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Christian v. State: an Unnecessary Overcorrection Threatens the Law of Criminal Assault

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CHRISTIAN V. STATE: AN UNNECESSARY OVERCORRECTION THREATENS THE LAW OF CRIMINAL ASSAULT

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In *Christian v. State*,[1] the Court of Appeals considered whether the mitigation defenses of imperfect self-defense and hot-blooded response could apply to the statutory crime of first degree assault.[2] As the court had previously decided that first degree assault could serve as a predicate felony for felony murder,[3] the court was compelled to extend these defenses to first degree assault.[4] Otherwise, each felony assault that resulted in death would be murder, falling under the strict liability felony murder rule.[5] While this conclusion solved the felony murder dilemma, allowing these defenses for every first degree assault, whether or not that assault resulted in death, is an unnecessary overcorrection.[6] In so holding, the court undermined the doctrinal underpinnings of homicide mitigation defenses, while at the same time frustrating the common law deterrence goals and legislative intent behind the assault statute.[7] The court should have instead applied the State of Georgia's "modified merger" approach, which would correct the felony murder problem without sacrificing these vital interests.[8]

I. THE CASE

Christian considered two recent decisions of the Court of Special Appeals that raised similar issues on appeal.[9] In an unreported opinion, the Court of Special Appeals held in *Christian v. State*[10] that im-

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1. 405 Md. 306, 951 A.2d 832 (2008).
2. *Id.* at 309–10, 951 A.2d at 833–34.
3. Roary v. State, 385 Md. 217, 236, 867 A.2d 1095, 1106 (2005).
4. *See Christian*, 405 Md. at 331, 951 A.2d at 846–47 (noting the concerns raised in *Roary* about a future case in which a defense of mitigating circumstances might potentially be raised).
5. *Id.*, 951 A.2d at 847 (citing and quoting *Roary*, 385 Md. at 235, 867 A.2d at 1105).
6. *See infra* Part IV.
7. *See infra* Part IV.A–B.
8. *See infra* Part IV.C.
9. *Christian*, 405 Md. at 309–10, 951 A.2d at 833–34.
10. No. 74 (Md. Ct. Spec. App. Mar. 9, 2005), *rev'd*, 405 Md. 306, 951 A.2d 832 (2008).

perfect self-defense could not be used to mitigate statutory first degree assault to second degree assault.[11] Similarly, the Court of Special Appeals held in *Stevenson v. State*[12] that the defense of hot-blooded response could not mitigate a charge of first degree assault.[13]

A. Christian v. State

Daniel Christian was tried in the Circuit Court for Baltimore County and found guilty of first degree assault, second degree assault, and carrying a dangerous and deadly weapon openly with intent to injure.[14] Christian was accused of stabbing Raynard Moulden, who confronted Christian in a parking lot outside of the Ruby Tuesday restaurant in Owings Mills after Moulden had begun to suspect that Christian was romantically involved with Moulden's girlfriend.[15] Moulden claimed that he "nudged" his girlfriend during the confrontation, at which point Christian put him into a "bear hug."[16] According to Christian, however, Moulden "shoved" his girlfriend, and then ran after a retreating Christian, forcing Christian to stab Moulden to defend himself.[17] Christian stabbed Moulden with a nine-inch blade, puncturing Moulden's lung.[18] The jury found Christian guilty of first degree assault, and the court sentenced him to ten years of incarceration for the crime.[19]

Christian appealed his conviction, claiming, *inter alia*, that the trial court erred in denying his request for a jury instruction on imperfect self-defense to mitigate a first degree assault charge.[20] Christian argued that recent revisions to the assault statute cast into doubt the

11. *Id.*, slip op. at 10.

12. 163 Md. App. 691, 882 A.2d 323 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

13. *Id.* at 691.

14. *Christian*, 405 Md. at 310, 951 A.2d at 834. The unreported opinion of the Court of Special Appeals states that Christian was tried in the Circuit Court for Anne Arundel County. *Christian*, No. 74, slip op. at 1. Entering the defendant's full name into the Maryland Judiciary Case Search website indicates that the Court of Appeals is correct that the trial court was in Baltimore County. *See* Maryland Judiciary Case Search, http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp (last visited May 20, 2009) (listing the trial court case as case number "03K02002414" under a search for "Daniel Marquel Christian).

15. *Christian*, No. 74, slip op. at 1–4.

16. *Id.* at 3.

17. *Id.* at 4.

18. *Id.* at 4, 6.

19. *Id.* at 1.

20. *Id.*

rule of *Richmond v. State*,[21] which held that imperfect self-defense does not apply to aggravated assault.[22] In an unreported opinion, the Court of Special Appeals rejected Christian's argument, unpersuaded by his assertion that the recodification of the assault statute called for a reexamination of *Richmond*'s holding.[23]

B. Stevenson v. State

In a separate proceeding, Kalilah Stevenson was tried in the Circuit Court for Wicomico County and found guilty of first degree assault, reckless endangerment, and malicious destruction of property.[24] Stevenson was charged with stabbing her husband, Antonio Corbin, in the arm following a confrontation at Corbin's mother's house.[25] Stevenson's and Corbin's versions of the facts differed significantly,[26] but the allegation at trial was that Stevenson stabbed Corbin twice in the arm with a butcher knife.[27] The trial court found Stevenson guilty and sentenced her to ten years of incarceration.[28]

Stevenson appealed, claiming that the trial court erred by refusing to instruct the jury on hot-blooded response to mutual combat to mitigate a charge of first degree assault.[29] The Court of Special Appeals, this time in a published opinion, rejected Stevenson's argument and affirmed the conviction.[30] While no Maryland case had directly addressed whether hot-blooded response to mutual combat could mitigate a charge of first degree assault, the court analogized the inapplicability of imperfect self-defense to that charge.[31] Again applying the

21. 330 Md. 223, 623 A.2d 630 (1993), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

22. *Christian*, No. 74, slip op. at 6 (citing *Richmond*, 330 Md. at 227–28, 623 A.2d at 632).

23. *Id.* at 10.

24. Stevenson v. State, 163 Md. App. 691, 692 & n.1, 882 A.2d 323, 324 & n.1 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

25. *Id.* at 693–94, 882 A.2d at 325.

26. *Christian*, 405 Md. at 312, 951 A.2d at 835. Corbin claimed that he tried to push Stevenson out of Corbin's mother's house to defuse an argument between Stevenson and Corbin's mother. *Id.* According to Corbin, Stevenson then took a butcher knife from the kitchen and stabbed him twice in the arm. *Id.* Stevenson's version of the events had Corbin's mother pulling a gun on Stevenson. *Id.* When Stevenson pushed the gun away, according to her story, Corbin attacked her. *Id.* Stevenson denied stabbing Corbin, instead claiming that she fled the scene, fearing for her life. *Id.*

27. *Stevenson*, 163 Md. App. at 694, 882 A.2d at 325.

28. *Christian*, 405 Md. at 312, 951 A.2d at 835–36.

29. *Stevenson*, 163 Md. App. at 692, 882 A.2d at 324.

30. *Id.* at 693, 882 A.2d at 324–25.

31. *Id.* at 696, 882 A.2d at 326.

holdings of *Richmond* and its predecessors,[32] the court found that the trial court did not err in refusing the jury instruction on mitigation.[33] The court noted, however, that Stevenson's request was "neither illogical nor unreasonable," and recognized that other jurisdictions had statutorily approved provocation as mitigation for assault charges.[34] The opinion seemed to signal the Court of Appeals or the General Assembly to address this issue.[35]

The Court of Appeals granted certiorari and consolidated the cases to determine whether imperfect self-defense and hot-blooded response should be recognized as defenses to a charge of first degree assault.[36]

II. LEGAL BACKGROUND

Christian v. State represents the intersection between two evolving doctrines in Maryland criminal law: (1) the application of imperfect defenses to malice-based criminal charges,[37] and (2) the development of the crime of assault following the 1996 statutory re-codification of that crime.[38]

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32. *See, e.g.*, Watkins v. State, 328 Md. 95, 613 A.2d 379 (1992); State v. Faulkner, 301 Md. 482, 483 A.2d 759 (1984); Bryant v. State, 83 Md. App. 237, 574 A.2d 29 (1990).

33. *Stevenson*, 163 Md. App. at 693, 882 A.2d at 324–25. The Court of Special Appeals also rejected Stevenson's claim that first degree assault was the "functional equivalent" of the former crime of assault with intent to murder. *Id.* at 699, 882 A.2d at 328. Indeed, assault with intent to murder, a "shadow form[ ]" of murder, could be mitigated by such a defense. *Id.* at 696–97, 882 A.2d at 326–27. Nevertheless, the court rejected this "functional equivalent" claim, noting the differences between the elements of first degree assault and the former crime of assault with intent to murder. *Id.* at 699–700, 882 A.2d at 328. The court also refused to reverse Stevenson's conviction on the basis that refusing to extend the mitigation defense to first degree assault would lead to an "absurd result," in which a person attacking another in hot blood with intent to kill would face a longer maximum prison sentence if the victim lived than if the victim died. *Id.* at 700–01, 882 A.2d at 328–29. The court disposed of this argument as well, noting that Maryland does not find "sentencing incongruities illegal or unconstitutional [unless that] incongruity actually produces" an unfair punishment. *Id.* at 701, 882 A.2d at 329 (citing Simms v. State, 288 Md. 712, 719–20, 421 A.2d 957, 961 (1980)).

34. *Id.* at 693 & n.2, 882 A.2d at 324 & n.2 (citing COLO. REV. STAT. ANN. § 18-3-202(2)(a)–(b) (West 2004); KY. REV. STAT. ANN. § 508.040 (West 2006); MO. ANN. STAT. § 565.060 (West 1999); N.J. STAT. ANN. § 2C:12-1 (West 1995); OHIO REV. CODE ANN. § 2903.12 (West 2004)).

35. *See id.* at 693, 882 A.2d at 325 ("If any change is to be made, it must be done by the Court of Appeals or the legislature. We shall affirm the judgments of the circuit court, confident that we have not heard the last of this matter.").

36. Christian v. State, 405 Md. 306, 309, 311, 313, 951 A.2d 832, 833, 835, 836 (2008).

37. *See infra* Part II.A.

