Florida, 458 U.S. 782, 799-800 nn.23-24 (1982) (noting that only about 0.5% of robberies result in homicide).

[49] Roth & Sundby, *supra* note 43, at 450-52.

[50] People v. Washington, 402 P.2d 130, 133 (Cal. 1965) ("The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."); State v. Kimbrough, 924 S.W.2d 888, 890 (Tenn. 1996) (indentifying one of the original purposes of the felony-murder rule as deterring the commission of "certain felonies in a dangerous or violent way").

[51] *See* Roth & Sundby, *supra* note 43, at 450.

[52] *Id.* at 451; Robert Mauldin Elliot, Comment, *The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 374 (1977).

[53] Elliot, *supra* note 52, at 374 (internal citation omitted) ("In the common law and in almost every state legislature in the United States, it has been determined that the threat of a murder conviction will weigh heavily on the mind of one considering the commission of a

criminals perpetrating the same crime in the same place in the same way will face much different consequences if during one's crime a death inadvertently occurs.[54] By participating, a felon faces the normal chance for standard punishment and a small chance of a very harsh penalty.[55] Here, sentencing operates like a punishment lottery.[56] The criminal plays at his own peril.

Besides deterrence, retribution also serves as a rationale for the felony-murder rule.[57] Under the theory of retribution, a person who causes harm to society deserves punishment, and the state should punish him proportionally to the harm caused.[58] A reckless bank robber who inadvertently kills a pedestrian during his getaway causes more societal harm than a careful bank robber who only robs the bank without inadvertently killing.[59] Thus, the reckless robber deserves greater punishment than his careful counterpart.[60] Without the felony-murder rule, both would receive similar prison sentences. Both only have mens rea as to the robbery. Without the felony-murder rule, proponents argue that killing might go unpunished, and society's concept of retributive justice might be disturbed.[61]

B. BACKGROUND OF THE DURESS DEFENSE

Where a defendant engages in illegal conduct under threat of death or serious bodily harm, the defense of duress (also called coercion)[62] absolves him of criminal liability.[63] A coerced defendant technically violates the

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felony in which the risk to human life might be substantial and cause him either to refrain or to act with extreme caution.").

[54] Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 110 (1990).

[55] Binder, *supra* note 47, at 981.

[56] Cole, *supra* note 54, at 110.

[57] Roth & Sundby, *supra* note 43, at 457-58; *see also* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 362-63 (1985).

[58] 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a)(6) (2d ed. 2003).

[59] Crump & Crump, *supra* note 57, at 363 ("Felony murder reflects a societal judgment that an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not.").

[60] *Id.*

[61] *Id.* (asserting that the felony-murder rule helps "to avoid depreciation of the seriousness of the offense and to encourage respect for the law").

[62] Duress and coercion are appropriately used interchangeably. Gerald A. Williams, Note, *Criminal Law:* Tully v. State of Oklahoma*: Oklahoma Recognizes Duress as a Defense for Felony-Murder*, 41 OKLA. L. REV. 515, 517 (1988).

[63] Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 313 (1957).

law.[64] The coercive threats neither make his action involuntary nor eliminate his mens rea.[65] Instead, the law recognizes that a person in the defendant's position could not "be fairly expected to abstain from committing the wrongful act."[66] Although debate exists about whether duress constitutes an excuse or a justification defense, the majority of legal scholars and courts view a successful duress defense as excusing, not justifying, criminal behavior.[67]

To invoke a duress defense, a defendant must typically satisfy three elements. First, he must face "an immediate threat of death or serious bodily injury."[68] Second, he must possess "a well-grounded fear that the threat [will] be carried out."[69] Third, the defendant must enjoy no reasonable opportunity to escape the threatened harm.[70] Some jurisdictions also require that the defendant not have recklessly placed himself in the threatening situation.[71]

Three oft-cited rationales support the duress defense: fairness, deterrence, and choice-of-evils. Punishing a coerced actor would violate standards of fairness.[72] Society views the coerced actor's conduct as reasonable for a person in his situation.[73] Reasonable conduct, though wrongful, is not blameworthy, and to punish non-blameworthy conduct is

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[64] *See* Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT'L L. & POL'Y 51, 52 (1996).

[65] *Id.*

[66] Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741, 752-53 (2008).

[67] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7, n.0.1 (2d ed. 2008-2009). Justification provides a defense for an actor who engages in otherwise illegal conduct but does so to avoid a greater threatened harm. *Id.* § 9.1(a)(3). Justified acts benefit society, and society encourages, or at least tolerates, them by absolving the actor of criminal liability. Chiesa, *supra* note 66, at 752. Alternatively, excuse applies in situations where society cannot expect the actor to "abstain from committing the wrongful act." *Id.* at 753. Society still denounces the conduct but declines to punish the actor because of his lack of blameworthiness. *Id.*

In early English common law, the distinction between justification and excuse mattered greatly. LAFAVE, *supra*, § 9.1(a)(4). "[J]ustification provided a complete defense, while . . . excuse merely gave the Crown an opportunity to grant a pardon." *Id.* Although the distinction today is generally less important as both provide complete defenses, it matters for duress, especially where murder is involved. *Id.*

[68] Steven J. Mulroy, *The Duress Defense's Uncharted Terrain*, 43 SAN DIEGO L. REV. 159, 165 (2006).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* Chiesa, *supra* note 66, at 752-53.

[73] *Id.*

unjust.[74] Punishment also does not deter a coerced actor.[75] By definition, he participates to avoid the harm threatened, not because the reward of the crime outweighs the risk of punishment.[76]

Courts often treat duress as a "choice of evils" defense.[77] When an individual faces a choice of two evils, society demands that he commit the lesser evil and thereby avoid the greater harm.[78] Sometimes, an actor must break the law to avoid the greater evil that would result from literal compliance with it.[79] For example, if a person faces a threat of death unless he participates in a theft, society prefers that he engage in the crime rather than die for his refusal. In choosing the lesser evil, the actor benefits society, and the law does not condemn his conduct.[80]

The "choice of evils" theory underlies the common law rule that duress can never serve as a defense for murder.[81] When a coerced actor kills, the resulting harm—the death of an innocent person—is at least as great as the

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[74] *Id.* at 753 ("[I]t is sensible not to punish such actors who were subjected to coercion that made their decisions to engage in the criminal acts understandable.").

[75] Newman & Weitzer, *supra* note 63, at 313.

[76] *See id.*

[77] United States v. LaFleur, 971 F.2d 200, 204 (9th Cir. 1992) ("The duress defense, which provides the defendant a legal excuse for the commission of the criminal act, is based on the rationale that a person, when confronted with two evils, should not be punished for engaging in the lesser of the evils."); State v. Rumble, 680 S.W.2d 939 (Mo. 1984). *But see* Spunaugle v. State, 946 P.2d 246, 250 (Okla. Crim. App. 1997) (explaining that Oklahoma adopted the excuse legal theory of duress, instead of justification, and therefore the "choice of evils" does not apply).

[78] LAFAVE, *supra* note 67, § 10.1; State v. Cozzens, 490 N.W.2d 184, 189 (Neb. 1992) (citing 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.4 at 627 (1986)).

[79] LAFAVE, *supra* note 67, § 10.1; *Cozzens*, 490 N.W.2d at 189.

