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Criminal Law - Duress: No Defense to Murder: - Commonwealth v. Vasquez, 971 N.E.2D 783 (Mass. 2012)

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CRIMINAL LAW—DURESS: NO DEFENSE TO MURDER?—*COMMONWEALTH V. VASQUEZ*, 971 N.E.2D 783 (MASS. 2012)

Duress has long been established at common law as a valid affirmative defense to criminal conduct and has been recognized by numerous states and the federal government.[1] The defense of duress applies when an individual commits a criminal act under an imminent threat that creates a reasonable fear of death or serious bodily harm to the individual, who has no reasonable means of escape available, and where no reasonable person could have acted otherwise.[2] In *Commonwealth v. Vasquez*,[3] the Massachusetts Supreme Judicial Court ("SJC") considered as a matter of first impression whether duress is a valid affirmative defense to intentional murder.[4] The SJC held that while duress may be a factor to consider for guilt reduction purposes, it is not an affirmative defense to murder because the harm resulting from the defendant's crime is greater than the harm threatened to the defendant himself.[5] This comment will analyze the SJC's attempt to reconcile traditional common-law values with recent criminal justice trends permitting duress as a defense to all crimes, as well as the potential impact of the decision on future murder-under-duress cases in Massachusetts.[6]

On November 3, 2001, Scott Davenport ("Davenport") drove his car to meet a friend, Ismael Vasquez ("Ismael"), at the Alewife Subway

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[1] *See* Arp v. State, 12 So. 301, 303 (Ala. 1893) (defining duress defense at common law). The *Arp* court held that duress was valid as a criminal defense where "the compulsion and coercion operated upon the defendant, and forced him to the commission of the act, notwithstanding he might have avoided the necessity by escape before that time." *Id.* at 304; Cal. Penal Code § 26 (West 1999) (same); Ky. Rev. Stat. Ann. § 501.090 (West 2008) (same); Me. Rev. Stat. Ann. tit. 17-A, § 103-A (2006) (same); Respublica v. McCarty, 2 U.S. 86, 86-87 (1781) (recognizing duress as valid criminal defense); MODEL PENAL CODE § 2.09 (1962) (advising that duress is valid criminal defense); *infra* note 27 and accompanying text (discussing common law history of duress).

[2] *See* Commonwealth v. Robinson, 415 N.E.2d 805, 812 (Mass. 1981) (outlining elements of duress defense); *see also infra* note 28 and accompanying text (same).

[3] 971 N.E.2d 783 (Mass. 2012).

[4] *Id.* at 790 (stating issue before court).

[5] *Id.* at 791-92. This particular logic underlying the defense of duress is known as, among other names, the "choice of evils" rationale. *See id.* at 790-91; *see also infra* note 27 and accompanying text (explaining choice-of-evils rationale behind duress defense).

[6] *See infra* note 49 and accompanying text (analyzing SJC approach to issue of duress as murder defense).

Station in Cambridge.[7] Davenport had arranged to bring Ismael, along with two other men and three women, including a woman named Io Nachtwey ("Nachtwey"), to Lawrence in exchange for heroin.[8] Ismael had recently formed a gang with these individuals and others who frequented the Harvard Square area of Cambridge.[9] At the time of the incident, the gang was experiencing internal tension, with Nachtwey's alliances to the gang specifically in question.[10] Davenport drove the group to Lawrence to retrieve the heroin, after which the group returned to Cambridge and stopped at a park.[11] Once there, a male member of the group (Parker) informed two of the women that when he signaled, they were to hold Nachtwey down and Davenport was to stab her to death.[12]

After returning to the car, the group drove to a side street in Cambridge near the Boston University Bridge.[13] Ismael handed Davenport a ten-inch knife and told him, "You know what you have to do."[14] Davenport told Ismael that he did not want to kill Nachtwey, to which

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[7] *See Vasquez*, 971 N.E.2d at 788 (describing arrangements made by Davenport and Ismael); *see also* Brief and Appendix of Appellant Scott Davenport at 3, Commonwealth v. Vasquez, 971 N.E.2d 783 (Mass. 2012) (No. 10140), 2010 WL 8471747, at *3-4 (noting group met at Alewife station).

[8] *Vasquez*, 971 N.E.2d at 788. The other occupants of the car were Ana White ("White"), Lauren Alleyne ("Alleyne"), and the two co-defendants, Luis Vasquez ("Vasquez") and Harold Parker ("Parker"). *Id.* Both White and Alleyne testified at trial against the four men, pursuant to a cooperation agreement. *Id.* at 787.

[9] *Id.* at 788. This section of Harvard Square is also known as "The Pit." *Id.* In October 2001, Ismael and Parker announced plans to form a new "Crips set" in Harvard Square and formally inducted its members in a Halloween ceremony. *Id.* The gang's primary objective consisted of performing "missions" during which gang members robbed unsuspecting victims. *Id.* The SJC did not consider Davenport to be a member of the gang, instead labeling him a "nonmember associate." *Id.* at 787.

[10] *See id.* at 789. Other members of the gang, a sub-group led by Nachtwey's boyfriend, Gene Bamford ("Bamford"), were in revolt against Ismael's leadership and planned to rescue Nachtwey by force. *Id.* at 788.