38. *See infra* Part II.B.

A. Hot-Blooded Response and Imperfect Self-Defense Are Historically Recognized as Mitigation Defenses to Murder and Assault with Intent to Murder

1. Hot-Blooded Response as Applied to Homicide and Assault with Intent to Murder

Maryland criminal law recognizes hot-blooded response to legally adequate provocation as mitigating murder to manslaughter.[39] Hot-blooded response is a mitigation defense developed under the common law.[40] As articulated in *Girouard v. State*[41] in 1990, to be eligible for mitigation on the basis of hot-blooded response, four elements must be present.[42] First, the provocation must be legally adequate.[43] In order to suffice, the provocation must be enough to "inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason."[44] Sufficient acts of provocation include, but are not limited to, discovering one's spouse in the act of adultery, mutual combat, or assault and battery.[45] Second, the homicide must have occurred in the heat of passion.[46] Third, the heat of passion must have been sudden and the homicide must have occurred before the heat of passion reasonably should have cooled.[47] Finally, there must be a causal link between the provocation, the heat of passion, and the homicide.[48]

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39. *See* Girouard v. State, 321 Md. 532, 538, 583 A.2d 718, 721 (1991) (defining voluntary manslaughter as an intentional homicide, caused by provocation and committed in a heat of passion).

40. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 191–92 (1769).

41. 321 Md. 532, 583 A.2d 718.

42. *Id.* at 538–39, 583 A.2d at 721.

43. *Id.* at 539, 583 A.2d at 721.

44. *Id.*, 583 A.2d at 722 (citations and internal quotation marks omitted).

45. *Id.* at 538, 583 A.2d at 721 (citing State v. Faulkner, 301 Md. 482, 486, 483 A.2d 759, 761 (1984)). The *Girouard* court also recognized the possibility that injury to a relative of the defendant or to a third party, or "death resulting from resistance of an illegal arrest" might suffice as legally adequate provocation for a mitigation defense. *Id.* These defenses roughly correspond to those available under the English common law: (1) assault and battery; (2) angry words followed by an assault; (3) witnessing the beating of a friend or family member; (4) witnessing an unlawful arrest; and (5) witnessing one's wife in that act of adultery. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 293 (1976) (citing R. v. Mawgridge, (1707) 84 Eng. Rep. 1107, 1114–15 (Q.B.)).

46. *Girouard*, 321 Md. at 539, 583 A.2d at 721.

47. *Id.*; *see also* BLACKSTONE, *supra* note 40, at 191 ("[I]f there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.").

48. *Girouard*, 321 Md. at 539, 583 A.2d at 721.

Maryland courts have limited this defense to the crime of homicide and its shadow forms.[49] Three of the four elements of the defense, in fact, are couched in terms of homicide.[50] The Court of Appeals expressed in *Richmond v. State*,[51] in dicta, the non-applicability of hot-blooded response to crimes other than homicide.[52] Like imperfect self-defense, hot-blooded response only mitigates the species of malice in murder crimes.[53]

2. *Imperfect Self-Defense as Applied to Murder and Assault with Intent to Murder*

Unlike the hot-blooded response mitigation defense, which originated in the English common law, imperfect self-defense is a relatively new mitigation theory, emerging only in the late nineteenth century.[54] After a series of cases that explored, but did not fully adopt, the doctrine of imperfect self-defense as a means to mitigate murder to manslaughter,[55] the Court of Appeals expressly accepted the doctrine in *State v. Faulkner*,[56] allowing it to mitigate both murder and assault with intent to murder.[57]

In 1975, a series of Maryland cases considered the impact of the Supreme Court of the United States' decision in *Mullaney v. Wilbur*,[58] which held that it was constitutionally impermissible for a state to place upon a defendant the burden to prove that he acted in the heat of passion on sudden provocation in order to escape conviction for murder.[59] This decision set the stage for a close consideration of the

49. Richmond v. State, 330 Md. 223, 232–33, 623 A.2d 630, 634–35 (1993), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

50. *See supra* notes 43–48 and accompanying text; *see also* Stevenson v. State, 163 Md. App. 691, 695, 882 A.2d 323, 326 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008) (emphasizing that the second, third, and fourth elements of this rule all reference homicide, thereby rejecting its application to non-homicide crimes).

51. 330 Md. 223, 623 A.2d 630.

52. *See id.* at 232, 623 A.2d at 634.

53. *Id.*

54. *See* State v. Faulkner, 301 Md. 482, 488–89, 483 A.2d 759, 762–63 (1984) (citing *Reed v. State*, 11 Tex. Ct. App. 509 (1882), as the earliest application of imperfect self-defense). The *Reed* court permitted imperfect self-defense to mitigate murder to manslaughter where the defendant wrongly placed himself in a position where he later needed to take the life of another to save his own life. *Id.*

55. *See infra* notes 58–69 and accompanying text.

56. 301 Md. 482, 483 A.2d 759.

57. *Id.* at 499–505, 483 A.2d at 768–71.

58. 421 U.S. 684 (1975).

59. *Id.* at 704. Because Fourteenth Amendment Due Process requires that a prosecutor prove every element of a crime, and absence of provocation is an element of malice aforethought, the burden must be on the prosecutor to prove the absence of provocation beyond a reasonable doubt. *Id.* at 703–04.

applicability of mitigation defenses in Maryland criminal law.[60] The Court of Special Appeals quickly applied the *Mullaney* constitutional standard to Maryland law in *Evans v. State*,[61] holding that it would be unconstitutional to require a defendant to prove the absence of any element of a crime.[62] In a footnote, the *Evans* court first considered the possibility of mitigation by imperfect self-defense, but qualified that it was "little more than an academic possibility."[63] In *Shuck v. State*,[64] decided only one day after *Evans*, the Court of Special Appeals reversed and remanded for a new trial a conviction for second degree murder and assault with intent to murder on the basis that the trial court failed to instruct the jury on mitigation, including imperfect self-defense as applied to an act in defense of another.[65] Three days later, in *Wentworth v. State*,[66] the Court of Special Appeals reversed and remanded for a new trial a conviction for second degree murder, kidnapping, and armed robbery on the basis of imperfect duress.[67] Finally, at the end of 1975, the court in *Law v. State*[68] applied the imperfect defense of habitation to a conviction for second degree murder and assault with intent to murder.[69]

In 1984, the Court of Appeals granted certiorari in *Faulkner* to determine whether imperfect self-defense could mitigate a charge of assault with intent to murder.[70] The Court of Appeals examined the three forms of imperfect self-defense employed by other jurisdictions: (1) where the defendant acted reasonably but had been the initial provocateur;[71] (2) where the defendant used an unreasonable amount of force to defend himself;[72] and (3) where the defendant acted under an "honest but unreasonable belief that he was about to suffer death or serious bodily harm."[73] The court accepted the third,

60. For a more complete discussion of the arc of Maryland cases following *Mullaney v. Wilbur*, see CHARLES E. MOYLAN JR., CRIMINAL HOMICIDE LAW § 10.1 (2002).

61. 28 Md. App. 640, 349 A.2d 300 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).

62. *Id.* at 730–31, 349 A.2d at 354.

63. *Id.* at 658 n.4, 349 A.2d at 314 n.4 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., HANDBOOK ON CRIMINAL LAW § 77, at 583 (1972)).

64. 29 Md. App. 33, 349 A.2d 378 (1975).

65. *Id.* at 34, 43–44, 349 A.2d at 379, 383–84.

66. 29 Md. App. 110, 349 A.2d 421 (1975).

67. *Id.* at 111, 121, 349 A.2d at 423, 428.

68. 29 Md. App. 457, 349 A.2d 295 (1975).

69. *Id.* at 459, 462, 349 A.2d at 296, 298.

70. State v. Faulkner, 301 Md. 482, 484, 483 A.2d 759, 760 (1984).

71. *Id.* at 489, 483 A.2d at 763 (citing Allison v. State, 86 S.W. 409, 414 (Ark. 1904) (dictum); Reed v. State, 11 Tex. Ct. App. 509, 518–19 (1882); State v. Flory, 276 P. 458, 465–66 (Wyo. 1929) (dictum)).

72. *Id.* (citing State v. Clark, 77 P. 287, 290 (Kan. 1904)).

73. *Id.* (citing *Allison*, 86 S.W. at 414); State v. Thomas, 114 S.E. 834, 837 (N.C. 1922)).

"unreasonable belief," form of the defense.[74] The court reasoned that "a defendant who commits a homicide while honestly, though unreasonably, believing" that force was necessary does not act with malice, and thus, his or her crime should be reduced to voluntary manslaughter.[75] Likewise, because the malice element of murder is identical to the intent element of assault with intent to murder, the court held that imperfect self-defense would also mitigate that crime to simple assault.[76]

Maryland courts drew a sharp line at the edge of its holding in *Faulkner*, subsequently limiting applicability of the doctrine to homicide and shadow forms of homicide like assault with intent to murder.[77] The Court of Appeals crystallized the inapplicability of imperfect self-defense to non-homicide crimes in *Richmond*, in which a criminal defendant appealed a conviction of malicious wounding with intent to disable, claiming that the jury should have been instructed on imperfect self-defense.[78] The court granted that something like imperfect self-defense might act to negate an element of a specific intent crime.[79] Imperfect self-defense could not, however, negate the "malice" of "malicious wounding with intent to disable."[80] Malice, the court explained, is a "chameleonic term" that has different meanings in different areas of the law.[81] Thus, the court concluded that imperfect self-defense may only negate the homicide-species of malice and therefore was inapplicable to the defendant's conviction.[82]

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74. *Id.* at 500, 483 A.2d at 769.

75. *Id.*

76. *Id.* at 504, 483 A.2d at 771.

77. *See, e.g.*, Watkins v. State, 328 Md. 95, 106 & n.3, 613 A.2d 379, 384 & n.3 (1992) (refusing to extend *Faulkner*'s already "generous expansion of the law of self-defense" to "unlawful shooting with intent to disable, use of a handgun in the commission of a felony, and battery" (citing *Faulkner*, 301 Md. at 505, 483 A.2d at 771)); Bryant v. State, 83 Md. App. 237, 245, 574 A.2d 29, 33 (1990) ("With respect to all other [non-homicide] crimes, the defendant is either guilty or not guilty. He either acted in self-defense or he did not. There is no 'in between.'").