[80] Mulroy, *supra* note 68, at 167; *see* Chiesa, *supra* note 66, at 747. Some legal commentators criticize the use of "choice of evils" analysis for the duress defense as a mistaken blurring of excuse and justification. Mulroy, *supra* note 68, at 169-70. Justification, they say, requires "choice of evil" considerations because society must be made better off by the conduct for it to be justified. *Id.* Justified conduct is not wrongful. *Id.* at 167 (saying that society recognizes an act as justified where on balance it decides society is "better off that the act occurred"). Comparatively, excuse does not negate wrongfulness; it just recognizes the lack of blameworthiness and whether the conduct benefits society does not matter. *Id.*

[81] Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1370 (1989) ("Stemming from antiquity, the nearly 'unbroken tradition' of Anglo-American common law is that duress never excuses murder, that the person threatened with his own demise 'ought rather to die himself, than escape by the murder of an innocent.'"). The seminal case in the United States is *Arp v. State*, in which the Alabama Supreme Court said a coerced defendant could not be justified by a plea of compulsion for taking the life of an innocent person. 12 So. 301, 303 (Ala. 1893).

threatened harm—the death of the actor.[82] As Blackstone noted in 1777, "though a man . . . 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 innocent."[83] Blackstone's command that a coerced actor jeopardize his life instead of sacrificing the life of another persists in modern American jurisprudence. Most states forbid the duress defense for murder.[84] Federal courts and the U.S. military justice system follow this common law rule as well.[85]

Critics say the common law rule imposes a heroic person standard, while criminal law normally demands only that a defendant act as a reasonable person would.[86] Yet, the nature of murder may validate elevated expectations for the coerced actor.[87] Most crimes to which duress serves as a defense can be remedied.[88] A stolen television can be replaced. A burnt-down home can be rebuilt. Even treason can be walked back.[89] Murder, once consummated, is irreparable.[90] Elevated expectations may also protect against unnecessary death. The coerced actor faces a threat and not a certainty.[91] Events might intervene or the threat might prove empty.[92] By discouraging compliance, the law not only may protect the third party but also may enhance the odds that both the third party and the coerced actor survive.[93]

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[82] People v. Anderson, 50 P.3d 368, 371 (Cal. 2002).

[83] 4 WILLIAM BLACKSTONE, COMMENTARIES *30 (1902).

[84] Mulroy, *supra* note 68, at 172.

[85] *Id.* at 172-73. In 1985, the Model Penal Code revised its duress rule to allow the defense for murder. The Code provides an affirmative defense where the coercion was such "that a person of reasonable firmness in [the coerced actor's] situation would have been unable to resist." MODEL PENAL CODE § 2.09 (1985).

[86] Chiesa, *supra,* note 66, at 757.

[87] *See* State v. Nargashian, 58 A. 953, 954 (R.I. 1904).

[88] *Id.*

[89] *Id.* (rejecting the defendant's argument that since duress is a defense in treason, it should also apply in murder).

[90] *Id.* ("But murder is a consummated act, irreparable after commission, and hence to be guarded against by a stricter rule, and such a rule has been applied in cases of murder.").

[91] People v. Anderson, 50 P.3d 368, 371 (Cal. 2002); Tully v. State, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986).

[92] *See Tully*, 730 P.2d at 1210.

[93] *Anderson*, 50 P.3d at 371 ("[W]hen confronted with an apparent kill-an-innocent-person-or-be-killed situation, a person can always choose to resist. As a practical matter, death will rarely, if ever, inevitably result from a choice not to kill. The law should require people to choose to resist rather than kill an innocent person.").

III. MODERN STATE APPROACHES TO DURESS AND FELONY MURDER

A. DURESS NEVER ALLOWED FOR ANY MURDER

Courts in six states—Arizona, Colorado, Indiana, Missouri, Nebraska, and Washington—have ruled to reject duress as a potential defense to felony murder.[94] None of the states distinguish felony murder from premeditated murder.[95] Each state, except Nebraska, has codified by statute the common law denial of the duress defense for murder.[96] All of the states, despite any contemporary evolution of the understanding of felony murder, declare felony murder still to be murder, and thus beyond the reach of the duress defense.[97]

While these six states reached the same conclusion, they arrived at it somewhat differently. The Missouri Supreme Court incorporated the common law rule against allowing the duress defense for felony murder in *State v. St. Clair* in 1953.[98] The Missouri General Assembly in 1979 codified the *St. Clair* ruling into statute.[99] That statute provides an affirmative defense where the defendant engaged in the prohibited conduct because "he was coerced to do so, by the use of, or threatened use of, . . . unlawful physical force," but it also makes the defense unavailable "[a]s to the crime of murder."[100]

In 1984, the Missouri Supreme Court confronted the applicability of the duress defense to felony murder in *State v. Rumble*.[101] There, the defendant, a prostitute, led a regular customer to a park where her boyfriend robbed the customer and unexpectedly stabbed him to death with a kitchen

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[94] State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982); People v. Al-Yousif, 206 P.3d 824, 830 (Colo. Ct. App. 2006); Moore v. State, 697 N.E.2d 1268, 1271 (Ind. Ct. App. 1998); State v. Rumble, 680 S.W.2d 939, 941 (Mo. 1984) (en banc); State v. Perkins, 364 N.W.2d 20, 26 (Neb. 1985); State v. Ng, 750 P.2d 632, 637 (Wash. 1988) (en banc).

[95] *See, e.g.*, State v. Ellison, 140 P.3d 899, 917 (Ariz. 2006) (en banc); *Rumble*, 680 S.W.2d at 942.

[96] *See, e.g.*, *Moore*, 697 N.E.2d at 1273; *Rumble*, 680 S.W.2d at 942. The Nebraska Supreme Court, however, did not articulate whether it based its decision on a statutory interpretation or the common law. *Perkins*, 364 N.W.2d at 25 (citing *State v. Fuller*. 278 N.W.2d 756, 762 (Neb. 1979), for the proposition that "[d]uress . . . is no excuse to a charge of homicide"). *Fuller* dealt with an intentional killing, not a felony murder. 278 N.W.2d at 757.

[97] *See, e.g.*, *Rumble*, 680 S.W.2d at 942; *Ng*, 750 P.2d at 636.

[98] *Rumble*, 680 S.W.2d at 942. "[I]t is established by the great weight of authority that although coercion does not excuse taking the life of an innocent person, yet it does excuse in all lesser crimes." *Id.* (quoting State v. St. Clair, 262 S.W.2d 25, 27 (Mo. 1853)).

[99] *Id.*

[100] MO. ANN. STAT. § 562.071 (West 1999).

[101] *Rumble*, 680 S.W.2d at 941.

knife.[102] The defendant claimed at trial that her boyfriend had coerced her into participating, but the trial judge refused to instruct the jury about the duress defense.[103] On appeal, the Missouri Supreme Court cited the state's statutory prohibition on duress for murder and refused to carve out an exception for the special circumstance of felony murder.[104] When interpreting a statute for legislative intent, the court said that it must presume the legislature acted with a full awareness of the state of the law.[105] The court reasoned that the General Assembly could have exempted felony murder when it codified the rule against duress if it had so desired.[106] Because the General Assembly had not, the court held that the statute "in unmistakably clear language declares that duress is not a defense to the crime of murder," felony murder included.[107]

The Arizona Supreme Court has repeatedly held that first-degree murder—whether premeditated or by way of felony murder—is ineligible for the duress defense.[108] In *State v. Encinas*, the defendant and two hitchhikers caught a ride from a driver whom they shortly thereafter robbed.[109] When the driver resisted, the other two hitchhikers stabbed him thirty to forty times with a screwdriver.[110] The trial court precluded a corroborating witness for the defendant's claim of coercion.[111] After his conviction, the defendant challenged the ruling, but the Arizona Supreme Court found no reversible error.[112] The Arizona duress statute makes the defense unavailable for "offenses involving homicide or serious physical injury."[113] Its plain language, the court said, forecloses the possibility of the duress defense for felony murder.[114]

Washington's approach hinges upon a historic case interpreting a historic statute.[115] In 1912, the State convicted Antonio Moretti of felony

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 942.

[105] *Id.* at 942 n.4.

[106] *Id.*

[107] *Id.* at 942 n.5.

[108] State v. Ellison, 140 P.3d 899, 917 (Ariz. 2006) (en banc); State v. Encinas, 647 P.2d 624, 627 (Ariz. 1982).