[11] *See id.* at 789. The reason for the trip is a matter of some dispute–the SJC's opinion asserts that the group went to Lawrence solely to pick up the drugs, while Davenport's brief cites Ismael's goal of acquiring a cache of weapons. *Compare id.* at 788 ("The group drove to Lawrence. While the four men went to get heroin . . . the [women] waited . . . ."), *with* Brief and Appendix of Appellant Scott Davenport, *supra* note 7, at 7 ("[Ismael] wanted to go to Lawrence to get weapons."). During the return trip from Lawrence, Nachtwey attempted to escape from the vehicle, but Ismael the others to prevent her from doing so and White complied. *Vasquez*, 971 N.E.2d at 789.

[12] *Id.* The trial court found no evidence that Davenport was aware of a murder plot against Nachtwey when he picked up the group. *Id.* at 787 n.3. Davenport's lack of knowledge of the murder plot is further demonstrated by the fact that the jury declined to convict Davenport of premeditated murder. *See id.* at 787 n.3 (listing defendants' convictions).

[13] *Vasquez*, 971 N.E.2d at 789.

[14] *Id.* (describing events preceding crime).

Ismael responded, "You're not getting out of here if you don't."[15] As the group walked along a set of nearby train tracks, Ismael gave the signal and the women pushed Nachtwey to the ground and restrained her.[16] Davenport ran toward them, shouting, "die, die, bitch, die," and repeatedly stabbed Nachtwey, who unsuccessfully tried to fight back.[17] After she stopped moving, Davenport and Vasquez threw her lifeless body into the Charles River.[18] At this time, Davenport ran his hands through his hair and exclaimed, "What a rush!" as the group returned to the car and drove off.[19]

At trial in Superior Court, Davenport claimed that he had acted under duress, an available defense to murder in Massachusetts, and requested a jury instruction to that effect.[20] Judge Brady denied Davenport's request, instructing the jury that duress was not a valid affirmative defense to murder.[21] The court stated the common-law principle that "duress does not . . . excuse the intentional murder of an innocent person."[22] Davenport was convicted of murder in the first degree.[23] Upon the SJC's plenary review, Davenport argued that the trial judge's jury instruction was in error.[24] Further, Davenport claimed he was entitled not only to an instruction that duress was a valid defense to murder, but also that it may mitigate a charge of murder to a charge of manslaughter.[25] The SJC heard the case to determine whether a murder defendant may argue duress as a valid affirmative defense in

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[15] *Id.* The SJC included these two statements as evidence of both Davenport's verbal expression of his unwillingness to kill Nachtwey and Ismael's verbal threats of harm to Davenport. *Id.* Davenport's brief details a longer conversation which includes further statements exhibiting Davenport's resistance and Ismael's coercion. Brief and Appendix of Appellant Scott Davenport, *supra* note 7, at 5. In his brief, Davenport alleges that he said, "I don't want to, I don't want to, I don't want to be involved in this. I don't want to do this," to which Ismael replied, "You're going to do it and if you don't you won't walk out of here." *Id.*

[16] *Vasquez*, 971 N.E.2d at 789 (detailing events preceding crime charged).

[17] *Id.* Davenport's own brief concedes he said as much. Brief and Appendix of Appellant Scott Davenport, *supra* note 7, at 6.

[18] *Vasquez*, 971 N.E.2d at 789 (detailing body disposal).

[19] *Id.* Davenport was not the only member of the group reveling in the crime; Alleyne and White sang on their way back to the car. *Id.*

[20] *See id.* at 790 (describing Davenport's requested jury instructions). Davenport was jointly tried with Vasquez, Ismael, and Parker. *Id.* at 787.

[21] *See id.* at 790 (discussing trial court's rejection of defendant's duress defense).

[22] *Id.* (quoting trial judge).

[23] *See Vasquez*, 971 N.E.2d at 787. All four defendants were convicted of first-degree murder. *Id.* Davenport was convicted of murder committed with extreme atrocity or cruelty, while Vasquez, Ismael and Parker were convicted of premeditated murder, among other charges. *Id.* at 787 n.3.

[24] *Id.* at 790 (outlining defendant's argument).

[25] *See id.* (numerating defendant's objections on appeal).

Massachusetts.[26]

The affirmative criminal defense of duress, also known as compulsion or coercion, has a lengthy common-law history rooted in the moralistic "choice of evils" rationale: duress is acceptable as a defense when the resulting harm is less than the threatened harm.[27] An actor commits a crime under duress when faced with a present, immediate, and impending threat that would induce "a well-founded fear of death or of serious bodily injury if the criminal act is not done; the actor must have been so positioned as to have had no reasonable chance of escape . . . where neither he nor a person of reasonable firmness could have acted otherwise in the circumstances."[28] The defense of duress is generally not

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[26] *See id.* (stating issue before court).

[27] *See* United States v. LaFleur, 971 F.2d 200, 205 (9th Cir. 1992) (explaining rationale underlying choice of evils); *see also* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., SUBSTANTIVE CRIMINAL LAW § 5.3 (2d ed. 1986) (same). LaFave and Scott's original work, a seminal treatise in the area of criminal defense, contained an oft-quoted explanation for the reasoning behind the choice-of-evils approach:

> The rationale of the defense [of duress] 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.