78. Richmond v. State, 330 Md. 223, 227, 623 A.2d 630, 632 (1993), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

79. *See id.* at 233–34, 623 A.2d at 635. If a jury were to find an honest but unreasonable belief that conflicted with the intent of the crime, the defendant would be fully exonerated. *Id.* at 234, 623 A.2d at 635. The court urged that this must be understood as a separate concept from mitigation. *Id.*

80. *Id.* at 230–31, 623 A.2d at 633–34.

81. *Id.* at 231, 623 A.2d at 634.

82. *Id.* The court discussed the historical reasons for this limitation. *See id.* at 231–32, 623 A.2d at 634. In English law, courts had sentencing discretion for non-homicide crimes, but for murder the sentence was always death. *Id.* (citing LAFAVE & SCOTT, *supra* note 63, § 76, at 582). Allowing mitigation defenses to reduce murder to manslaughter was meant to ameliorate this harsh rule. *Id.*

B. The General Assembly's 1996 Revisions to Statutory Assault Simplified the Law of Assault and Battery, but Challenged the Courts to Integrate the New Law into the Common Law Scheme

1. 1996 Revisions to the Assault Statute

Before 1996, the law of assault and battery in Maryland was a patchwork of statutes and common law versions of the crime. Historically, Maryland recognized the common law crime of assault and the closely related common law crime of battery.[83] Battery, at common law, included "any unlawful force used against the person of another, no matter how slight."[84] Maryland common law additionally recognized two forms of assault: (1) "'attempt[ing] to commit a battery,'" and (2) "'intentional[ly] placing . . . another in apprehension of receiving an immediate battery.'"[85] "Assault and battery" could either refer to two separate crimes or simply to the crime of battery.[86]

The Maryland General Assembly first modified the common law crimes of assault and battery in 1853 by enacting the first aggravated assault statute.[87] Over the next century and a half, the legislature modified this statute and added additional categories, defining specific penalties for each.[88] By the 1990s, the law of assault was spread across the Criminal Law Article and more than a century of case law.

In 1996, the General Assembly significantly simplified the Maryland law of criminal assault, repealing the former statutory forms of

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83. Ford v. State, 330 Md. 682, 700, 625 A.2d 984, 992 (1993).

84. Kellum v. State, 223 Md. 80, 85, 162 A.2d 473, 476 (1960).

85. Dixon v. State, 302 Md. 447, 457, 488 A.2d 962, 966 (1985) (quoting ROLLIN M. PERKINS, CRIMINAL LAW 114 (2d ed. 1969)).

86. State v. Duckett, 306 Md. 503, 510, 510 A.2d 253, 256–57 (1986).

87. MD. CODE art. 27, § 189 (1888).

> If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, or shall assault and beat any person, with intent to maim, disfigure or disable such person, or with intent to prevent the lawful apprehension or detainer of any party for any offence for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender, shall, upon conviction thereof, be punished by confinement in the penitentiary for a period not less than eighteen months and not more than ten years.

Id. This early statute contained many of the hallmarks of Maryland's subsequent aggravated assault statutes, including application to assaults with intent to commit serious bodily injuries or involving the use of a firearm, and limiting a court's sentencing discretion to ensure a harsh penalty. *Cf.* MD. CODE ANN., CRIM. LAW § 3-202 (LexisNexis 2002) (integrating the first two of these elements, though not setting a minimum penalty for first degree assault).

88. *See infra* note 97.

assault and consolidating them into a two-tiered assault statute.[89] This consolidation roughly tracked the recommended text of section 211.1 of the Model Penal Code, which suggested simplifying the common law of assault and battery and sprawling statutory varieties into one integrated statute.[90] "Assault," under these revisions, included the crimes judicially recognized as assault, battery, and assault and battery.[91] A person who committed any of these judicially recognized crimes would be guilty, at minimum, of the misdemeanor of second degree assault.[92] Conviction for second degree assault carries a fine of up to $2,500 or incarceration for up to ten years, or both.[93] If, however, a person commits any form of assault (a) with the intent to cause "serious physical injury" to another[94] or (b) with a firearm, then that person is guilty of first degree assault.[95] First degree assault is a felony punishable by up to twenty-five years of imprisonment.[96] This penalty represents a substantial increase from the maximum penalties for serious assault crimes under the former statute, which carried maximum prison terms of fifteen years.[97]

In addition to consolidating the numerous forms of assault and battery into a two-tiered statutory scheme, the statute also offered ad-

89. 1996 Md. Laws 3616–20.

90. MODEL PENAL CODE § 211.1 & cmt.2 (1962).

91. MD. CODE ANN., CRIM. LAW § 3-201 (LexisNexis 2002).

92. *Id.* § 3-203.

93. *Id.* § 3-203(b).

94. *Id.* § 3-202. The 1996 statute defines "serious physical injury" as "physical injury that creates a substantial risk of death or causes permanent or protracted serious: disfigurement, loss of . . . or impairment of the function of any bodily member or organ." *Id.* § 3-201. This definition strongly resembles the definition given in the *Model Penal Code*, "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." MODEL PENAL CODE § 210.0(3). The General Assembly modified this definition slightly in the Maryland assault statute, adding "protracted" to refer to disfigurement and "permanent" to refer to loss or impairment. *See* 1996 Md. Laws 3619.

95. MD. CODE ANN., CRIM. LAW § 3-202.

96. *Id.* § 3-202(b).

97. Assault with intent to rob under the former statute carried a maximum of ten years. MD. ANN. CODE art. 27, § 12 (1992). Assault with intent to rape was punishable by up to fifteen years. *Id.* The crime of mayhem carried a maximum sentence of ten years. *Id.* § 384. Malicious injury to tongue, nose, eye, lip, and limb with intent to disfigure carried a maximum sentence of fifteen years. *Id.* § 385. Unlawful shooting, stabbing, and assaulting with intent to maim, disfigure, or disable or to prevent lawful apprehension was punishable by up to fifteen years. *Id.* § 386. The 1996 first degree assault statute exceeded each of these by at least ten years. *See supra* note 96 and accompanying text. While the pre-1996 crime of assault with intent to commit murder carried a *greater* penalty of up to thirty years, MD. ANN. CODE art. 27, § 12, this probably better corresponds with the 1996 attempted murder statute, which punished an attempt to commit second degree murder by up to thirty years and an attempt to commit first degree murder by up to a life sentence. MD. ANN. CODE art. 27, § 411A (1996).

ditional elements that clarified the prosecutorial function and available defenses.[98] The amended statute included a "charging documents" section that offered prosecutors a boilerplate charging document that clarified how offenses under the section interrelate.[99] The statute also included a section that ensured that "[a] person charged with an offense under this subheading is entitled to assert any judicially recognized defense."[100] This provision replaced the former section 12A, which made available a defense for any person intervening in the assault of another.[101] The committee notes indicate that this revision was intended to ensure that the repeal of the former section 12A was not understood as a repeal of the defense available under former section 12A, nor an abrogation of the extension of this defense recognized by the Court of Special Appeals in *Alexander v. State*[102] to individuals who reasonably believed that another was being assaulted.[103]

The two-tiered assault statute now embodies all of the law of assault in Maryland. The 1996 amendments expressly repealed all other statutory forms of assault.[104] Further, just as the Court of Appeals determined in *West v. State*[105] that the 1987 consolidated theft statute subsumed common law larceny,[106] it held in *Robinson v. State*[107] that the 1996 assault statute subsumed and abrogated the former common law crimes of assault, battery, and assault and battery.[108] The once

98. *See infra* notes 99–103 and accompanying text.

99. *See* MD. ANN. CODE art. 27, § 12A-4 (1996).

100. *Id.* § 12A-3.

101. MD. ANN. CODE art. 27, § 12A (1992) ("Any person witnessing a violent assault upon the person of another may lawfully aid the person being assaulted by assisting in that person's defense. The force exerted upon the attacker or attackers by the person witnessing the assault may be that degree of force which the assaulted person is allowed to assert in defending himself.").

102. 52 Md. App. 171, 447 A.2d 880 (1982).

103. 1996 Md. Laws 3621.

104. 1996 Md. Laws 3616–17. The statute specifically eliminated the former statutory crimes of assault with intent to murder, MD. ANN. CODE art. 27 § 12 (1992); assault with intent to ravish, *id.*; assault with intent to rob, *id.*; reckless endangerment, *id.* § 120; mayhem, *id.* § 384; tarring and feathering, *id.*; malicious injury to tongue, nose, eye, lip, limb, etc., *id.* § 385; and unlawful shooting, stabbing, or assaulting with intent to maim, disfigure, or disable or to prevent lawful apprehension, *id.* § 386.

105. 312 Md. 197, 539 A.2d 231 (1988).

106. *Id.* at 202–03 n.1, 539 A.2d at 233 n.1 (citing Rice v. State, 311 Md. 116, 124–26, 532 A.2d 1357, 1360–61 (1987)).

107. 353 Md. 683, 728 A.2d 698 (1999).

108. *Id.* at 700–01, 728 A.2d at 706. The procedural history of *Robinson* offers a picture of the complex challenges prosecutors faced under the pre-1996 assault scheme. *See supra* notes 98–103 and accompanying text. The defendant in *Robinson* was charged with both second degree assault under the 1996 statue and common law assault for a sexual offense upon a seven-year-old girl. *Id.* at 687, 728 A.2d at 699. After the State made its case, the

complex web of statutory and common law forms of violent crime to the person was reduced to a two-category system.