[109] *Encinas*, 647 P.2d at 625.

[110] *Id.*

[111] *Id.* at 626.

[112] *Id.* at 627.

[113] *Id.*

[114] *See id.*

[115] WASH. REM. & BAL. CODE 2256 ("Whenever any crime, except murder, is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in

murder for a killing committed by a co-felon during a robbery.[116] On appeal, Moretti averred that the jury should have considered whether he only partook in the robbery due to coercion.[117] The Washington Supreme Court pointed to the duress statute, which made the defense unavailable in murder cases, and held:

> Since the killing . . . was committed by one of the appellant's confederates while in the act of committing the robbery, [the] appellant is as much responsible for the killing as he is for the robbery. By the very terms of [the duress statute] . . . this excludes the defense of duress.[118]

Seventy-six years later, the Washington Supreme Court reassessed its *Moretti* decision in *State v. Ng* and reiterated that the unavailability of duress as a defense to murder "applies regardless [of] whether a defendant is charged with intentional or felony murder."[119] The court in *Ng* acknowledged the harshness of the felony-murder rule. But instead of lifting the duress prohibition, the court pointed to a statutory defense as the supposed mitigator of that harshness.[120] The four-part defense allows an accomplice to the underlying felony to avoid liability for a felony murder if he was both unarmed and had no reason to believe his co-participants were armed.[121]

The defendant in *Ng* was ineligible for the statutory defense. He admittedly carried a gun during his crime.[122] Likewise, the defense—though maybe mitigating some of the felony-murder rule's harshness—does not operate as a substitute for the duress defense. Duress in Washington requires that the actor feel an immediate threat of death or grievous bodily injury and have a reasonable apprehension that the threat will be carried out.[123] In most circumstances, the actor's fear would be legitimized by a belief that the other felon is armed. Such a belief would preclude reliance on the Washington statutory defense.

Of the states surveyed here, Indiana most broadly restricts the application of the duress defense. In *Moore v. State*, the defendant testified that he was forced at gunpoint to help rob a pizza delivery man out making

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the mind of such participator that in case of refusal he is liable to instant death or grievous bodily harm, such threats and apprehension constitute duress, which will excuse such participator from criminal prosecution.").

[116] State v. Moretti, 120 P. 102, 103 (Wash. 1912).

[117] *Id.*

[118] *Id.* at 104.

[119] State v. Ng, 750 P.2d 632, 636 (Wash. 1988).

[120] *Id.*

[121] *Id.*

[122] *Id.* at 626 n.7.

[123] WASH. REV. CODE ANN. § 9A.16.060 (West 2003).

deliveries.[124] After taking his money, one of the co-felons shot and killed the delivery man.[125] The Indiana Court of Appeals ruled that the trial court did not err in refusing to tender a duress defense jury instruction because the Indiana duress statute barred the defense for offenses against persons.[126] Disposing of the issue quickly, the court did not specify which offense it considered an offense against persons: the armed robbery or the felony murder.[127] If the court meant the felony murder, duress could never constitute a defense. If the court meant the armed robbery, duress as a defense might work depending on the nature of the underlying felony.

Two other states, Nebraska and Colorado, decided with limited discussion, to forbid duress for felony murder. In *State v. Perkins*, the Nebraska Supreme Court rejected the defendant's request for a jury instruction as to duress.[128] Unlike in the other states mentioned, the court in Nebraska did not rely on statutory interpretation. Instead, the court simply treated felony murder as homicide and held that "as established in [a previous case], duress is not a defense to a charge of homicide."[129] In *People v. Al-Yousif*, the Colorado Court of Appeals advised that the Colorado duress statute "provides that a person may not be convicted of an offense, other than a class one felony, for conduct committed under duress."[130] Felony murder, the court noted, constitutes a class one felony.[131]

B. DURESS ALLOWED FOR FELONY MURDER

With its decision in *McMillan v. State*, the Maryland Court of Special Appeals sided with courts in six other states—California, Illinois, Kansas, Ohio, Oklahoma and Virginia—that embrace duress as a defense to felony murder.[132] Courts in each of these states acknowledged the general

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[124] Moore v. State, 697 N.E.2d 1268, 1270 (Ind. Ct. App. 1998).

[125] *Id.*

[126] *Id.* at 1273.

[127] *See id.*

[128] 364 N.W.2d 20, 26 (Neb. 1985).

[129] *Id.* The previous case, *State v. Fuller*, 278 N.W.2d 756 (Neb. 1979), involved an intentional killing, not a felony murder. 278 N.W.2d at 762.

[130] People v. Al-Yousif, 206 P.3d 824, 830 (Colo. Ct. App. 2006) (emphasis omitted) (citing COLO. REV. STAT. § 18-1-708 (2005)).

[131] *Id.* In Colorado, Class I felonies include first-degree murder, first-degree murder of a peace officer or fireman, first-degree kidnapping, assault during escape, and treason. COLO. LEGIS. COUNCIL, *Crime Classification Guide: A Listing of Crimes and Traffic Infractions in Colorado*, RES. PUBLICATION NO. 552 (2006), *available at* http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2004/research/CriminalJustice/04Class1Felonies.PDF.

[132] People v. Anderson, 50 P.3d 368, 379 (Cal. 2002); People v. Sims, 869 N.E.2d 1115, 1145 (Ill. 2007); People v. Serrano, 676 N.E.2d 1011, 1015 (Ill. App. Ct. 1997); State v. Hunter, 740 P.2d 559, 570 (Kan. 1987); State v. Lundgren, No. 90-L-15-125, 1994 Ohio

inapplicability of the defense to murder.[133] Only Kansas had codified the prohibition into statute.[134] The other six, Maryland included, had incorporated the ban through case law.[135] Relying upon writings of contemporary legal scholars and analysis of principles underlying the common law, all seven states carved a special exception into the prohibition and approved of duress as a defense to felony murder where it also serves as a valid defense to the underlying felony.[136]

The Oklahoma Court of Criminal Appeals made Oklahoma the first state to accept duress as a viable defense to felony murder, and its decision established the legal foundation upon which the other states later relied. In *Tully v. State*, the defendant had a bat poked in his face by his coercer and was ordered to search the pockets of a man whom the coercer had beaten senseless with the bat.[137] The defendant complied. Both he and the coercer left together, and the beaten man later died.[138] At trial, the defendant asserted that he knew nothing of the robbery before it occurred and eventually participated in it only through coercion.[139] The court denied his requested jury instruction as to duress, and he was convicted of first-degree murder.[140] On appeal, the defendant cited the rejected instruction as a reversible error.[141] The State of Oklahoma, represented by the state attorney general, responded that duress under Oklahoma law could never function as a defense to any form of first-degree murder.[142] Disagreeing with the state attorney general, the court said that no precedent bound its decision on the issue.[143] No Oklahoma statute expressly prohibited the duress defense for the entire class of first-degree murder offenses.[144] Never

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App. LEXIS 1722, at *45-46 (Ohio Ct. App. Apr. 22, 1994); Tully v. State, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986); Pugliese v. Commonwealth, 428 S.E.2d 16, 24 (Va. Ct. App. 1993).

[133] *See, e.g.*, *Serrano*, 676 N.E.2d at 1015; *Pugliese*, 428 S.E.2d at 26.

[134] *Hunter*, 740 P.2d at 567.

[135] *Tully*, 730 P.2d at 1209; *Lundgren*, 1994 Ohio App. LEXIS 1722, at *17.

[136] *See Serrano*, 676 N.E.2d at 1015; *Hunter*, 740 P.2d at 569.

[137] *Tully*, 730 P.2d at 1208.

[138] *Id.* at 1207-08. After leaving the victim, the coercer, the defendant, and the coercer's girlfriend drove to the victim's trailer home. There, the coercer, bat still in hand, ordered the defendant to "get [his] ass out of the car" and assist with the burglary.