LaFleur, 971 F.2d at 205 (quoting 1 LAFAVE & SCOTT, § 5.3); *see also* United States v. Bailey, 444 U.S. 394, 409-10 (1980) (discussing LaFave's choice-of-evils rationale); United States v. Mitchell, 725 F.2d 832, 835 n.4 (2d Cir. 1983) (explaining logic behind choice-of-evils rationale); *Vasquez*, 971 N.E.2d at 790 (quoting LaFave's analysis of duress defense in reasoning). The moral impetus underlying such a rule stems from the idea that "a person under duress ought to choose 'rather to die himself than escape by the murder of an innocent.'" *Mitchell*, 725 F.2d at 835 n.4 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *30); *see also* Arp v. State, 12 So. 301, 303 (Ala. 1893) (applying choice of evils to murder-under-duress case). The choice-of-evils rationale is also known as the "balance of harms" or "lesser harm" theory. *See* Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 166-69 (2006) (analyzing balance-of-harms theory of duress).

[28] Commonwealth v. Robinson, 415 N.E.2d 805, 812 (Mass. 1981). In *Robinson*, the SJC clearly defined duress as a valid criminal defense in Massachusetts. *See id.* In doing so, the SJC held that a valid defense of duress meant the defendant was not capable of forming the proper criminal intent. *See id.* The defense of duress is unique in that its ambiguous qualities have left ample room throughout history for debate concerning its most basic definition. *See* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1349-50 (1989) (outlining disagreement over duress as excuse or justification defense). American common law has historically distinguished between duress, a defense to an act performed in response to a man-made threat, and necessity, a defense to an act

available to an individual who recklessly puts himself in a position where he is likely to experience coercion, for duress is rooted in reasonableness, and recklessness is not reasonable.[29]

Anglo-American common law has consistently rejected the acceptance of duress as a valid murder defense.[30] Most state appellate courts to address the issue have affirmed the common-law interpretation regarding the unavailability of duress as a defense in murder trials.[31] The Model Penal Code ("MPC") recognizes and advises duress as a defense to all crimes, including murder.[32] Some states' criminal statutes contain language mirroring the Model Penal Code's liberal definition of duress and permit its application to guilt reduction statutes.[33] Most states, however,

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performed in response to a natural threat. *See id.* at 1347-48. The Supreme Court has recognized this historical common-law distinction between duress and necessity, but has also noted that the line between the two defenses is unclear. *See Bailey*, 444 U.S. at 409-10 (discussing evolving definition of duress at common law). Further muddling the issue, the Model Penal Code distinguishes between duress and "choice of evils," characterizing them as two separate defenses. *Compare* MODEL PENAL CODE § 2.09 (1962) (defining duress defense), *with* MODEL PENAL CODE § 3.02 (1962) (defining choice-of-evils defense). LaFave appears to classify duress as a justification for a crime, not an excuse. *See* 1 LAFAVE & SCOTT, § 5.4 (arguing crime not excused but justified by duress). Massachusetts follows the same model. *See Robinson*, 415 N.E.2d at 812 (same).

[29] *See* United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (holding duress not "valid legal excuse" for recklessness); Commonwealth v. Allen, 717 N.E.2d 657, 660 (Mass. 1999) (denying use of duress defense due to defendant's reckless behavior); *Robinson*, 415 N.E.2d at 812 n.11 (noting unavailability of duress defense for recklessness under common and statutory law); *see also* MODEL PENAL CODE § 2.09(2) (1962) (excluding reckless and negligent behavior from duress defense). Judicial and legislative efforts to keep the duress defense from reckless actors underscores the inherent focus on objective reasonability present in any duress analysis. *See Robinson*, 415 N.E.2d at 812 (discussing duress defense's standard of reasonableness).

[30] *See LaFleur*, 971 F.2d at 205 (discussing common-law rejection of duress as murder defense). The Anglo-American tradition of barring duress as a defense to murder is considered in many legal circles to be "virtually unassailable." Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J. TRANSNAT'L L. & POL'Y 51, 58-61 (1996) (analyzing English and American common-law bar on duress defense for murder).

[31] *See Arp*, 12 So. at 304 (excluding duress as defense to murder); Brewer v. State, 78 S.W. 773, 776 (Ark. 1904) (same); People v. Anderson, 50 P.3d 368, 371 (Cal. 2002) (same); Wright v. State, 402 So. 2d 493, 497 (Fla. Dist. Ct. App. 1981) (same); *see also* Mulroy, *supra* note 27, at 172 (discussing appellate authority barring duress as murder defense). *But see* Reed, *supra* note 30, at 60-61 (discussing recent appellate authority permitting duress as murder defense).

[32] *See* MODEL PENAL CODE § 2.09(1) (1962) (advising duress as defense to murder). The American Law Institute drafters of the Model Penal Code rejected the expansive choice-of-evils rationale, deeming it "hypocritical" to impose such a strict ban on the duress defense in all instances of homicide. Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 VA. J. INT'L L. 861, 874 (2003) (discussing MPC drafters' intent and reasoning); *see also* LAFAVE, *supra* note 27 (noting availability of duress defense to all crimes under MPC).