2. *In 2005, the Court of Appeals Considered the Relationship Between Statutory Assault and the Common Law Scheme, Holding that First Degree Assault Qualified as a Predicate Felony for Felony Murder*

The 1996 amendments presented a puzzle for Maryland courts in their consideration of its relationship to the felony murder rule. Maryland statutory law recognizes twelve felonies that may serve as predicate felonies for first degree felony murder,[109] but Maryland common law permits additional felonies to qualify as predicate felonies for common law felony murder.[110]

The Court of Appeals provided the framework for deciding if a felony qualifies as a predicate felony for common law felony murder in *Fisher v. State*.[111] In *Fisher*, the court addressed whether any felonies other than those in the statute might qualify.[112] The *Fisher* court rejected the notion that enumerated felonies in the statute were the only predicate felonies recognized under Maryland law.[113] The court determined that the felony murder statute, enacted by the General Assembly in 1809, was not meant to create new crimes nor eliminate existing crimes, but only to divide murder into degrees.[114] While the statute laid out felonies that could support a first degree felony mur-

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defendant's counsel argued that these charges were duplicitous. *Id.* at 688, 728 A.2d at 700. The state prosecutor elected to enter the statutory crime as *nolle prosequi* and proceed with the common law assault charge. *Id.* at 689, 728 A.2d at 701. On appeal, the defendant's conviction for common law assault was reversed when the Court of Appeals determined that common law assault was no longer a crime after the 1996 revisions to the assault statute. *Id.* at 704–05, 728 A.2d at 708.

109. MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2002) (arson, barn-burning, burglary, carjacking, escape from prison, kidnapping, mayhem, rape, robbery, sexual offense, sodomy, and manufacture or possession of a destructive device).

110. Fisher v. State, 367 Md. 218, 250–51, 786 A.2d 706, 725–26 (2001) (citing Evans v. State, 28 Md. App. 640, 686 n.23, 349 A.2d 300, 329–30 n.23 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976)). Common law felony murder is second degree murder. *See* MD. CODE ANN., CRIM. LAW § 2-204(a).

111. 367 Md. 218, 786 A.2d 706.

112. *Id.* at 225, 786 A.2d at 710. At the time that *Fisher* was decided, only eleven of the current twelve felonies were recognized for the purposes of statutory felony murder. *See* MD. ANN. CODE art. 27, §§ 408–410 (1996). The current statute, codified at MD. CODE ANN., CRIM. LAW § 2-201(a)(4) (LexisNexis 2002), includes each of the qualifying felonies enumerated in the 1996 code, but also includes manufacture or possession of a destructive device. *Id.*

113. *Fisher*, 367 Md. at 251, 786 A.2d at 726.

114. *Id.* at 249, 786 A.2d at 725 (quoting Hardy v. State, 301 Md. 124, 137, 482 A.2d 474, 481 (1984)).

der conviction, common law second degree felony murder remained a cognizable crime.[115] The court further rejected the petitioner's arguments that felony murder was limited to those felonies recognized at common law,[116] or to those felonies which, considered in the abstract rather than the circumstances of the particular case, would be dangerous to human life.[117] Noting that one of the primary purposes of the felony rule is to deter conduct that is dangerous to human life,[118] the court held that a felony dangerous to human life either by the nature of the crime or under the particular circumstances in which it was committed would qualify for common law second degree felony murder.[119] Applied to *Fisher*, in which the defendants were convicted of second degree felony murder on the basis of child abuse under particularly horrifying facts,[120] the court upheld the convictions.[121]

In *Roary v. State*,[122] the Court of Appeals, applying *Fisher*'s "dangerous to human life" rule as a baseline, declared that first degree assault could serve as a predicate felony for common law second degree felony murder.[123] *Roary* presented an interesting problem: Applying the straight holding of *Fisher*, first degree assault would certainly meet the standard of a crime dangerous to human life.[124] To commit first degree assault, by definition, is to intentionally cause or attempt to cause "serious physical injury" to another.[125] "Serious physical injury," which the statute defines as creating "substantial risk of death"[126] or causing "permanent or protracted serious (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ,"[127] would meet the *Fisher* threshold in the abstract.[128] Under this reasoning,

115. *See supra* note 110.

116. *See id.* at 251–54, 786 A.2d at 726–27.

117. *See id.* at 254–63, 786 A.2d at 727–33.

118. *Id.* at 262, 786 A.2d at 732.

119. *Id.* at 263, 786 A.2d at 733.

120. *See id.* at 226–36, 786 A.2d 711–17 (describing, in graphic terms, the ritual abuse of two young girls—defendant Mary Utley's daughters and defendant Rose Mary Fisher's sisters—resulting in the death by dehydration and malnutrition of one of the two victims, nine-year-old Rita Fisher).

121. *Id.* at 263, 282, 786 A.2d at 733, 744.

122. 385 Md. 217, 867 A.2d 1095 (2005).

123. *Id.* at 236, 867 A.2d at 1106.

124. *Id.* at 230, 867 A.2d at 1102.

125. MD. CODE ANN., CRIM. LAW § 3-202(a)(1) (LexisNexis 2002).

126. *Id.* § 3-201(c)(1).

127. *Id.* § 3-201(c)(2).

128. *Roary*, 385 Md. at 230, 867 A.2d at 1102.

however, murder would effectively become a strict liability crime.[129] Because conceivably every murder would meet the requirements of first degree assault, the State would no longer need to prove intent in order to secure a conviction.[130]

The petitioner in *Roary* urged the court to adopt the "merger" approach applied by other state courts and hold that assault could not supply the predicate felony for felony murder.[131] The Court of Appeals declined.[132] The court's reasoning was couched in the deterrence principle advocated by *Fisher*.[133] The court determined that retaining the rule was necessary to deter the perpetration of dangerous felonies.[134]

The Court of Appeals noted, in dicta, the approach taken by the Supreme Court of Georgia in *Edge v. State*,[135] in which the court addressed the effect of applying aggravated assault to felony murder on the availability of mitigation defenses.[136] Georgia's high court discussed the unfairness of "bootstrapping" an assault charge to support a felony murder conviction for a crime that would otherwise be mitigated to manslaughter.[137] While rejecting adoption of the merger doctrine, the Supreme Court of Georgia chose to apply a modified merger rule.[138] Under the *Edge* rule, a court must instruct the jury on both felony murder with aggravated assault as the underlying felony and also on malice murder.[139] If the jury finds that malice murder has been mitigated to manslaughter, then it may not find the defendant guilty of felony murder.[140]

As *Roary* did not raise the issue of mitigation, the Court of Appeals saved consideration of that issue for another day.[141]

129. *See id.* at 235, 867 A.2d at 1105 (quoting State v. Williams, 24 S.W.3d 101, 114 (Mo. Ct. App. 2000)).

130. *See id.*

131. *Id.* at 232, 867 A.2d at 1103.

132. *Id.* at 236, 867 A.2d at 1106.

133. *Id.*

134. *Id.*

135. 414 S.E.2d 463 (Ga. 1992).

136. *Roary*, 385 Md. at 235, 867 A.2d at 1105 (citing *Edge*, 414 S.E.2d at 465).

137. *Id.*

138. *Edge*, 414 S.E.2d at 465.

139. *Id.* at 465–66.

140. *Id.* at 466.

141. *Roary*, 385 Md. at 235, 867 A.2d at 1105.

III. THE COURT'S REASONING

In *Christian v. State*, the Court of Appeals reversed and remanded the consolidated decisions of the Court of Special Appeals.[142] While the *Richmond v. State* rule established that defenses of imperfect self-defense and hot-blooded response applied only to homicide and its shadow forms,[143] *Richmond* pre-dated the 1996 statute so the case at bar posed an open question.[144] Applying the *Roary v. State* rule that first degree assault could serve as the predicate felony for felony murder, the court held that first degree assault could be considered a shadow form of homicide under certain circumstances and was therefore subject to the same mitigation defenses.[145]

The majority approached this question by applying the rationale of earlier assault decisions to the conditions created under the new statute.[146] The court pointed to pre-1996 opinions that had held that imperfect self-defense mitigated the former crime of assault with intent to murder[147] and that hot-blooded response might also mitigate the same crime.[148] In those cases, the court recognized, the defenses were available because the malice element of assault with intent to murder was the same as the malice element of murder.[149] While the court noted its refusal to extend the mitigation defenses to other assault crimes in *Richmond*, it reasoned that *Roary*'s application of first degree assault to second degree felony murder allowed the court to reconsider that rule.[150]

Roary presented a problem for the court's continued application of the rule of *Richmond*. The court considered that because first degree assault could not be mitigated, a defendant charged with felony murder in which first degree assault was the predicate felony would not be able to present mitigation defenses as he or she could if charged with intent-to-kill murder.[151] As a result, the court recog-

142. Christian v. State, 405 Md. 306, 333, 951 A.2d 832, 848 (2008).

143. *Id.* at 322, 951 A.2d at 841 (citing Richmond v. State, 330 Md. 223, 232–33, 623 A.2d 630, 634–35 (1993), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008)).

144. *Id.* at 328, 951 A.2d at 845.

145. *Id.* at 332–33, 951 A.2d at 847–48.

146. *Id.* at 329, 951 A.2d at 845.

147. *Id.*, 951 A.2d at 845–46 (citing State v. Faulkner, 301 Md. 482, 500, 483 A.2d 759, 769 (1984)).

148. *Id.*, 951 A.2d at 845 (citing Webb v. State, 201 Md. 158, 162, 93 A.2d 80, 82 (1952)).

149. *See id.*, 951 A.2d at 845–46.

150. *See id.* at 330, 951 A.2d at 846.

151. *See id.* at 331, 951 A.2d at 846–47 (citing Roary v. State, 385 Md. 217, 235, 867 A.2d 1095, 1105 (2005)).

nized, any felony assault that ended in the victim's death would be murder, potentially outmoding all lesser homicide crimes.[152]

The Court of Appeals chose to use *Christian* as an opportunity to resolve this problem, even though neither petitioner had been charged with felony murder.[153] Because felony murder operates to transfer the underlying felony to supplant the malice element of murder, the court reasoned that a mitigation defense that normally negates malice should also, under certain circumstances, mitigate a qualifying predicate felony.[154] As such, in light of *Roary*'s extension of the felony murder rule to first degree assault, the court decided that "first degree assault [could now] be considered, under certain circumstances, a shadow form of homicide in Maryland."[155] Recognizing that the *Richmond* rule was "no longer viable," the court held mitigation defenses to be available for first degree assault.[156]

In a concurring opinion, Chief Judge Bell agreed with the majority's conclusion, but instead based his decision on the rule of lenity.[157] The rule of lenity dictates that any ambiguous language in a criminal statute "*must* be interpreted in favor of the [criminal] defendant."[158] This rule usually applies when the court is unsure whether the legislature intended that there be multiple punishments for the same act or a more severe punishment to apply to a particular case.[159]

Relying upon a committee note corresponding with the 1996 statute, the State argued that assault with intent to murder had merged with the crime of attempted murder, and therefore, did not fall within the purview of the assault statute.[160] This argument did not persuade Chief Judge Bell, as the 1996 statute expressly stated that "assault and

152. *Id.*, 951 A.2d at 847 (citing *Roary*, 385 Md. at 235, 867 A.2d at 1105).