[139] *Id.* at 1207; Williams, *supra* note 62, at 523. The defendant presented evidence that his "prior knowledge of [the coercer's] violent character coupled with the manner in which the victim was beaten to death produced the requisite fear of immediate death or serious bodily harm." *Id.*

[140] *Tully*, 730 P.2d at 1208.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 1208-09.

[144] *Id.* at 1208.

had any Oklahoma court held that such a prohibition exists.[145] The common law rule barring the defense, according to the court, governs "the intentional taking of an innocent life" but not unintended killing.[146]

Treating the case as one of first impression, the court based its decision on legal policy and the writings of Professors Wayne R. LaFave and Austin W. Scott.[147] The duress defense rests on "society's realization that a person, when faced with the choice of two evils," should not be punished for committing the lesser evil and thereby avoiding the greater societal harm.[148] According to LaFave and Scott, this policy extends to protect a coerced participant in a felony where a death inadvertently occurs.[149] They explain:

> The law properly recognizes that one is justified in aiding in a robbery if he is forced by threats to do so to save his life; he should not lose his defense because his threateners unexpectedly kill someone in the course of the robbery and thus convert a mere robbery into a murder.[150]

Following this rationale, the Oklahoma Court of Criminal Appeals held that the common law policy underlying duress is compatible with allowing it for an actor who consents, under coercion, to participate in the felony but not the ensuing killing.[151] The defendant in *Tully*—if genuinely coerced—faced a choice of evils between robbing an already mortally injured victim or dying himself.[152] By removing the money from the victim's pocket, he consented to only that act and chose the lesser evil.[153] As such, the court reversed his conviction and remanded the case for a new trial.[154]

Whether implicitly or explicitly, every court that has subsequently ruled in a case of first impression to allow the duress defense for felony murder has followed Oklahoma's lead. Moreover, each court but the one in Ohio has cited LaFave and Scott.[155] In *People v. Serrano*, the Illinois Appeals Court reversed the felony-murder conviction of a fifteen-year-old boy who participated, purportedly at gunpoint, in a barroom robbery.[156]

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[145] *Id.* at 1208-09.

[146] *Id.* at 1210.

[147] *Id.* at 1209.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 1210 (citing LAFAVE & SCOTT, *supra* note 18, at 377).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 1211.

[155] *E.g.*, People v. Anderson, 50 P.3d 368, 379 (Cal. 2002); Pugliese v. Commonwealth, 428 S.E.2d 16, 26 (Va. Ct. App. 1993).

[156] 676 N.E.2d 1011 (Ill. App. Ct. 1997).

During the crime, a co-felon shot a patron to death.[157] The court advised that "compulsion is a defense to armed robbery and defendant cannot be guilty of felony murder if he was compelled to commit the underlying felony."[158] Because a duress defense instruction was necessary for the jury to determine whether the defendant had opted for the lesser evil or consented to the entire crime, the court ordered a new trial.[159]

The Supreme Court of Kansas in *State v. Hunter* surveyed the approaches taken by courts in Missouri and Arizona but instead heralded Oklahoma as the model to emulate.[160] Kansas, unlike Oklahoma, had incorporated by statute the common law prohibition of the duress defense for all murder.[161] In interpreting that statute, the Kansas Supreme Court noted that both Missouri and Arizona had read their similar statutes to forbid the defense.[162] Courts in those states did not distinguish felony murder from intentional killing because felony murder derives the intent to kill from the intent to participate in the underlying felony.[163] The better view, according to the Kansas Supreme Court, confines any limitation on the duress defense "to crimes of intentional killing and not to killings done by another during the commission of some lesser felony."[164] The court construed its statute to comport with the *Tully* decision.[165] It held that where duress could serve as a defense to the underlying felony, it is "equally a defense to charges of felony murder."[166]

C. DURESS ALLOWED FOR ALL MURDER

Two states—Arkansas and Connecticut—allow the duress defense for all classifications of murder.[167] In Arkansas, the duress defense for murder

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[157] *Id.* at 1013.

[158] *Id.* at 1015.

[159] *Id.* at 1015-16.

[160] 740 P.2d 559, 569 (Kan. 1987).

[161] *Id.* at 568. The Kansas duress statute provides:

> A person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which he performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if he reasonably believes that death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, brother or sister if he does not perform such conduct.

KAN. STAT. ANN. § 21-3209 (2007); *see also* Tully v. State, 730 P.2d 1206, 1208 (Okla. Crim. App. 1986).

[162] *Hunter*, 740 P.2d at 568.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 569.

[166] *Id.*

[167] MacKool v. State, 213 S.W.3d 618 (Ark. 2005); State v. Heinemann, 920 A.2d 278 (Conn. 2007).

operates identically to the general duress defense. It has no additional elements.[168] The defense exists when the defendant engages in illegal conduct because "'he reasonably believed he was compelled to do so by the threat of use of unlawful force . . . that a person of ordinary firmness in the [defendant's] situation would not have resisted.'"[169]

Connecticut has veered from the common law and established extra requirements necessary for the duress defense. The Connecticut statute reflects the Model Penal Code.[170] It has a subjective component and an objective component.[171] Objectively, the force threatened must go beyond what an individual of reasonable firmness in the defendant's situation would be able to resist.[172] The level of resistance exerted also must meet community standards of reasonableness.[173] A number of factors help decide the reasonableness of the defendant's actions.[174] They include the seriousness of the threat, the nature of the harm faced, the opportunity for escape and the seriousness of the crime committed by the defendant.[175] Subjectively, the defendant actually must have been coerced into the criminal action.[176] This requires the jury to analyze the defendant's sincerity.[177] Regardless of what an ordinary person would have perceived, the defendant must truly have felt an imminent threat of harm.[178]

III. UNACCEPTABLE RESULTS IN DENYING THE DURRESS DEFENSE FOR FELONY MURDERS

In a sense, the divide between the states that allow the duress defense and those that do not amounts to simple interpretation. Those courts that strictly read the law—especially statutory law—view felony murder as murder and punish it as such. Approaching the law more flexibly, other courts give credence to evolving societal standards. They recognize that people see inadvertent killing as less abhorrent than intentional killing and thus treat the offenses differently. That the states are almost equally split between the two interpretations, though, does not mean that both are equal.

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[168] *MacKool*, 213 S.W.3d at 624.

[169] *Id.* at 623 (citing ARK. CODE ANN. § 5-2-2088 (1997) (repealed) (internal citations omitted)).

[170] *Heinemann*, 920 A.2d at 293.

[171] *Id.* at 292-93.

[172] *Id.* at 293.

[173] *Id.*

[174] *Id.* at 292.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

When applied to real people in real situations, the denial of the defense may produce three unacceptable consequences. First, a defendant may be found guilty of felony murder where he otherwise would not be guilty of the underlying felony. Second, a coerced actor may be convicted via accomplice liability for the death of his coercer. Finally, a defendant may be sentenced to capital punishment if he knowingly participates under duress in a felony which presents a grave risk of death for others.