[33] *See* ALASKA STAT. § 11.81.440 (1978) (applying MPC definition of duress as defense to murder); DEL. CODE ANN. tit. 11, § 431 (West 1972) (same); HAW. REV. STAT. § 702-231 (1979) (same); N.J. STAT. ANN. § 2C:2-9 (West 1978) (same); N.Y. PENAL LAW § 40.00 (McKinney

have adopted the common-law rule excluding duress as an affirmative defense to murder as well as for purposes of guilt reduction.[34]

In recent years, an increasing number of courts and legal scholars have argued for the allowance of duress as a defense to a broader range of crimes, including murder.[35] Judicial flexibility in the consideration of duress for guilt reduction purposes in murder cases has also been on the rise.[36] Massachusetts courts had not addressed this issue directly, although the Commonwealth's capital review statute provides the SJC with the authority to consider duress as a factor in mitigating a murder charge to manslaughter.[37] Still, some courts continue to adhere to the common-law rule of keeping the duress defense out of murder trials all together, citing policy concerns that allowing it would encourage criminal gang members to follow an order to kill if they knew they could avoid responsibility by proving coercion.[38] Courts have also applied this rationale in denying a

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1968) (same); N.D. CENT. CODE § 12.1-05-10 (1973) (same); TENN. CODE ANN. § 39-11-504 (West 1989) (same); TEX. PENAL CODE ANN. § 8.05 (West 1973) (same); UTAH CODE ANN. § 76-2-302 (West 1973) (same).

[34] *See Anderson*, 50 P.3d at 377 ("The cases that have considered the question . . . have generally rejected the argument that duress can reduce murder to manslaughter."); *see also* Mulroy, *supra* note 27, at 172-73 (discussing state statutory and common-law authority barring duress as murder defense); Reed, *supra* note 30, at 60 ("[T]he majority of American jurisdictions still apply the common law, which is predicated on . . . an intolerance for the defense of duress in cases involving any form of homicide . . . .").

[35] *See Anderson*, 50 P.3d at 387 (Kennard, J., concurring and dissenting in part) (noting recent push for more flexible duress approach); Tully v. State, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986) (permitting duress defense in felony-murder trial). In rejecting *Anderson*'s absolute bar on the defense of duress in murder trials, Justice Kennard of the Supreme Court of California voiced concerns in his dissenting opinion that the majority "oversimplifie[d] a highly complex issue." *Anderson*, 50 P.3d at 387; *see also* Mulroy, *supra* note 27, at 207 (detailing modern trend toward allowing duress defense for all crimes). While duress is still widely unavailable as a defense to murder at common law, the fact that some states have adopted the Model Penal Code's broader definition of the defense sets America apart from other common law nations. Mulroy, *supra* note 27, at 173 (noting relatively liberal American approach to duress as murder defense).

[36] *See Anderson*, 50 P.3d at 377 ("'While moral considerations require the rejection of any claim of excuse, they do not require that the mitigation of the circumstances be overlooked.'" (quoting R. PERKINS & R. BOYCE, CRIMINAL LAW 1058 (3d ed. 1982))); Mulroy, *supra* note 27, at 173 (observing modern flexibility in applying duress for mitigation purposes). LaFave even argues that the presence of duress may necessitate a murder defendant's guilt reduction. *Anderson*, 50 P.3d at 377 (quoting 1 LAFAVE & SCOTT, *supra* note 27, at 719) ("[I]t is arguable that [a defendant's] crime should be manslaughter rather than murder, on the theory that the pressure upon him, although not enough to justify his act, should serve at least to mitigate it to something less than murder."). Such support for judicial consideration of coercive factors in mitigation reflects the idea that duress may serve to justify, while not excusing, the commission of a crime. *See* Dressler, *supra* note 28, at 1349-57 (analyzing duress as justification defense).

[37] *See* MASS. GEN. LAWS ch. 278, § 33E (2010) (outlining SJC's authority to review capital cases).

[38] *See Anderson*, 50 P.3d at 374 (citing negative consequences of allowing duress defense for crimes involving gang violence). *See generally* State v. Scott, 827 P.2d 733, 739-41 (Kan. 1992)

criminal defendant's use of duress for guilt reduction purposes.[39]

In *Commonwealth v. Vasquez*, the SJC addressed the issue of duress as an affirmative defense to intentional murder.[40] The SJC, relying primarily on the choice-of-evils rationale, held that the trial court did not abuse its discretion by refusing to instruct the jury that duress was a valid defense to intentional murder.[41] In doing so, the SJC affirmed the common-law rule, persuaded by the argument that the threat of harm to oneself does not excuse the taking of an innocent life.[42] By killing Nachtwey, the SJC reasoned, Davenport had not prevented the commission of a crime of greater magnitude; therefore, duress should not have been available to him as an affirmative defense.[43] Additionally, the SJC cited *Anderson's* policy considerations for keeping the defense of duress away from defendants charged with murder.[44] The potential for the availability of the defense to act as additional motivation for a gang member to kill was a concern for the SJC, as it was for the *Anderson* court.[45]

(affirming trial court's refusal to provide instruction regarding duress defense during trial of gang member). In *Anderson*, the Supreme Court of California gave this policy argument a great deal of weight, explaining, "California today is tormented by gang violence." 50 P.3d at 374. The *Anderson* court did not address the uniquely pervasive nature of California's problems with gang violence.