153. *Id.*

154. *Id.* at 332–33, 951 A.2d at 847–48.

155. *Id.*

156. *Id.* at 333, 951 A.2d at 848. While the exact language of the holding—"[W]e hold that the mitigation defenses of hot-blooded response to adequate provocation and imperfect self-defense could apply to mitigate first degree assault where those assaults could now supply the malice necessary for felony murder if the victim dies"—intimates the court would only apply these defenses to first degree assaults that result in death, the posture of the case indicates otherwise. *Id.* Neither of the victims in *Christian* died, but the court applied this new rule to reverse and remand both first degree assault convictions. *Id.*

157. *Id.* (Bell, C.J., concurring).

158. *Id.* at 340, 951 A.2d at 852 (citing State v. Kennedy, 320 Md. 749, 754, 580 A.2d 193, 195 (1990)).

159. *Id.* (citing Haskins v. State, 171 Md. App. 182, 193–94, 908 A.2d 750, 756–57 (2006); Marquardt v. State, 164 Md. App. 95, 149, 882 A.2d 900, 932 (2005)).

160. *Id.* at 341, 951 A.2d at 853.

battery retain[ed] their 'judicially determined meanings.'"[161] Chief Judge Bell also rejected the State's application of *Williams v. State*,[162] which held assault with intent to murder to be the same crime as attempted second degree murder for the purposes of merger.[163] Chief Judge Bell decided that this decision was inapplicable because the merger doctrine had no bearing on legislative intent and because *Williams* predated the 1996 statute.[164] The Chief Judge therefore found there was ambiguity with regard to where assault with intent to murder fit into the new statutory scheme.[165]

Applying the rule of lenity, Chief Judge Bell opined that mitigation should be available to all first degree assault crimes under the 1996 statute.[166] Were this not the result, he reasoned, a defendant whose crime would have satisfied the requirements of the former crime of assault with intent to murder would not be able to apply the former mitigation defenses.[167] He or she would be convicted of first degree assault and face a significantly harsher penalty.[168] Chief Judge Bell concluded that the rule of lenity does not permit vague statutory language to lead to such a harsh result.[169]

IV. ANALYSIS

The *Roary v. State* decision, extending the felony murder rule to include first degree assault, set a stage for many downstream problems.[170] *Christian v. State* posed the first post-*Roary* paradox for the Court of Appeals to unravel: What would become of mitigation defenses when first degree assault could supply the malice element for felony murder? While the court's expansion of provocation defenses solved the problem at hand—preserving the mitigation defenses—this approach was a gross overcorrection that overlooked precedent and

161. *Id.* at 342, 951 A.2d at 853 (quoting MD. CODE ANN., CRIM. LAW § 3-201 (LexisNexis 2002)).

162. 323 Md. 312, 593 A.2d 671 (1991).

163. *Christian*, 405 Md. at 342, 951 A.2d at 853 (citing *Williams*, 323 Md. at 319, 593 A.2d at 674).

164. *Id.*, 951 A.2d at 853–54.

165. *Id.* at 344, 951 A.2d at 854.

166. *Id.* at 346, 951 A.2d at 856.

167. *Id.* at 346–47, 951 A.2d at 856.

168. *Id.* The maximum sentence for first degree assault is twenty-five years, while second degree assault carries a maximum sentence of ten years. *Id.*

169. *See id.*

170. *See* Marcia J. Simon, Note, *An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland*, 65 MD. L. REV. 992, 1009–16 (2006) (forecasting *Roary*'s effects on deterrence of violent crime, disproportionate punishments, and erosion of the intent requirement in prosecuting murder).

legislative intent.[171] The court should have instead adopted Georgia's "modified merger" rule, which would solve the problem at hand without undermining the goals of Maryland's criminal law.[172]

A. The Christian *Court's Application of Mitigation Defenses to First Degree Assault Went Further than Necessary to Correct the Paradox Created by* Roary*'s Extension of the Felony Murder Rule to Statutory First Degree Assault, Undermining Legislative Intent and the Court's Own Policy Interests*

1. Christian *Cannot Be Reconciled with the Doctrinal and Policy Bases for the Historical Scheme Under Which Mitigation Defenses Only Applied to Homicide Crimes*

By extending mitigation defenses to first degree assault, *Christian* defies centuries of common law doctrine and contravenes the deterrence policy that informed *Roary*.[173] The court is unable to explain this choice doctrinally, as mitigation defenses only applied to homicide at common law.[174] Further, by ensuring lighter penalties for the same crime addressed in *Roary*, this decision threatens the very interest that the court sought to advance in that decision.[175]

Mitigation, as historical sources and the State's jurisprudence have shown, is a concept limited to the law of homicide.[176] The historical purpose of the doctrine was to provide gradations of punishment for the crime of murder, which was punishable only by death in the English courts.[177] While Maryland now provides degrees of homicide by statute, with some sentencing discretion for murder in the second degree and manslaughter,[178] the doctrinal theory of mitigation remains in place.[179] Mitigation negates the species of malice—the ex-

171. *See infra* Part IV.A–B.

172. *See infra* Part IV.C.

173. *See infra* notes 176–182 and accompanying text.

174. *See infra* notes 183–189 and accompanying text.

175. *See infra* notes 190–204 and accompanying text.

176. Richmond v. State, 330 Md. 223, 231, 623 A.2d 630, 634 (1993), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

177. *Id.*

178. *See* MD. ANN. CODE, CRIM. LAW §§ 2-101 to -305 (LexisNexis 2002).

179. *See Richmond*, 330 Md. at 231, 623 A.2d at 634 (citing Ross v. State, 308 Md. 337, 340 n.1, 519 A.2d 735, 736 n.1 (1987)) ("[M]alice means the presence of the required malevolent state of mind coupled with the absence of legally adequate justification, excuse, or circumstances of mitigation."); Morris v. State, 33 Md. App. 185, 190, 364 A.2d 588, 590 (1976) ("[M]alice and mitigation due to provocation [can] not coexist."); *cf.* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982). Professor Dressler argues that, as the hot blood doctrine was devised "to avoid the harshness of the . . . death penalty," the rationale is no longer valid. *Id.* at 432. Professor Dressler is unsatisfied with the law's ability to rationalize this defense in

act species of malice—that is a necessary element of murder.[180] Because assault was not a felony at common law, the English courts would not have needed to address the problem addressed in *Christian*.[181] There would have been no concern that a prosecutor could overcome the malice calculation by applying the underlying assault in every homicide as a predicate felony for felony murder, because the misdemeanor of assault could never apply as a predicate felony for felony murder.[182]

Christian therefore treats the question of whether first degree assault may be mitigated by homicide defenses as a question wholly unaddressed by the common law.[183] The *Christian* court reasoned that because first degree assault could now serve as a predicate felony for felony murder, "under certain circumstances," it could be considered "a shadow form of homicide in Maryland."[184] The court's result, extending mitigation defenses to every first degree assault, is doctrinally untenable, defying the common law in two ways.

First, were the court's position correct, then every predicate felony could be considered a shadow form of homicide because any qualifying felony could supply the malice element of murder under the felony murder rule. Nowhere in the common law, however, is the extension of a mitigation defense to crimes other than murder permitted.[185] Courts and commentators have, in fact, considered and rejected applying the provocation defense to the closely related

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modern times, specifically finding fault with inconsistent standards and provocation's unsure placement between the theories of justification and excuse. *Id.* at 432–33, 438–43.

180. *See Richmond*, 330 Md. at 232–33, 623 A.2d at 634–35 (finding that imperfect self-defense, and mitigation in general, applies only to homicide and its shadow forms (citing Bryant v. State, 83 Md. App. 237, 244, 574 A.2d 29, 32 (1990))); *see also* Dressler, *supra* note 179, at 447–48. Professor Dressler offers that if provocation is rationalized as a partial justification, that the victim "asks for it," then if the potential killer were to control his rage enough only to strike the victim, this should theoretically serve as a "total" defense to assault and battery. *Id.* at 448. Because Maryland approaches these defenses not as justification or excuse, but simply as the negation of the specific mens rea of murder, Professor Dressler would find that they only negate murder and other crimes requiring the same mens rea, i.e., the shadow crimes of homicide. *See id.* at 447.

181. *See* WAYNE R. LAFAVE, CRIMINAL LAW 736 (3d ed. 2000) ("Assault and battery . . . were common law misdemeanors . . . .").

182. *See id.*

183. Christian v. State, 405 Md. 306, 328, 951 A.2d 832, 845 (2008) ("The question of whether mitigation defenses apply to the 1996 assault statute is a matter of first impression, in as much as the statute created a new offense and abrogated the common law offense of assault and battery.").

184. *Id.* at 332–33, 951 A.2d at 847–48.