A. GUILTY OF FELONY MURDER BUT NOT THE UNDERLYING FELONY

In the most predictable of the unacceptable outcomes, denying the duress defense will lead courts to find defendants guilty of felony murder where the defendants otherwise could not be convicted of the underlying felony. Such a result is not difficult to imagine. For criminal liability under felony murder, a defendant need not be found independently guilty of the underlying felony.[179] Courts have regularly upheld convictions where a defendant was acquitted of the underlying felony or where the court vacated the defendant's conviction on the underlying felony.[180] A defendant need not even be charged, indicted, or prosecuted for the underlying felony.[181] Absent a conviction for the predicate offense, jurors may find a defendant guilty of felony murder if they believe beyond a reasonable doubt that he committed the underlying felony.[182]

Courts have said, in theory, that convicting a defendant of felony murder is improper where he is innocent of the underlying felony.[183] Yet, a coerced defendant actually commits the prohibited conduct with the requisite mens rea.[184] Duress, as an affirmative defense, does not undo what the defendant did but it does excuse it.[185] If the defendant is not charged with the underlying felony, the jury will hear all about his unlawful behavior but will not receive an instruction on the duress that compelled him to engage in it. Savvy prosecutors can bring only the felony-murder charge and thereby avoid dealing with the duress defense.[186] In such a situation, a truly coerced defendant—absent jury nullification—will likely

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[179] State v. Wise, 697 P.2d 1295, 1300 (Kan. 1985) (holding that under the Kansas statute, KAN. STAT. ANN. § 21-3401 (2007), the defendant need not be prosecuted or convicted of the underlying felony in order to be convicted of felony murder).

[180] Commonwealth v. Giles, 456 A.2d 1356 (Pa. 1983).

[181] 40 C.J.S. *Homicide*, *supra* note 39, § 51.

[182] People v. Prince, 156 P.3d 1015, 1072-73 (Cal. 2007).

[183] Noel v. State. 705 So.2d 648, 649 (Fla. Dist. Ct. App. 1998).

[184] Reed, *supra* note 64, at 52.

[185] Newman & Weitzer, *supra* note 63, at 313.

[186] *See* State v. Rumble, 680 S.W.2d 939, 940, 942-43 (Mo. 1984); People v. Al-Yousif, 206 P.3d 824, 831 (Colo. Ct. App. 2006); Mulroy, *supra* note 68, at 186-87;.

be convicted of felony murder predicated on an offense for which he is not legally culpable. If instead charged with the underlying felony but not the felony murder, that same coerced defendant probably escapes liability. In that scenario, the judge should allow the affirmative defense on its merits. If the defense convinces the jury, the jury should say the defendant's conduct was excused and acquit him. The coerced defendant, who is not guilty of anything as long as everyone survives the felony, faces harsh consequences if someone does perish.[187]

Not only does a conviction for felony murder based on an excusable felony make little logical sense, it also fails to serve the policy behind both the felony-murder rule and the duress defense. The felony-murder rule is designed to produce two deterrent effects.[188] First, it aims to deter criminals from negligently or recklessly killing in the course of their crimes.[189] Facing elevated stakes, criminals hopefully will carry out their felonies more carefully and control the conduct of their co-felons.[190] Second, the felony-murder rule seeks to convince criminals not to commit the underlying felony at all.[191] Imposing an uncertain but very harsh penalty for any accidental death may convince aspiring criminals that the risk of committing the crime outweighs its rewards.[192]

Both deterrence arguments presuppose that criminals rationally approach decisions about committing crimes.[193] To do so, a prospective criminal must have accurate information about the likelihood of being caught and the expected punishment.[194] He needs the time, the interest, and the requisite cognitive ability to analyze that information.[195] A coerced actor does not undertake such a decision-making process. Society simply cannot expect the deterrent functions of the felony-murder rule to influence someone participating in a felony under duress. First, the felony is not his

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[187] Cole, *supra* note 54, at 110. (discussing the felony-murder rule as a punishment lottery in which "felons are given a certain sentence if convicted of robbery . . . but despite the felons' identical conduct" are given much harsher sentences if someone dies, even accidently, during their felony).

[188] Roth & Sundby, *supra* note 43, at 450.

[189] *Id.*

[190] *Id.*

[191] Cole, *supra* note 54, at 109.

[192] Elliot, *supra* note 52, at 374.

[193] *Id.* at 375.

[194] Roth & Sundby, *supra* note 43, at 452-53 ("[F]ew felons either will know that the felony-murder rule imposes strict liability for resulting deaths or will believe that harm will result from the commission of a felony.").

[195] *Id.* Studies show that prospective criminals do not engage in this type of logical analysis and notoriously overestimate their odds of avoiding punishment. Binder, *supra* note 47, at 983.

to execute more or less carefully. The coerced actor did not create the dangerous atmosphere and has little influence over the conduct of his co-felons—the very people threatening him.[196] Second, the coerced actor cannot be deterred from committing the crime altogether. He does not participate voluntarily but under imminent threat of force. The choice faced by the unwilling participant is not the risk of being caught versus the reward of getting away. Instead, he chooses between life and possible death. The prospect of severe punishment likely means little to someone facing the grave threat of death.

Just as convicting a coerced defendant fails to advance the goals of felony-murder statutes, withholding the duress defense ignores the principles behind the defense. The duress defense rests on the "choice of evils" theory.[197] When a person faces two evils, society demands that he minimize damage by opting for the lesser evil.[198] Common law prohibits the duress defense for murder generally because a coerced actor, when faced with his death or that of an innocent third party, chooses between two evils of equal magnitude.[199] Usually, the evils are actually skewed as the death of the innocent is more certain than the death of the coerced participant.[200] Events may intervene or threats may prove empty.[201] For felony murder, the opposite holds true. The risk of a death occurring during the felony is rather low. Meanwhile, the coerced participant faces a relatively high prospect of being killed for resisting. Based on the probability of harm, society stands to benefit most with the coerced actor participating.

The coerced actor who takes part in a robbery, therefore, makes the decision society wants him to make: he selects the lesser evil.[202] If his coercer inadvertently kills and the coerced actor is denied the duress defense, society punishes him for doing exactly what it advised him to do.

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[196] *See* Roth & Sundby, *supra* note 43, at 451-53 ("The defendant has no control over the acts of the third party and thus the rule cannot deter this sort of killing.").

[197] Dressler, *supra* note 81, at 1371.

[198] LAFAVE, *supra* note 67, § 10.1.

[199] State v. Hunter, 740 P.2d 559, 568 (Kan. 1987).

[200] Tully v. State, 730 P.2d 1206, 1209 (Okla. Crim. App. 1986).

[201] *See id.* at 1210.

[202] Professor LaFave explained that "[t]he law properly recognizes that one may aid in a robbery if he is forced by threats to do so to save his life." LAFAVE, *supra* note 67, § 9.7. "[I]f *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." *Id.* "[H]e should not lose the defense because his threateners unexpectedly kill someone in the course of the robbery." *Id.*

This paradox violates society's concepts of fairness and predictability.[203] Additionally, punishment may deter future actors from minimizing harm. Future actors may behave undesirably heroically. In resisting their coercers, they may endanger themselves and bring the greater of the evils upon society.

B. ACCOMPLICE LIABILITY AND THE DEATH OF A CO-FELON

Accomplice liability makes a participant in an unlawful endeavor responsible for any crime committed by a co-participant in the course of the unlawful endeavor.[204] If during a robbery one co-felon inadvertently kills, then all co-felons are "subject to conviction" for felony murder.[205] A particular co-felon defendant need not want the killing to take place and may earnestly desire that it not happen.[206] The law simply treats all participants as equally guilty. It matters not who fired the fatal shot.[207]

A person coerced into joining another's crime is generally not an accomplice.[208] Just as duress, if proven, operates as a defense for someone who actually committed the criminal act, it also excuses the conduct of a defendant charged via accomplice liability.[209] But for murder, the unavailability of the duress defense extends from principal to accomplice.[210] Where states prohibit the defense for felony murder, accomplice liability leaves a coerced actor vulnerable to conviction for the deaths of numerous people who die in a variety of ways.

To hold an accomplice accountable, the victim of the felony murder does not need to also be the victim of the underlying felony. The death of any uninvolved party may trigger accomplice liability. With the duress defense denied, a coerced actor risks prosecution when a co-felon

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[203] *See* Chiesa, *supra* note 66, at 755.

[204] People v. Burton, 491 P.2d 793, 801 (Cal. 1971) ("Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances."); Watkins v. State, 726 A.2d 795, 805 (Md. Ct. Spec. App. 1999).