[39] *See Anderson*, 50 P.3d at 377 (prohibiting duress as factor in guilt reduction); *see also* United States v. LaFleur, 971 F.2d 200, 206 (9th Cir. 1992) (holding same rationale bars duress as defense and for mitigation); State v. Nargashian, 58 A. 953, 955 (R.I. 1904) (reasoning duress barred for guilt reduction due to presence of malicious intent). *But see* Wentworth v. State, 349 A.2d 421, 427-28 (Md. Ct. Spec. App. 1975) (recognizing that duress may apply for guilt reduction in certain cases). The *Anderson* court's reluctance to recognize duress as a mitigating factor in murder cases also grew from concerns that doing so would in effect create a new category of manslaughter, a job generally left to the legislature. 50 P.3d at 378-79.

[40] 971 N.E.2d 783, 792 (Mass. 2012) (holding duress not valid defense to murder).

[41] *See id.* (applying choice-of evils-reasoning). In his opinion, Justice Spina quoted LaFave's moralistic analysis in keeping the duress defense from individuals charged with homicide. *Id.* at 790. Specifically, the SJC rejected "duress as a defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree . . . ." *Id.* at 792.

[42] *See id.* Echoing Blackstone, the SJC declared: "We are persuaded that, under our common law, a defendant is not excused from taking the life of an innocent person because of the threat of harm to himself." *Id.*; *see also* United States v. Mitchell, 725 F.2d 832, 835 n.4 (2d Cir. 1983) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES * 30) (explaining common-law rejection of duress as murder defense).

[43] *See Vasquez*, 971 N.E.2d at 792 (rationalizing complete bar on duress defense for murder). The SJC did not consider any theory of rationale for the defense of duress other than the choice of evils.

[44] *See id.* at 790-91 (citing People v. Anderson, 50 P.3d 367, 374 (Cal. 2002)) (citing California gang violence in reasoning). While echoing the *Anderson* court's concerns, the SJC's opinion did not include a discussion of current gang violence trends in Massachusetts.

[45] *See Vasquez*, 971 N.E.2d at 790-91 (barring defense in effort to deter gang violence). In addition to the specifics of gang violence in the Commonwealth, the SJC's opinion did not

While the SJC rejected duress as an affirmative duress to murder, it did reserve the right to consider duress as a mitigating factor in guilt reduction under the Massachusetts capital review statute.[46] In conducting a plenary review of Davenport's conviction, the SJC applied the elements of the duress defense to the facts and found that no reduction in guilt was necessary.[47] The SJC, in barring duress as a complete defense to murder while allowing its consideration for guilt reduction purposes in "exceptional and rare circumstances," reasoned this slight alteration of the common-law rule represented the fairest interpretation of the duress defense as it applies to murder defendants.[48]

In *Commonwealth v. Vasquez*, the SJC, by refusing to allow the defense of duress to murder, chose to endorse an impractical and outdated common-law principle.[49] The logic behind the choice-of-evils rationale, that a person "ought rather to die himself, than escape by the murder of an innocent," is based on a noble yet rigid moral sensibility that stretches back almost as far as the common law itself.[50] While such an estimable history

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analyze the comparative nature of gang violence in Massachusetts and California.

[46] *See id.* at 792. The manner in which the SJC chose to announce this departure from the common-law rule juxtaposes two competing views of duress as applied to homicide: "[a]lthough we hereby reject duress as a defense to deliberately premeditated murder, murder committed with extreme atrocity or cruelty, and murder in the second degree, we do not foreclose the possibility that, in exceptional and rare circumstances of duress, justice may warrant reduction of a defendant's guilt . . . ." *Id.*; *see also* MASS. GEN. LAWS ch. 278, § 33E (2010) (outlining SJC's plenary authority to review capital cases).

[47] *See Vasquez*, 971 N.E.2d at 792 ("Where escape was available to Davenport, duress does not lie, even if it were a recognized defense in the Commonwealth."). In a standard application of the elements of duress, the SJC determined that Davenport acted of his own volition, did not possess a reasonable fear of immediate harm or death, and had ample opportunity to remove himself from the situation. *Id.*

[48] *See id.* (explaining reasoning for permitting duress as mitigating factor upon review). The SJC noted that in some cases "justice may warrant" the consideration of duress in murder trials. *Id.*

[49] *See* Mulroy, *supra* note 27, at 175 (discussing consequences of absolute bar on duress defense). Mulroy argues that forbidding the availability of duress as a defense to all crimes is based on an "overly harsh" and unrealistic assessment of human nature, as factors of duress must in some cases excuse criminal behavior. *Id.* Even LaFave, considered the preeminent scholar on the issue of coercion in the criminal context, recently updated his ubiquitous treatise to define duress as an excuse rather than a justification, as well as to exclude any mention of a choice-of-evils rationale behind barring the defense in murder trials. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.7(a), at 73-74 (3d ed. 2003) (eschewing choice-of-evils rationale in barring duress defense for murder). LaFave's treatise now reads that duress may excuse an actor if he "lacked a fair opportunity to avoid acting unlawfully," a decidedly more normative approach to the defense. *Id.*; *see also* Mulroy, *supra* note 27, at 171 (highlighting LaFave's recent deviation from common-law explanation for barring duress as murder defense).