185. A.J. Ashworth, *supra* note 45, at 292.

common law felony of mayhem.[186] If mayhem, committed in hot blood, could not be mitigated in the common law, then neither should aggravated assault be mitigated. Neither has imperfect self-defense, in jurisdictions that recognize the theory, been applied to mayhem.[187]

Second, the court by its own terms limits its consideration of first degree assault as a shadow form of homicide to "under certain circumstances."[188] The *Christian* holding, however, is not so limited, making these defenses available for all first degree assaults, regardless of whether the crime ends in a death thus elevating the assault to "malice" for the purposes of the felony murder rule.[189]

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186. *See* BLACKSTONE, *supra* note 40, at 206 (noting that mayhem remains a felony even "committed upon the highest provocation"); LAFAVE, *supra* note 181, at 717 (refusing mitigation defenses for a husband who, acting in hot blood, severed the sex organ of his wife's lover (citing Sensobaugh v. State, 244 S.W. 379, 379 (Tex. Crim. App. 1922))). Under the applicable statute in the *Sensobaugh* case, had the defendant killed his wife's lover during the act of adultery, he would have been completely exonerated. *Sensobaugh*, 244 S.W. at 379. Because he did not kill his wife's lover, but instead tied him up and severed his penis with a razor, the defendant could not claim the intent to kill and did not get the protection of the statute. *Id.* This holding is particularly notable, in that a jurisdiction that chose to make this sort of provocation a complete justification, rather than a partial defense, refused to apply that same provocation to mitigate aggravated assault. *See id.*

187. *See* People v. Hayes, 15 Cal. Rptr. 3d 884, 887–88 (Cal. Ct. App. 2004) (rejecting that the malice applicable to mayhem—"to vex, annoy, or injure another person, or an intent to do a wrongful act"—is a species of malice that could be negated by imperfect self-defense). The defendant in *Richmond* cited one California case as persuasive authority for extending imperfect self-defense to non-homicide crimes. Richmond v. State, 330 Md. 223, 233, 623 A.2d 630, 635 (1993) (citing People v. McKelvy, 239 Cal. Rptr. 782 (Cal. Ct. App. 1987)), *abrogated by* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008). In *McKelvy*, the California Court of Appeal for the First District approved the availability of imperfect self-defense to mitigate mayhem to a lesser included offense based on the same act. *McKelvy*, 239 Cal. Rptr. at 786–87. The *Richmond* court distinguished *McKelvy* as applying imperfect self-defense not to mitigate the "malice" of mayhem the same way that it might negate murder-malice, but rather applying imperfect self-defense as making the requisite state of mind of a specific intent crime impossible. *Richmond*, 330 Md. at 233, 623 A.2d at 635. Later California decisions declined to follow *McKelvy*. *See, e.g.*, People v. Sekona, 32 Cal. Rptr. 2d 606, 609–10 (Cal. Ct. App. 1994).

188. *Christian*, 405 Md. at 332, 951 A.2d at 847.

189. *Id.* at 333, 951 A.2d at 848. Presumably, the court chose not limit the applicability of this defense to avoid a sentencing anomaly raised by one of the *Christian* defendants. As the defendant argued, if a person stabbed another in hot blood and that victim lived, then the crime would be first degree assault, punishable by twenty-five years imprisonment. Stevenson v. State, 163 Md. App. 691, 700, 882 A.2d 323, 328–29 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008). If the victim died, however, then murder would be mitigated to manslaughter and the punishment would be only ten years. *Id.* By making this defense available to all first degree assaults, this anomaly is corrected. The practicality of this result, however, does not address the doctrinal problem in projecting to new crimes those defenses only available to murder. *See supra* Part IV.A.1.

This result is especially puzzling in that it marks a significant departure from the court's own established policy of deterring violent crime.[190] If *Roary* may fairly be considered the decision that sets up the paradox to be addressed in *Christian*, it is a paradox motivated by the deterrence of violent crime.[191] By choosing to resolve that paradox in a way that reduces the potential penalty for the *same crime* addressed in *Roary*, the court undermines the rationale of the *Roary* decision.

Aside from skepticism about the deterrence principle in general,[192] at least one commentator has offered that a crime in hot blood is less likely to be deterred.[193] This misunderstands the natures of both imperfect self-defense and hot-blooded response to adequate provocation. The criminal acting under the honest but unreasonable belief that force is necessary is not immune to the deterrent effect of a criminal sanction.[194] If he or she were, then imperfect self-defense would be a complete, rather than partial justification.[195] Nor is the criminal acting in hot blood so compelled by the act of provocation that he or she is powerless to resist acting.[196] Were this true, the

190. *See infra* notes 191–204 and accompanying text.

191. *See* Roary v. State, 385 Md. 217, 236, 867 A.2d 1095, 1106 (2005) ("[T]he better policy is for the law to provide an additional deterrent to the perpetration of felonies which, by their nature or the attendant circumstances, create a foreseeable risk of death." (citing Fisher v. State, 367 Md. 218, 256, 786 A.2d 706, 728–29 (2001))). *But see* Simon, *supra* note 170, at 1009–11 (arguing that allowing first degree assault to serve as an underlying felony will not deter first degree assault). Simon argues that deterrence should be directed to the intended harm rather than the unintended result, that a second degree felony murder conviction only carries a slightly harsher penalty than a first degree assault conviction, and that empirical research does not support the deterrent effect of the felony murder rule. *Id.*

192. *See, e.g.*, Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953–55 (2003) (exploring the three criteria that must be met for criminal law to deter violators: (1) that the potential violator knows of the rule; (2) that the potential violator perceives the cost of the violation is greater than the benefit; and (3) that the potential violator is willing to use this knowledge at the time of the offense).

193. *See, e.g.*, LAFAVE, *supra* note 181, at 25 (citing JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 45–46 (1974)) ("Those who commit crimes under emotional stress (such as murder in the heat of anger) or who have become expert criminals through the training and practice of many years (such as the professional safebreaker and pickpocket) are less likely than others to be deterred.").

194. *See id.* ("Those [acting in] the heat of anger . . . are *less likely* than others to be deterred." (emphasis added)).

195. *See* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic But Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 12–15 (1998) (noting that the objective reasonability standard required by the rule of complete self-defense "is necessarily predicated upon a presumption of free will").

196. *See* Dressler, *supra* note 179, at 466–67 ("[T]he actor's moral blameworthiness is found not in his violent response, but in his *homicidal* violent response. He did not control

crime could not be deterred and hot-blooded response would also be treated as a complete excuse.[197]

This also ignores the more general effect of deterrence on the public as a whole.[198] Even if punishment of violent crimes committed in hot blood or under the honest but unreasonable belief that violence was necessary is not as easily deterred, punishment of those crimes has a deterrent effect on potential criminals who might fall within the general class of violent offenders.[199] By imposing this new prosecutorial hurdle, the Court of Appeals actually threatens both of the tools that the State employs to deter crime: severity of punishment and certainty of punishment.[200] All citizens pondering violent crime are less likely to be generally deterred if they do not believe that the State takes punishing those crimes seriously.[201]

The court's purpose in *Roary* was to place serious penalties on an act entered into voluntarily with knowledge of the dangerousness of the crime, with an eye toward deterring that particular crime.[202] This

himself as much as he *should* have, or as much as common experience tells us he *could* have, nor as much as the ordinary law-abiding person *would* have. Thus, his choice-capabilities were partially undermined by severe and understandable, non-blameworthy anger, but he was not sufficiently in control of his actions so as to merit total acquittal.").

197. *See* MODEL PENAL CODE § 2.01(1) (1962) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."); *see also* O.W. HOLMES JR., THE COMMON LAW 54 (1881) ("The act is not enough by itself. An act, it is true, imports intention in a certain sense. It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed.").

198. *See* ANDENAES, *supra* note 193, at 8 (describing the three "general-preventative effects" of punishment: (1) deterrence; (2) strengthening moral inhibitions; and (3) stimulating law-abiding conduct as habit); *see also* Stanley I. Benn & Richard S. Peters, *The Utilitarian Case for Deterrence*, *in* CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 96, 97 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) ("The strongest utilitarian case for punishment is that it serves to deter potential offenders by inflicting suffering on actual ones. On this view, punishment is not the main thing; the technique works by threat.").

199. *See* FRANKLIN E. ZIMRING, PERSPECTIVES ON DETERRENCE 3 (1971) (discussing deterrence in its simplest form, as applied to a specific behavior that carries specific consequences).

200. *See* ERNST W. PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 16–17 (1953) (discussing the fallacy behind increasing punishments to deter crimes without addressing the more important factor of improving the likelihood that a given behavior results in punishment).

201. *See* ANDENAES, *supra* note 193, at 19–21 (quoting JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863)) (questioning the impact of punishment on general deterrence of sex crimes and murder, but ultimately concluding that fear of being hanged probably causes some to abstain from committing murder).

202. Roary v. State, 385 Md. 217, 236, 867 A.2d 1095, 1106 (2005).

is, in fact, the entire purpose of the felony murder rule.[203] To follow *Roary*'s application of the felony of first degree assault to a conclusion that lightens the penalty associated with that same crime in cases in which first degree assault does not result in death is a strange perversion of the deterrence principle.[204]

2. Christian *Similarly Undermines the Legislature's Intent in Re-codifying Maryland's Assault Statute*

While the preamble to the re-codification statute offers few clues as to legislative intent,[205] the plain text of the statute and the notes of the Committee to Revise Article 27 indicate that the General Assembly was interested in: (1) simplifying the law of assault,[206] (2) ensuring harsh penalties for serious crimes,[207] and (3) maintaining the status quo on defenses available for assault crimes.[208] *Christian* undermines all three of these purposes.[209]

The statute offers several indicators that the General Assembly was interested in promoting simplicity.[210] Condensing several available charges into a two-tiered regime points to simplicity.[211] Additionally, the amended statute contained a "charging documents" section, offering prosecutors a boilerplate document and clarifying the way offenses under that section interrelate.[212] Both of these point to the General Assembly's interest in promoting administrability and simplifying the prosecutorial function.

Christian's extension of mitigation defenses to first degree assault does worse than muddy the prosecutorial waters; it threatens the State's ability to secure a felony assault conviction by requiring the

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203. *See* HOLMES, *supra* note 197, at 58 ("[T]he law [of felony murder] is intelligible as it stands. The general test of murder is the degree of danger attending the acts under the known state of facts. If certain acts are regarded as peculiarly dangerous under certain circumstances, a legislator may make them punishable if done under these circumstances, although the danger was not generally known.").

204. *Cf. id.* at 61. Holmes opined that mitigating murder to manslaughter did not upset the deterrence principle. *Id.* The threat of punishment accompanying manslaughter, "a threat of less than death," would sufficiently deter violence without excessively punishing someone acting in hot blood. *Id.*

205. *See* 1996 Md. Laws 3616 (setting forth the purpose statement in preamble that is largely limited to reciting the statute's headings).

206. *See infra* notes 210–212 and accompanying text.

207. *See infra* note 216 and accompanying text.

208. *See infra* note 225 and accompanying text.

209. *See infra* notes 210–232 and accompanying text.

210. *See infra* notes 211–212 and accompanying text.

211. *See supra* notes 83–97 and accompanying text.