[205] Jansen v. State, 892 P.2d 1131, 1134 (Wyo. 1995).

[206] People v. Cavitt, 91 P.3d 222, 228 (Cal. 2004) (noting that it is no defense to felony murder that the non-killer did not intend to kill, forbade his associates to kill, or was himself unarmed); State v. Weinberger, 671 P.2d 567, 569 (Mont. 1983).

[207] *Cavitt*, 91 P.3d at 228 ("'If the homicide in question was committed by one of [his] associates engaged in the robbery, *in furtherance of their common purpose to rob*, he is as accountable as though his own hand had intentionally given the fatal blow, and is guilty of murder in the first degree.'" (citing People v. Vasquez, 49 Cal. 560, 563 (1875))).

[208] Henderson v. State, 63 S.E. 535, 535-36 (Ga. Ct. App. 1909).

[209] *See* Roth & Sundby, *supra* note 43, at 450.

[210] Wentworth v. State, 349 A.2d 421, 426-28 (Md. Ct. Spec. App. 1975).

intentionally kills, such as the shooting of an eyewitness, recklessly kills, such as a fatal car accident during a high-speed chase, or accidently kills, such as a heart attack caused by the stress of the situation.[211] Courts have convicted accomplices of felony murder where a police officer is killed by a co-felon, the victim of the felony, or a fellow police officer. In condemning a coerced actor for the death of a police officer, the law punishes the coerced actor as a result of the unsuccessful intervention of the person most apt to intervene on the actor's behalf.

Some jurisdictions attach accomplice liability to a defendant whose co-felon dies during the course of the felony.[212] Although society may have little sympathy for an arsonist who perishes in the fire he helped ignite, the dead arsonist's participation does not "compel society to give up all interest in his survival."[213] Such liability often applies where one co-felon kills another co-felon.[214] But in cases of duress, the law would demand that a coerced actor assume liability for the deaths of the very individuals who are coercing him. While struggling to protect himself from his coercers, he also faces the duty to protect his coercers from each other.

Other states hold defendants accountable for felony murder if a co-felon is killed by a police officer,[215] a victim of the felony[216] or a third party.[217] Imagine the scenario for the coerced participant. After being

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[211] People v. Friend, 211 P.3d 520, 544 (Cal. 2009); People v. Burke, 407 N.E.2d 728, 730-31 (Ill. App. Ct. 1980).

[212] People v. Graham, 477 N.E.2d 1342, 1346-47 (Ill. App. Ct. 1985) (finding that the defendant was properly convicted of felony murder after his co-felon was shot by another co-felon while trying to escape the scene of the armed robbery); Watkins v. State, 726 A.2d 795, 803-04 (Md. Ct. Spec. App. 1999).

[213] People v. Billa, 79 P.3d 542, 546 (Cal. 2003).

[214] United States v. Etheridge, 424 F.2d 951, 964-65 (6th Cir. 1970) (affirming the murder conviction for defendants whose co-defendant shot and killed a co-felon in order to avoid apprehension for past bank robberies); People v. Cabaltero, 87 P.2d 364, 366 (Cal. Ct. App. 1939) (finding that all who participated in the robbery were guilty of first-degree murder under felony murder because one of their co-felons had shot a second co-felon).

[215] Mikenas v. State, 367 So.2d 606, 608-09 (Fla. 1978) (holding that Florida's second-degree felony-murder statute applies against the defendant where a deputy sheriff shot and killed his co-felon during a robbery).

[216] State v. O'Dell, 684 S.W.2d 453, 464-65 (Mo. Ct. App. 1984) (affirming defendant's felony-murder conviction where the victim shot and killed the defendant's co-felon wife during an attempted assault). *But see* People v. Washington, 402 P.2d 130, 133 (Cal. 1965) (noting that the purpose of the felony-murder rule—deterring felons from killing negligently or accidentally—"is not served by punishing them for killings committed by their victims").

[217] In *State v. Baker*, a woman was accosted upon entering her house by two robbers. 607 S.W.2d 153 (Mo. 1980). They later had her call her husband to relay a message. Using a prearranged signal, the woman indicated to her husband that something was wrong. The husband and a friend arrived and a shootout ensued, during which the husband killed one of the robbers. The Missouri Supreme Court upheld the conviction of the surviving robber for

forced to participate in the burglary, the coerced actor is then ordered to drive an automobile the coercer has just stolen. The coerced participant complies. A high-speed chase ensues. The police run the car off the road and, as a result, the coercer is killed. Accomplice liability might make the coerced participant liable for the coercer's death.[218] Had the police not intervened, the coerced actor would have a legal defense to any crime he committed. In rescuing the coerced actor, the police would ironically expose him to a charge of felony murder. This outcome, and accomplice liability as generally applied to a coerced actor, hardly comports with societal ideals of fairness.

C. THE DEATH PENALTY FOR A COERCED ACTOR

In *Enmund v. Florida*, the U.S. Supreme Court objected generally to capital punishment for defendants who only aid and abet the underlying felony.[219] There, the Florida Supreme Court had affirmed a trial court's sentence of death for a getaway driver who participated in a robbery that turned fatal.[220] In reversing the sentence, the U.S. Supreme Court pointed to the culpability of the defendant, not the defendant's co-felons, as the important inquiry in a capital murder case.[221] Punishment must be proportional to the harm caused and the defendant's blameworthiness.[222] Because the gravity of the death penalty looms so large, an individual consideration of responsibility is required.[223] The Court in *Enmund* acknowledged the seriousness of the defendant's role in the felony and advised that he deserved strict punishment. His crime, nevertheless, was not "'so grievous an affront to humanity that the only adequate response [was] the penalty of death.'"[224] Where the defendant did not himself kill, attempt to kill, or intend that the killing happen, the Court held that the Eighth Amendment bars the use of capital punishment.[225]

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felony murder even though a third party shot and killed the co-felon. *Id.*; *see also* People v. Morris, 274 N.E.2d 898 (Ill. Ct. App. 1971).

[218] *See O'Dell*, 684 S.W.2d at 465; *Baker*, 607 S.W.2d at 156-57; *Mikenas*, 367 So.2d at 609.

[219] 458 U.S. 782, 794 (1982). The petitioner neither actively participated in the events leading to the killing nor was present at the murder site. Tison v. Arizona, 481 U.S. 137, 144 (1987).

[220] *Enmund*, 458 U.S. at 786.

[221] *Id.* at 794.

[222] *Id.* at 815 (O'Connor, J., dissenting).

[223] *Id.* at 798.

[224] *Id.* at 797 (quoting Gregg v. Georgia, 428 U.S. 153, 184 (1976)).

[225] *Id.*

In 1987, The U.S. Supreme Court changed course with *Tison v. Arizona*.[226] The defendants in *Tison*, two brothers, had helped their father and another inmate escape prison.[227] While on the run, the fugitives flagged down a passing vehicle, and the two escaped inmates executed its passengers.[228] The State convicted the brothers of capital murder based on Arizona's felony-murder law and sentenced them to death.[229] Even though the brothers did not intend to kill, the U.S. Supreme Court affirmed their death sentences and criticized *Enmund*'s requirement of intent.[230]

An exclusive focus on intent to kill, instructed the Court in *Tison*, functions as a "highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers."[231] Numerous instances exist in criminal law where a person intends to kill but is not viewed as deserving capital punishment,[232] meanwhile some non-intentional murders rank among the most inhumane.[233] "[R]eckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"[234] The Court, therefore, ruled to authorize capital punishment for a felony-murder accomplice who acted as a major participant in the felony and knew that the felonious conduct carried a grave risk of death to others.[235]

Given these precedents, could a coerced defendant be sentenced to death? Consider the following hypothetical. Four inmates hatch a conspiracy to escape prison. For their plan to succeed, they need the assistance of Inmate Number Five, who has access to unique materials or to an essential area of the prison. They threaten Inmate Number Five until he cooperates and set the plot into motion. During the escape, a guard unexpectedly stumbles upon the group, and one inmate stabs the guard to death. Authorities later capture Inmate Number Five and charge him with felony murder predicated on the prison escape.