[50] *See* United States v. LaFleur, 971 F.2d 200, 205 (9th Cir. 1991) (discussing choice-of-evils rationale for duress defense); *see also* United States v. Mitchell, 725 F.2d 832, 835 n.4 (2d Cir. 1983) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *30) (describing common-law

must be respected, the SJC's application of this antiquated norm is not in keeping with modern criminal justice trends or the practical role of the common law to reflect an ever-evolving mosaic of societal values and expectations of behavior.[51] Certain principles are surely indelible, and this does not mean that modern society is or should be more willing to acquit individuals charged with murder; however, whenever possible, society should have the opportunity to consider doing so based on the sum of the facts in total.[52] The role of the courts should not be to force unforgiving moral standards upon those charged with a crime, even if that crime is murder.[53] The outright exclusion of the duress defense in murder trials imposes upon the defendant an inflexible and imperfect standard of how a human being should act at all times, and not an objective and independent standard of how a reasonable person would act in a given situation.[54] It is

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exclusion of duress as murder defense); *supra* note 27 and accompanying text (explicating traditional reasoning underlying choice of evils). The SJC's reluctance to do away with established convention is understandable because there is evidence that the nearly "unbroken tradition" of support for the choice-of-evils rationale stretches back to ancient times. *See* Dressler, *supra* note 28, at 1370 (noting historical adherence to choice-of-evils rationale).

[51] *See generally* People v. Anderson, 50 P.3d 368, 384-85 (Cal. 2002) (Kennard, J., concurring and dissenting in part) ("[T]he weight of scholarly commentary favors the . . . abolition of the common law murder exception to the duress defense."); Mulroy, *supra* note 27, at 207 (discussing recent approach to increased availability for duress as defense to murder). Even in England, the source of the common-law bar on duress as a defense to homicide, more flexible approaches to the proposition are being considered. *See* Reed, *supra* note 30, at 53-54 (noting recent judicial and legislative disputes concerning duress as murder defense in England).

[52] *See* Mulroy, *supra* note 27, at 175-76 (addressing moral concerns in permitting duress as defense to murder). Allowing a jury to consider a defense of duress in homicide trials would not necessarily lead to a murder defendant's escape from justice because juries will still require evidence of a genuine state of duress and lesser charges and penalties would still be available to punish an individual for his crimes. *Id.* Dressler argues that "reasonable minds can and will differ regarding [the] proper boundaries" of the duress defense, and therefore the question of its applicability should be left to a jury. Dressler, *supra* note 28, at 1368; *see also Anderson*, 50 P.3d at 385 (Kennard, J., concurring and dissenting in part) (quoting Dressler's proposed standard of reasonableness).

[53] *See* Mulroy, *supra* note 27, at 176 (decrying overreach of courts in applying strict moral standards). The choice-of-evils rationale "not only 'asks us to be virtuous,' but actually 'demands our virtual sainthood.'" *Id.* (quoting Dressler, *supra* note 28, at 1373). Such a narrow and exacting paradigm cannot possibly apply equally to all crimes committed under duress, especially when the situation is not as simple as taking a life to save one's own. Dressler, *supra* note 28, at 1352-53 (observing difficulty of applying choice of evils to lesser or similar crimes). A pre-trial judicial balancing of the relative severity of a criminal act, or an avoided criminal act, takes a critical question of fact away from the jury. *Id.* at 1345; *see also* Reed, *supra* note 30, at 69-70 (asserting capability of jury to assess facts regarding duress excuse).

[54] *See* Dressler, *supra* note 28, at 1366 ("At its core, the defense of duress requires us to determine what conduct we, a society of individual members of the human race, may legitimately expect of our fellow threatened humans."). The jury is better situated than the court to evaluate, based on specific facts and context, the reasonableness of an individual's actions through both a moral and normative lens. *See* Reed, *supra* note 30, at 63 (observing suitability of jury to

the province of the jury, not the court, to apply such a standard.[55] In affirming the choice-of-evils rationale, the SJC precluded this possibility in favor of an approach that could potentially lead to injustice, albeit on rare occasions.[56] Regardless of the scarcity of true murder-under-duress cases, justice would be better served in the Commonwealth if the adjudication of such claims consisted of a primarily normative, not moral, approach.[57]

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determine reasonable and moral behavior).

[55] *See* Dressler, *supra* note 28, at 1373-74 (discussing benefits of normative jury analysis of duress defense); *see also* MODEL PENAL CODE § 2.09(1) (1962) (leaving question of whether duress is a valid murder defense to jury); Reed, *supra* note 30, at 69-71 (supporting jury consideration of duress factors). Permitting juries to consider duress as a defense to murder represents a more honest approach to our expectations of human behavior and would likely lead to a more pragmatic and flexible criminal justice system. *See* Dressler, *supra* note 28, at 1368 ("In the realm of duress, hypocrisy is the result of holding others to a standard of moral strength to which we would not hold ourselves if we were similarly situated."); *see also* Mulroy, *supra* note 27, at 175 (advocating normative approach to duress claims). Mulroy's inquisitive inferential chain best explains the logic behind allowing the defense of duress in murder trials:

> 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?