212. *See* MD. ANN. CODE art. 27, § 12A-4 (1996).

prosecutor to prove a negative.[213] If we are to understand that mitigation defenses will operate the same way with first degree assault as they have with homicide, then the due process requirements established in *Mullaney v. Wilbur* and applied to Maryland law in *Evans v. State* should also now extend to first degree assault. The prosecutor will have the burden to show the absence of provocation because the absence of provocation is now an element of first degree assault. Recognizing the "heavy burden" in proving the absence of provocation, the Supreme Court of the United States in *Mullaney* nonetheless refused to shift the burden of proving that fact to the defendant.[214] Extending this "heavy burden" to the law of assault contravenes the legislature's intent to simplify the prosecutorial function.[215]

This decision also defeats the legislature's intent to ensure harsh penalties, or at least to maximize judicial sentencing discretion.[216] As an illustration, consider the facts of *Stevenson v. State*. Acting in hot blood, Kalilah Stevenson stabbed her husband twice in the arm with a butcher knife.[217] As a result of this severe wound, he required 126 stitches and lost sensation in his hand.[218] Before 1996, if this crime were tried as statutory mayhem, it would have been punishable by a prison term of up to ten years.[219] If it were tried as malicious injury to limb, or unlawful stabbing with intent to maim, disfigure, or disable, it would have been punishable by up to fifteen years.[220] Following the General Assembly's effort to increase maximum penalties for violent crime in 1996, however, Stevenson's maximum statutory penalty would be significantly increased to twenty-five years.[221] Applying hot-blooded response to mitigate Stevenson's conviction to second degree assault, however, reduces her crime to a misdemeanor punishable by not more than ten years.[222] Rather than increase the penalty, as the legislature intended, Stevenson's penalty would be five *fewer* years than it could have been before 1996.[223] Considering the potential fre-

213. *See* Mullaney v. Wilbur, 421 U.S. 684, 701 (1975) (acknowledging the "heavy burden" of proving a negative).

214. *Id.* at 701 (citing State v. Wilbur, 278 A.2d 139, 145 (Me. 1971)).

215. *See supra* notes 98–103 and accompanying text.

216. *See supra* note 97.

217. Stevenson v. State, 163 Md. App. 691, 694, 882 A.2d 323, 325 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

218. *Id.*

219. MD. ANN. CODE art. 27, § 384 (1992).

220. *Id.* §§ 385–386.

221. MD. ANN. CODE art. 27, § 12A-1(b) (1996).

222. *Id.* § 12A(b).

223. *See supra* note 97 and accompanying text. Granted, if Stevenson's crimes had occurred before 1996, she could have been charged under common law assault, which had

quency with which an assault may be accompanied by one of the many legally adequate forms of provocation,[224] the courts may become frustrated with their inability to issue harsher penalties.

Finally, while the General Assembly expressly retained all defenses available to statutory assault as of 1996, it gave no indication that it foresaw an expansion of this type.[225] Instead, the committee notes following the statutory sections seem to indicate that the General Assembly intended to freeze the defenses available to defend against a charge of assault, while keeping the definition of assault open for further interpretation.[226]

Section 12A-3 states simply, "A person charged with an offence under this subheading is entitled to assert any judicially recognized defense."[227] One could interpret the phrase "any judicially recognized defense" as including defenses not recognized as of the 1996 amendments, but to be recognized in the future.[228] This approach would find support in the committee notes following section 12, which expressly indicated that the statute did not intend to "freeze" the meanings of "assault," "battery," and "assault and battery."[229] The

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no maximum penalty except for the Eighth Amendment prohibition against cruel and unusual punishment and Articles 16 and 25 of the Maryland Declaration of Rights. *See* Simms v. State, 288 Md. 712, 714, 421 A.2d 957, 958 (1980). The United States Court of Appeals for the Fourth Circuit considered the Eighth Amendment question as applied to common law assault in Maryland in *Sutton v. State*, 886 F.2d 708, 709 (4th Cir. 1989). There, Sutton was convicted of common law assault for stabbing a man who had lived with the defendant's wife a total of five times in the neck and chest, before leaving the man in a street gutter. *Id.* at 709. The court held that the fifteen year sentence did not violate the Eighth Amendment simply because it exceeded certain statutory assault penalties. *Id.* at 710–13. Instead, the Fourth Circuit recognized that Maryland had refused to set a maximum for common law assault because certain crimes—like Sutton's—might be more grievous than any category that the legislature could forecast in defining aggravated assault. *See id.* at 711. The conviction could only be reversed after applying a separate Eighth Amendment analysis, focusing on the gravity of the offense and harshness of the penalty, the sentences imposed on criminals in the same jurisdiction, and the sentences imposed on criminals in other jurisdictions. *Id.* at 712–13 (citing Solem v. Helm, 463 U.S. 277, 292 (1983)).

224. Consider, for example, mutual combat. Under Maryland's homicide law, mutual combat provides adequate provocation. Whitehead v. State, 9 Md. App. 7, 11, 262 A.2d 316, 319 (1970).

225. *See infra* notes 227–230 and accompanying text.

226. *See infra* notes 231–232 and accompanying text.

227. MD. ANN. CODE art. 27, § 12A-3.

228. *See* Mary L. Moore, *Practice Tips: Statutory Assault: The Future in the Context of the Past*, 30 MD. B.J. 46, 46 (1997) (interpreting a committee note stating the intent of the legislature in defining assault in terms of its judicially determined meaning as an acknowledgement that the legislature could not foresee the full application of the law of assault).

229. MD. ANN. CODE art. 27, § 12 committee note.

committee envisioned that these terms would continue to be defined by future case law.[230]

The committee note following section 12A-3, the section defining the defenses, contains nothing of this sort.[231] Instead, the committee explains that section 12A-3 is intended to preserve the defenses of the former section 12A, the judicially recognized defense of *Alexander v. State*, and that "all other defenses will also remain *unchanged* under this revision."[232] This phrase indicates that the committee intended to "freeze" the defenses available to an assault defendant. Any new defense, including those established in *Christian*, is outside of and runs counter to the articulated purposes of the General Assembly in re-codifying the law of assault.

B. The Court Should Have Instead Adopted Georgia's "Modified Merger" Rule to Solve the Problems Before the Court Without Offending the Doctrinal Basis for the Mitigation Rule or Undermining the State's Policy Goals

The Court of Appeals, in extending mitigation defenses to first degree assault in *Christian*, while creating the new problems outlined above, did solve the central paradox created by *Roary*'s extension of the felony murder rule to first degree assault.[233] By allowing imperfect self-defense and hot-blooded response to mitigate felony assault to misdemeanor assault, the court prevented prosecutors from using the felony murder rule as a way to secure second degree murder convictions for crimes that would otherwise be mitigated to manslaughter.[234]

Extending these mitigation defenses to *all* first degree assault charges, however, is an unnecessary overcorrection of the *Roary* problem. The court instead should have adopted the "modified merger" rule applied by the Supreme Court of Georgia in *Edge v. State*. This intermediate approach would have solved the *Christian* court's dilemma without sacrificing the doctrinal integrity of the mitigation rule, the court's interest in deterring violent crime, or any of the apparent legislative goals of the 1996 amendments.[235] The *Edge* approach, described below, would not solve the sentencing anomaly presented by the *Stevenson* petitioner, but this anomaly is not constitu-

230. *Id.*
231. *See id.* § 12A-3 committee note.
232. *Id.* (emphasis added).
233. *See supra* notes 151–152 and accompanying text.
234. *See supra* notes 151–152 and accompanying text.
235. *See infra* notes 244–262.

tionally invalid.[236] This sentencing irregularity, however, in which a defendant who assaults his or her victim in hot blood may be subjected to a greater penalty if the victim lives than if the victim dies, may serve a policy interest in maximizing judicial sentencing discretion.[237]

Edge, unlike *Christian*, involved an actual homicide.[238] Jesse Calvin Edge Jr., shot and killed his estranged wife and was convicted of both voluntary manslaughter and felony murder with aggravated assault serving as the underlying felony.[239] While Georgia recognizes aggravated assault as a qualifying predicate felony for felony murder,[240] it refused to permit a felony murder conviction where the jury had determined that a malice murder charge was mitigated to voluntary manslaughter.[241] Under the *Edge* approach, the jury must be instructed to give adequate consideration to whether malice murder could be mitigated to manslaughter before considering a felony murder charge.[242] This approach prevents the unfair "bootstrapping" of aggravated assault to secure a felony murder conviction where malice murder would otherwise be mitigated to manslaughter.[243]

Edge's reasoning plays a clever trick with mitigation of malice, one that the Court of Appeals could have followed to preserve the doctrinal limitation on the application of mitigation strictly to murder malice. "If a jury [charged under the *Edge* instruction] finds voluntary manslaughter, it . . . finds the [aggravated] assault was mitigated . . . and committed without the mens rea essential to impute malice to the killing."[244] Rather than mitigating the felony itself as a

236. *See infra* notes 263–270 and accompanying text.

237. *See infra* notes 271–274 and accompanying text.

238. 414 S.E.2d 463, 464 (Ga. 1992).

239. *Id.*

240. Baker v. State, 225 S.E.2d 269, 271–72 (Ga. 1976). The *Baker* court refused to adopt the merger doctrine, which would not allow aggravated assault to serve as the predicate felony for felony murder; the court did so not to deter violent crime, but to address a gap in Georgia's statutory law of homicide. *Id.* Under Georgia law, the only categories for homicide were malice murder, felony murder, voluntary manslaughter, and involuntary manslaughter. *Id.* at 271. Voluntary manslaughter was limited to passion killings. *Id.* at 271–72. Involuntary manslaughter was limited to lawful acts committed in an unlawful manner and misdemeanor manslaughter. *Id.* at 272. If Georgia were to accept the merger doctrine, then it would be impossible to convict someone who brought about death as a result of aggravated assault—but without malice—of any crime, since it would not fit within the narrow manslaughter definitions. *Id. But see* Lewis v. State, 396 S.E.2d 212, 213 n.2 (Ga. 1990) (criticizing *Baker*'s logic and indicating that the solution should have been to amend the statute).

241. *Edge*, 414 S.E.2d at 465.

242. *Id.* at 466.

243. *Id.* at 465.