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[226] 481 U.S. 137.

[227] *Id.* at 139.

[228] *Id.* at 139-41.

[229] *Id.* at 141-42.

[230] *Id.* at 158.

[231] *Id.* at 169 (Brennan, J., dissenting).

[232] *Id.* The court referenced killing with an affirmative defense and killing when sparked by provocation as instances where the law does not deem the death penalty as appropriate for an intentional killing. *Id.*

[233] *Id.* As an illustration, the Court mentioned someone torturing another person and not caring whether that person lives or dies or a robber wounding a victim during a robbery simply as a means of facilitating the crime. *Id.*

[234] *Id.* at 157.

[235] *Id.* at 151, 158.

If these events occur in a state barring the duress defense, then the state may establish all the elements necessary to convict Inmate Number Five of felony murder. First, a human being was unlawfully killed.[236] Second, the killing occurred during the commission of a felony—the prison escape.[237] Finally, Inmate Number Five committed the underlying felony.[238] He engaged in the prohibited conduct with the requisite mental state.[239] The duress neither renders his conduct involuntary nor negates his intent.[240]

In states that impose an *Enmund*-like requirement of intent to kill, Inmate Number Five likely would not qualify for capital punishment. He intended, albeit under deadly threat, to assist his coercers in escaping prison. He did not mean for the guard to die. The fate of Inmate Number Five, however, is less clear in the twenty-two states that allow capital punishment for a felony-murder accomplice who did not intend to kill.[241] In these jurisdictions, the laws governing the death penalty vary from state to state. Some states demand that the accomplice acts with a particular culpable mental state.[242] Others limit the imposition of the death penalty to certain crimes.[243] Many require the jury to establish statutory aggravating factors, such as killing by means of torture or killing for financial benefit,[244] or to consider specified mitigating factors, such as the age of the defendant or substantial duress.[245]

Despite variance in their laws, courts in none of these twenty-two states, absent the defendant's intent to kill, may impose a sentence of death unless the threshold requirements of *Tison* are found. The defendant must have acted as a major participant in the felony and must have known of the substantial risk of death to other people.[246] Prisons are designed as heavily guarded fortresses for keeping allegedly dangerous people within their walls. Escaping them, by definition, is fraught with peril, and a court could easily find that Inmate Number Five knew the danger that an escape posed to prison staff, other inmates, and the general public. As to his participation, Inmate Number Five may not have killed the guard,

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[236] 40 C.J.S. *Homicide*, *supra* note 39.

[237] *Id.*

[238] *Id.*

[239] *See* Reed, *supra* note 64, at 52.

[240] *Id.*

[241] Melanie A. Renken, Comment, *Revisiting* Tison v. Arizona*: The Constitutionality of Imposing the Death Penalty on Defendants Who Did Not Kill or Intend to Kill*, 51 ST. LOUIS U. L.J. 895, 911-12 (2007).

[242] *See, e.g.*, ARK. CODE ANN. § 5-10-101 (2006); Renken, *supra* note 241, at 913.

[243] *See, e.g.*, NEB. REV. STAT. § 28-303 (2008).

[244] MONT. CODE ANN. § 46-18-303 (2007); S.D. CODIFIED LAWS § 23A-27A-1 (2007).

[245] ARIZ. REV. STAT. ANN. § 13-701 (2001).

[246] Tison v. Arizona, 481 U.S.137, 158 (1987).

masterminded the crime, or even wanted to participate, but he played an essential role in facilitating it. Courts, likewise, have upheld death sentences for felony-murder accomplices whose involvement—though not extensive—was instrumental to the crime.[247]

The prospect of a coerced actor being sentenced to death may seem farfetched. Yet, a look at how the law might apply to Inmate Number Five demonstrates the plausibility of such a result. In Georgia, a person commits murder when causing the death of another in the commission of a felony, and a defendant, once convicted of murder, becomes eligible for capital punishment.[248] For a sentence of death, the jury must find at least one statutory aggravating circumstance.[249] Georgia's list of aggravating circumstances includes a killing committed to interfere with lawful confinement, a killing of a corrections employee, and a killing in a place of lawful confinement.[250] All three of these aggravating circumstances would apply against Inmate Number Five. Following pattern instructions, a judge in Georgia would likely advise the jury to generally consider "mitigating facts" that reduce the culpability of the defendant.[251] Duress falls into this category. How the jury treats mitigating facts, however, is completely discretionary.[252] Jurors can give as much or as little weight to evidence of duress as they desire. Even if established, they can sentence Inmate Number Five to death. Of course for most defendants, jurors would not overlook genuine duress and impose capital punishment on a coerced actor, but for Inmate Number Five—a previously convicted criminal who was involved in a prison escape and the killing of a guard—they just might.

IV. RECONCLING THE APPROACHES OF THE STATES

The unacceptable consequences that may result from denying the duress defense provide a compelling case for its allowance. Yet, states ruling to prohibit the defense have done so on principle. Courts in each of these states, except Nebraska, have interpreted their state statutes as both classifying felony murder as murder and forbidding the defense of duress

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[247] People v. Hodgson, 3 Cal. Rptr. 3d. 575, 585 (Cal. Ct. App. 2003) (upholding capital sentence for accomplice who slowed down an automatic electric garage gate because his role was instrumental in a robbery where the victim was fatally shot); Medrano v. State, No. AP-75320, 2008 WL 5050076, at *24 (Tex. Crim. App. Nov. 26, 2008) (upholding capital sentence for accomplice who was not present during crime but provided weapons with knowledge that they would be used in a planned robbery).

[248] GA. CODE. ANN. § 16-5-1 (West Supp. 2009).

[249] 2 COUNCIL SUPER. CT. JJ. GA., SUGGESTED PATTERN JURY INSTRUCTIONS: CRIMINAL CASES § 2.15.30 (5th ed. 2007) [hereinafter GA. JURY INSTRUCTIONS].

[250] GA. CODE. ANN. § 17-10-30 (West Supp. 2009).

[251] GA. JURY INSTRUCTIONS, *supra* note 249, § 2.15.30.

[252] *Id.*

for murder. Their conclusion about felony murder's ineligibility for the defense, however, does not represent the inevitable conclusion that any state with a similar duress statute must reach. Kansas provides an alternative example. Even though the Kansas legislature had codified the common law prohibition on duress for murder, the Kansas Supreme Court understood the statute as allowing duress to excuse a defendant's liability for a felony murder where it equally excused his involvement in the underlying felony.[253]

In *State v. Hunter*, the defendant had been hitchhiking through Kansas.[254] A driver with other two passengers picked up the defendant, and soon thereafter one of the passengers began brandishing a pair of guns and bragging about his prior crimes.[255] A county undersheriff stopped the vehicle, and someone from inside of it fired gunshots at the undersheriff.[256] The car later traveled to a grain elevator where two hostages were taken.[257] Although stories conflict about whether the defendant assisted in the kidnapping, the ordeal left the two hostages and one bystander dead.[258]

Convicted on two counts of felony murder, the defendant in *Hunter* appealed, claiming that the trial court wrongly denied his request for a duress instruction.[259] The Kansas duress statute makes a defendant not guilty of a crime committed under "threat of imminent infliction of death or great bodily harm" but allows the defense only for crimes "other than murder or voluntary manslaughter."[260] This statutory language reads clearly. As in Missouri and Arizona, the Kansas statute unambiguously forbids the duress defense for murder, and in interpreting its statute, the Kansas Supreme Court explicitly looked to Missouri and Arizona as

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[253] *See* State v. Hunter, 740 P.2d 559, 569-70 (Kan. 1987).