Id. The driving force behind allowing duress as an affirmative defense to murder is the concern that a complete bar on the defense in homicide trials serves as a one-size-fits-all answer to a distinctly complex and final question. *Id.*; *see also Anderson*, 50 P.3d at 387 (Kennard, J., concurring and dissenting in part) (noting complicated nature of debate over duress as valid murder defense).

[56] *See* Mulroy, *supra* note 27, at 175 (discussing limited authority where duress excused murder); *see also* Brooks, *supra* note 32, at 868-69 (same). While they do exist, cases in which factors of duress have excused intentional murder are not common and are rarely prosecuted. *See* Mulroy, *supra* note 27, at 175 (noting scarcity of authority where duress excused murder). Principled proponents of keeping the defense of duress from the jury's purview in murder trials claim that the inherent evil of intentional murder should never be excused; however, the same cannot be said about felony or accomplice murder, where the defendant may never have formed the intent to kill. *See* Tully v. State, 730 P.2d 1206, 1210 (Okla. Crim. App. 1986) (reasoning duress can excuse felony murder).

[57] *See* Brooks, *supra* note 32, at 879 (stressing importance of reasonableness in duress determination); Dressler, *supra* note 28, at 1385 (arguing reasonableness of duress should be determined by jury); Reed, *supra* note 30, at 63 (advocating MPC designation of jury to determine reasonableness). Although reasonableness should be the primary standard when weighing a defense of duress in a murder trial, morality need not be wholly absent from a jury's consideration. *See* Dressler, *supra* note 28, at 1334 ("[The defendant] should be excused only if he attained or reflected society's legitimate expectations of moral strength."). However, any moral consideration given to an individual's criminal act should be dependent upon objective societal expectations of behavior under a particular set of circumstances. *See* Reed, *supra* note

The SJC, like the *Anderson* court, focused too heavily on unfounded policy concerns that allowing duress as an affirmative defense to murder would encourage killing and increase gang violence.[58] Permitting duress as a defense to murder would not increase gang violence, just as barring the defense does not decrease it.[59] It is highly unlikely that potential legal defenses serve as a determining factor in the mind of a gang member charged with an order to kill.[60] Practically, barring the duress defense in gang-related murder cases is redundant–in Massachusetts, a gang member or "nonmember associate" like Davenport would likely not be permitted to claim duress anyway, as courts and legislatures have routinely held that an individual's association with a criminal gang qualifies as reckless behavior, rendering the defense unavailable.[61] The availability of duress as a valid affirmative defense to murder would also be unlikely to motivate potential killers with the confidence to kill, as juries are extremely reluctant to acquit defendants charged with murder based on claims of duress.[62] If the defense were accessible to murder defendants in

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30, at 55 ("[T]he standard is that of the reasonable man, not the reasonable hero. To suggest otherwise is absurd.").

[58] *See* Commonwealth v. Vasquez, 971 N.E.2d 783, 790-91 (Mass. 2012) (citing California's struggles with gang violence in reasoning); *see also Anderson*, 50 P.3d at 374 (barring duress as murder defense based on potential to increase gang violence); Dressler, *supra* note 28, at 1382 (detailing logical flaws in argument that permitting duress defense increases gang violence); Mulroy, *supra* note 27, at 187 (contending that allowance of duress defense for murder would not lead to killers evading responsibility).

[59] *See* Mulroy, *supra* note 27, at 175 (discussing implausibility of duress defense's unavailability deterring killing). No evidence exists to suggest that extending the availability of the duress defense to murder defendants results in higher rates of killing. *Id.*

[60] *See id.* (discussing motivation of individual ordered to kill). Mulroy states that it is reasonable to assume that the "last thing" on the mind of a potential killer under duress is speculation concerning his subsequent prosecution. *Id.*

[61] *See* United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (withholding duress defense from reckless actor); *Anderson*, 50 P.3d at 386 (Kennard, J., concurring and dissenting in part) ("Because persons who join criminal street gangs . . . can anticipate pressure to commit crimes, the defense would usually be unavailable to those individuals."); State v. Scott, 827 P.2d 733, 739-40 (Kan. 1992) (holding voluntary membership in criminal gang precludes duress defense); Commonwealth v. Allen, 717 N.E.2d 657, 660 (Mass. 1999) (same); Commonwealth v. Robinson, 415 N.E.2d 805, 812 n.11 (Mass. 1981) (same); *see also* MODEL PENAL CODE § 2.09(2) (1962) (same); Mulroy, *supra* note 27, at 176 (describing lack of reckless behavior as prerequisite for claiming duress defense). Although in *Vasquez* the SJC did not acknowledge this specific redundancy, it did note that regardless of the availability of the duress defense to murder defendants, Davenport's opportunity to escape prevented his use of the defense in Massachusetts. *Vasquez*, 971 N.E.2d at 792 (concluding duress did not apply to actor with chance to escape).