244. *Id.*

categorical matter, as the Court of Appeals decided was necessary, the *Edge* court focused instead on the malice transferred from the aggravated assault to the homicide.[245] When a jury finds voluntary manslaughter, "the felony of assault . . . cannot support a felony murder because there is no malice to be transferred."[246]

The *Edge* approach also serves the deterrence goals emphasized in *Roary* but derailed in *Christian*.[247] Assuming that individual and general deterrence is best promoted by maximizing the availability of harsh sentences,[248] the "modified merger" approach serves this interest by keeping the twenty-five year penalty available for first degree assault convictions. This significant penalty is certain to give pause to an individual considering committing a violent crime. Further, it best encourages the general deterrence of violent crime and promotes habitual law-abiding conduct.[249] To the degree that such a harsh result would seem unjust under the facts of a particular crime, the court may elect to impose a lighter sentence.[250] Indeed, first degree assault carries no statutory minimum.[251]

The "modified merger" rule would also preserve the three goals of the legislature in amending the assault statute in 1996: maintaining the status quo on available defenses, promoting administrability for courts and prosecutors, and ensuring the availability of harsh penalties for violent crimes.[252] No new defenses are presented by the *Edge* "modified merger" rule that would not have been present at the time of the 1996 amendments to the assault statute, so only defenses known to the legislature at that time will be preserved.[253] If section 12A intended to freeze the availability of assault defenses to those recognized as of 1996, the "modified merger" rule will accomplish this goal. Because the "modified merger" rule does not impact first degree assault unless the assault ends in a death, adopting that rule would not affect the legislature's vision as to that crime.[254]

Georgia's approach is also in line with the Maryland General Assembly's apparent intent to promote easy administrability for courts

245. *See id.*

246. *Id.*

247. *See supra* notes 190–197 and accompanying text.

248. *See supra* notes 198–204 and accompanying text.

249. *See supra* notes 198–201 and accompanying text.

250. *See* MD. CODE ANN., CRIM. LAW § 3-202(b) (LexisNexis 2002) (setting a maximum, but no minimum, penalty for first degree assault).

251. *Id.*

252. *See supra* Part IV.A.2.

253. *See supra* notes 225–232 and accompanying text.

254. *See supra* note 241 and accompanying text.

and prosecutors.[255] While the "modified merger" rule requires "some precision in the charge to the jury"[256] so that the jury could not return a conviction for felony murder when it finds provocation and heat of passion, this is a lesser burden on administrability than required by the *Christian* holding.[257] Additionally, this slightly complicated jury charge would apply to considerably fewer criminal cases. The *Edge* rule only applies in homicide cases, whereas the *Christian* rule will burden courts and prosecutors in every criminal trial where a defendant is charged with either homicide or first degree assault.[258]

Finally, this approach preserves the legislature's interest in ensuring the availability of harsh sentences for violent crimes. Under *Christian*'s holding, if Kalilah Stevenson was found to have acted in hot blood, she could only be punished by a maximum of ten years.[259] Under the Georgia "modified merger" rule, however, her crime could not be mitigated by a hot blood theory.[260] A court would have the discretion to punish her by up to twenty-five years under the first degree assault statute.[261] Maryland has traditionally trusted judicial discretion in assigning penalties, recognizing that a legislative sentencing regime may not be able to foresee categories of heinous crimes.[262]

The Georgia approach is not a panacea, however; it will not reach every anomaly created by the *Roary* holding. One of Kalilah Stevenson's contentions in her appeal was that refusing to apply mitigation defenses to first degree assault leads to "an absurd result."[263] As Stevenson argued, if a person acting in hot blood intending to kill attacked a victim and the victim lived, he or she would face a maximum penalty of twenty-five years for first degree assault.[264] If the victim died, however, then the defense of hot-blooded response would be activated and that person would face a maximum penalty of only ten years.[265] Under this hypothetical, the greater crime could yield a considerably more lenient sentence. Because Georgia's "modified merger" approach would not allow mitigation defenses for first degree

255. *See supra* notes 210–212 and accompanying text.

256. Edge v. State, 414 S.E.2d 463, 465 (Ga. 1992).

257. *See supra* notes 213–215 and accompanying text.

258. *See supra* notes 155–156, 241 and accompanying text.

259. *See supra* note 222 and accompanying text.

260. *See supra* notes 240–243 and accompanying text (describing how the "modified merger" approach only impacts crimes ending in death).

261. MD. CODE ANN., CRIM. LAW § 3-202(b) (LexisNexis 2002).

262. Sutton v. State, 886 F.2d 708, 710–11 (4th Cir. 1989) (applying Maryland law).

263. Stevenson v. State, 163 Md. App. 691, 700, 882 A.2d 323, 328 (2005), *rev'd sub nom.* Christian v. State, 405 Md. 306, 951 A.2d 832 (2008).

264. *Id.*, 882 A.2d at 329.

265. *Id.*, 882 A.2d at 328–29.

assault when the victim does not die, this anomaly remains in place under that approach.[266] This anomaly is not an unacceptable outcome, however, for many reasons. First, as the Court of Special Appeals pointed out in *Stevenson*, sentencing anomalies have been permitted in the law of assault in the past.[267] Common law assault, for example, had no maximum penalty.[268] Before the statutory abrogation of the common law of assault and battery,[269] a sentence for common law assault could therefore theoretically exceed the statutory maximum penalty for a more severe statutory form of assault, provided that the penalty did not exceed constitutional limits.[270]

Further, from a policy perspective, it is advantageous to retain the flexibility, even in the hypothetical described above, to sentence the individual to the full twenty-five years of incarceration. Examining the constitutionality of Maryland's former assault framework, the United States Court of Appeals for the Fourth Circuit noted the wisdom in retaining the common law of assault with no statutory limits.[271] The legislature retained this flexibility, recognizing that it could not foresee every condition that might make one assault more "grievous and blameworthy" than another.[272] While the construct as understood by the Fourth Circuit did not survive the 1996 amendments to the assault statute and consequent abrogation of common law assault, the high maximum penalty serves the same purpose.[273] To the degree that the two penalties are incongruous, perhaps it is the ten year maximum penalty for manslaughter—not the twenty-five year maximum penalty for assault—that is the problem.[274]

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266. *See supra* notes 240–243 and accompanying text.

267. *Stevenson*, 163 Md. App. at 700–01, 882 A.2d at 329 (citing Simms v. State, 288 Md. 712, 719–20, 421 A.2d 957, 961 (1980)).

268. Sutton v. State, 886 F.2d 708, 710 (4th Cir. 1989).

269. *See supra* note 108 and accompanying text.

270. *See supra* note 223.

271. *Sutton*, 886 F.2d at 711 (quoting Walker v. State, 53 Md. App. 171, 197, 452 A.2d 1234, 1248 (1982)).

272. *Id.*

273. *See supra* note 223.

274. Several commentators have pressed for an abandonment of the provocation defense in criminal homicide. *See, e.g.*, Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) (citing Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742) ("I would abolish this hoary distinction and convict all intentional killers of murder. Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive or antisocial desires."). Professor Morse argues that most defendants truly deserving of excuse for homicide may be exonerated completely on the basis of irrationality or loss of self-control, while most intentional killers do not deserve sympathy. *Id.* at 34. To extend a partial defense past the line of total loss of control is, however, in Professor Morse's opinion, to confuse responsibility with sympa-

V. CONCLUSION

In *Christian v. State*, the Court of Appeals extended two mitigation defenses previously only available to homicide, imperfect self-defense and hot-blooded response, to statutory first degree assault.[275] This holding solved one of the downstream paradoxes of the *Roary v. State* decision, which brought first degree assault within the felony murder rule.[276] *Christian* did so, however, at the expense of preserving the doctrinal underpinnings of mitigation;[277] the court's stated interest in deterring violent crime;[278] and the legislature's intent to provide easy administration, harsh penalties, and consistent defenses to assault crimes.[279] Instead, the court should have looked south, to the State of

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thetic notions of culpability. *Id.* at 35–36. While Morse validates society's sympathy for actors that it considers less culpable, like mercy killers, he indicates that these call for extensions of complete justification defenses, rather than the development of partial defenses. *See id.* at 35. Addressing the partial excuse of imperfect self-defense, Morse favors following the *Model Penal Code* and treating a defendant as having committed negligent or reckless homicide rather than mitigating murder to manslaughter. *Id.* at 35 n.120 (citing MODEL PENAL CODE § 3.09(2) (Official Draft & Revised Comments 1962)). Contrasting Professor Morse's hard-on-crime approach, but reaching the same result, is the argument taken by some feminist critics for abolishing the provocation defense. *See generally* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 186–97 (1992) (arguing that the United Kingdom should abandon the provocation defense and leave the effect of provocation as a mitigator in sentencing because of, among other reasons, gender bias within the provocation defense); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001) (advocating for abandoning the provocation defense, in light of its common law origins reinforcing the concept of women as property, its modern discretionary application allowing juries to reinforce male-dominance in society, its frequent application to mitigate males killing intimates, and for providing inadequate protection to women seeking to leave relationships). Finally, at least one critic has acknowledged utilitarian reasons to eliminate the provocation defense. Professor Joshua Dressler states:

> Perhaps the law ought to take the position that those who kill in rage need to make greater efforts to learn how to deal more constructively with their anger so that they don't lash out violently and kill. Abolition of the provocation defense, therefore, might send a useful *general deterrence* message that people should manage their anger and stress before emotions boil over in violence, or they will be treated the same as those who kill calmly.

Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 966 (2002) (emphasis added). Professor Dressler disposes of this argument by concluding that the underlying basis of the provocation doctrine is retribution, not deterrence. *Id.* This, however, is not the opinion of the Court of Appeals. *See supra* notes 190–204 and accompanying text. If deterrence of violent crime is the paramount value of *Roary* and the line of cases informing the *Roary* decision, then Professor Dressler's utilitarian concerns may have merit.

275. *See supra* note 156 and accompanying text.

276. *See supra* notes 151–152 and accompanying text.

277. *See supra* Part IV.A.1.

278. *See supra* Part IV.A.1.

279. *See supra* Part IV.A.2.

Georgia, for a more targeted intermediate solution, which would have limited activating mitigation defenses to only crimes resulting in the victim's death.[280]

280. *See supra* Part IV.B.