[254] *Id.* at 562. The defendant was also convicted of two counts of aggravated kidnapping, aggravated robbery, aggravated battery on a law enforcement officer, and aggravated battery. *Id.*

[255] *Id.* at 562 ("[The armed passenger] began talking about another hitchhiker he wished he had killed and also described prior crimes he had committed including several murders.").

[256] *Id.* The county undersheriff indentified the defendant as the man who shot at him. Yet the defendant, the armed passenger and the other passenger, all testified at trial that the armed passenger had actually been shooting at the undersheriff.

[257] *Id.* at 562-63.

[258] *Id.* The driver was killed during the apprehension. The armed passenger pled guilty to all charges. Along with the defendant, the other passenger was convicted on two counts of felony murder.

[259] *Id.* at 562. The defendant was also convicted of two counts of aggravated kidnapping, aggravated robbery, aggravated battery on a law enforcement officer, and aggravated battery.

[260] KAN. STAT. ANN. § 21-3209 (2007). For duress, the defendant must reasonably believe that "death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, brother or sister if he does not perform such conduct." *Id.*

examples of states with duress statutes whose courts had addressed the issue.[261]

Nonetheless, the Kansas Supreme Court found the reasoning of the Arizona Supreme Court in *Berndt* and the Missouri Supreme Court in *Rumble* to be unpersuasive.[262] Instead, the court heralded as superior the approach of the Oklahoma Court of Criminal Appeals in *Tully*.[263] The prohibition on the duress defense, instructed the Kansas Supreme Court, extends to "crimes of intentional killing and not to killings done by another during the commission of some lesser felony."[264] It held that where duress would serve as a defense to the underlying felony, duress is "equally a defense to charges of felony murder."[265]

Given a plain-language reading of the Kansas statute, the *Hunter* decision may appear disingenuous to some skeptics. All the court did, though, was construe the statute in light of contemporary standards of justice. The Kansas legislature codified the common law at a moment in time. The common law later evolved. Recognizing this evolution, the court simply announced that prohibiting the duress defense for a coerced actor who participates in a felony during which a death inadvertently occurs does not square with concepts of fairness in a modern society. The Kansas Supreme Court in *Hunter* implicitly forwarded the premise that a statute grounded in the common law should be read in light of developments in the common law.[266]

Based on that premise, courts in Missouri, Washington, and Arizona should reinterpret their duress statutes through Kansas's lens and declare the defense available for felony murder. A quick analysis of those statutes illustrates that such reinterpretations are possible. An affirmative defense exists in Missouri where an actor engages in the proscribed conduct because "he [is] coerced to do so, by the use of, or threatened imminent use of, unlawful physical force."[267] The defense, however, does not apply "[a]s to the crime of murder."[268] In Washington, an actor, who absent coercion would not have engaged in the crime, may rely upon the duress defense if faced with a threat that created a reasonable apprehension of fear of

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[261] *Hunter*, 740 P.2d at 562.
[262] *Id.*
[263] *Id.* at 569.
[264] *Id.* at 568.
[265] *Id.*
[266] *See id.* at 568-69.
[267] MO. REV. STAT. § 562.071 (West 1999).
[268] *Id.*

"immediate death or immediate grievous bodily injury."[269] Where the actor is charged with "murder, manslaughter, or homicide by abuse," the defense is unavailable.[270] The Missouri and Washington statutes are substantially similar to the Kansas statutes. Nothing prevents courts in those states from interpreting their duress statutes like the Kansas Supreme Court understood its statute.

Arizona and Indiana present slightly more complex situations. In Arizona, an actor's otherwise illegal conduct is justified if "a reasonable person would believe that he was compelled to engage in [it] by the threat or use of immediate physical force." [271] A later subsection declares the defense "unavailable for offenses involving homicide or serious physical injury."[272] In Indiana, an actor "compelled to [engage in prohibited conduct] by threat of imminent serious bodily injury" qualifies for the duress defense.[273] If charged with a felony offense against the person as defined under Indiana law, the defendant loses access to the defense.[274]

The legislatures in Arizona and Indiana, unlike in Missouri and Washington, made the duress defense unavailable for offenses other than killings. Their inclusion of other offenses may indicate that their legislatures did not intend to follow the common law doctrine but instead sought to establish their own modified doctrine. If so, courts may risk overriding the will of the citizenry by imposing different standards.

For Arizona, the state duress statute only slightly varies from the common law rule by also prohibiting the defense for offenses involving serious physical injury. The Arizona court can reconcile this variance by allowing the duress defense for felony murder, except where the underlying felony involves serious physical injury. This modification honors Arizona's particular concerns while making its legal regime more just.

The Indiana statute makes the duress defense inapplicable to any felony that is an offense against the person.[275] Such offenses include homicide, battery, kidnapping, confinement, human trafficking, sex crimes,

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[269] WASH. REV. CODE ANN. § 9A.16.060 (West 2009). Duress is also unavailable if the "[defendant] intentionally or recklessly places himself . . . in a situation in which it is probable that he . . . will be subject to duress." *Id.* § 9A.16.060(3).

[270] *Id.*

[271] ARIZ. REV. STAT. ANN. § 13-412 (2001). Subsection B of the statute makes duress unavailable if the defendant "intentionally, knowingly or recklessly placed himself in a situation" where he was likely to be coerced. *Id.* § 13-412(b).

[272] *Id.* § 13-412(c).

[273] IND. CODE ANN. § 35-41-3-8 (West 2004).

[274] *Id.* § 35-41-3-8(b)(2).

[275] *Id.* § 35-41-3-8.

and robbery.[276] The court in Indiana could declare that duress functions as a defense for felony murder unless the underlying crime is one of those enumerated as offenses against the person. However, Indiana lawmakers in drafting their duress statute clearly envisioned a scheme significantly different than the common law rule. If the court tampered with this statutory scheme, it would unjustifiably and improperly violate the autonomy of the Indiana legislature. In pursuit of fairness, Indiana should embrace the common law acceptance of the duress defense for felony murder but must do so legislatively, not judicially.

V. CONCLUSION

Only fifteen states have ruled definitively whether duress can serve as a defense to felony murder. Because forty-eight states have statutes codifying felony murder, the applicability of the duress defense will surely arise many times in the future. As this Comment has illustrated, prohibiting the defense distorts both the policies of the felony-murder rule and the duress defense. It does not deter coerced actors from engaging in the felony, properly punish wrongdoing, or recognize when coerced actors choose the lesser of two social evils. Furthermore, banning the defense leads to unacceptable results. A coerced defendant, who independently would not be found guilty of the underlying felony, may be convicted of a felony murder predicated on that felony. Accomplice liability may hold a coerced actor liable for any death caused by anyone—even the death of the coercer. Finally, a coerced defendant conceivably may even face the death penalty under the U.S. Supreme Court standard established in *Tison*.[277]

In light of the above considerations, the principles of fairness demand that the duress defense be available for a felony-murder charge if the duress negates the coerced actor's responsibility for the underlying felony. In deciding the issue in matters of first impression, courts may differ in their legal analysis based on their particular state laws and precedents, but all should reach the same outcome. States which rely on the common law duress defense should look to the Oklahoma approach in *Tully* and recognize that the common law has evolved to allow duress as a defense for felony murder.[278] In states with duress statutes, courts should interpret their statutes through Kansas's lens as established in *Hunter* and distinguish felony murder from intentional murder.[279]

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[276] *See id.* § 35-42 *et seq.*

[277] Tison v. Arizona, 481 U.S. 137 (1987).

[278] Tully v. State, 730 P.2d 1206 (Okla. Crim. App. 1986).

[279] State v. Hunter, 740 P.2d 559 (Kan. 1987).