[62] *See* Mulroy, *supra* note 27, at 176 (discussing skepticism juries hold concerning duress claims). As proof that moral consideration of a murder defendant's behavior is not lost under a normative approach to duress, the desire to punish an actor for a heinous crime remains strong, even if a duress defense is proffered. *See* Dressler, *supra* note 28, at 1373-74 (noting moral considerations of jurors when faced with duress defense to murder); Reed, *supra* note 30, at 63

Massachusetts, the average jury would acquit no more hardened killers than the average judge, and would be able to reasonably consider the rare but real murder-under-duress case when justice requires.[63] The harm in allowing a murder defendant to present evidence of duress to a jury is therefore difficult to envision.[64]

The SJC did manage to find middle ground between common-law doctrine and modern legal trends by permitting the consideration of duress as a mitigating factor on review of intentional murder convictions.[65] This position certainly alleviates some of the rigidity of the common-law rule, yet forces a murder defendant with a potentially valid excuse of duress to wait until after trial and conviction to plead his case in full.[66] At this point, even if the SJC detects sufficient evidence of coercion present to justify the excusal of the defendant's criminal conduct, nothing can be done.[67] However, the allowance of duress consideration upon review, coupled with the fact that the SJC's decision in *Vasquez* only bars the defense of duress for intentional murder and not for lesser charges such as manslaughter, marks a step in the right direction toward a more reasonable and

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("[T]here is no doubt that juries are commendably robust in rejecting the [duress] defense where appropriate.").

[63] *See* Mulroy, *supra* note 27, at 175 (observing scarcity of true murder-under-duress cases); *supra* note 62 and accompanying text (discussing unlikelihood that juries would be prone to acquit murder defendants). As for Davenport, it is highly unlikely that a Massachusetts jury would consider the facts of his case to be a true murder-under-duress scenario; in fact, a jury would no doubt reach the same conclusion as the SJC concerning the applicability of the duress defense. *Vasquez*, 971 N.E.2d at 792 (concluding defendant did not kill under duress).

[64] *See* Dressler, *supra* note 28, at 1373-74 (endorsing normative jury analysis of duress defense); Reed, *supra* note 30, at 69-70 (same). Fears of mass acquittals if duress is made available to murder defendants are groundless and likely stem from a lack of faith in the competence of the average juror. *See supra* note 62 and accompanying text (noting rational skepticism of modern juror). As juries are predisposed to disbelieve claims of duress in homicide trials, the defense should not be barred from using the defense based on the flawed assumption that actual and excusable murder-under-duress cases never occur. *See* Dressler, *supra* note 28, at 1373 ("It is not inherently imp[l]ausible to contend that persons of reasonable moral strength will accede to some, but not all, homicides.").

[65] *See Vasquez*, 971 N.E.2d at 792 (permitting duress in guilt reduction); *see also* Mulroy, *supra* note 27, at 182 (describing increased parity in allowing duress for mitigation purposes).

[66] *See* Brooks, *supra* note 32, at 885-86 (using example to display potential harm caused by permitting duress only for mitigation). Brooks, using the example of an unwilling yet ultimately obedient officer at the Srebrenica massacre, paints a vivid portrait of how permitting duress simply for guilt reduction may not always achieve true justice. *Id.* An individual involved in, but not guilty of, intentional murder based on coercion hardly escapes without consequence or punishment: lesser charges, the actual and personal cost of being on trial, and the perpetual associated stigma serve to punish the actor for his involvement. *Id.* at 868.

[67] *See* MASS. GEN. LAWS ch. 278, § 33E (2010) (authorizing SJC review of capital cases); *Vasquez*, 971 N.E.2d at 792 (granting SJC authority to apply duress for mitigation purposes only).

representative criminal justice system.[68] The SJC's departure from the common-law rule, however slight, reveals a pragmatic and increasingly common judicial recognition that specific factors of duress may be essential to fair and complete adjudication, even where the affirmative defense of duress is barred.[69]

In *Commonwealth v. Vasquez*, the SJC tasked itself with determining what role, if any, duress should play in Massachusetts murder trials. By invoking the choice-of-evils rationale to keep the affirmative defense of duress from those charged with murder, the SJC validated a seemingly righteous yet inherently unfair principle of common law. While duress consideration in guilt reduction better serves the murder defendant than an absolute bar, the SJC's reluctance to allow duress as a defense to all crimes reflects a widespread, instinctive adherence to a deeply-engrained tenet of Anglo-American common law—one based on a simplistic appraisal of human nature and the purpose of the criminal justice system. Whether the specific circumstances of an individual's actions warrant the excusal of those actions is primarily a question of reasonableness, not morality. This question should not be disregarded by an indiscriminate legislative or judicial standard; it should be addressed and answered by a jury.

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[68] *See Vasquez*, 971 N.E.2d at 792 (barring duress defense only for first- and second-degree murder); Mulroy, *supra* note 27, at 182 (observing parity behind allowing duress for guilt reduction). It is difficult to see how justice is not served when a criminal defendant is allowed to present—and a jury is allowed to consider—all of the facts relevant to the defendant's side of the story. *See* Mulroy, *supra* note 27, at 162 n.16 (discussing unjust result of Tennessee case where duress bar precluded murder defendant's complete defense).

[69] *See Vasquez*, 971 N.E.2d at 792 (granting SJC authority to consider duress in guilt reduction); Mulroy, *supra* note 27, at 173, 207 (noting modern trend of accepting duress as murder defense and as mitigating factor). Such recognition "reminds us that countless ordinary people, like ourselves, have weaknesses and susceptibilities that allow us to contribute to the world's injustices and cruelty. That we are human really means, at times, that we are all too human." Dressler, *supra* note 28, at 1386.