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Duress in Immigration Law

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CONTENTS

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INTRODUCTION

The doctrine of duress is common to other bodies of law, but the application of the duress doctrine is both unclear and highly unstable in immigration law. Outside of immigration law, a person who commits a criminal act out of well-placed fear of terrible consequences is different than a person who willingly commits a crime, but American immigration law does not recognize this difference. The lack of clarity leads to certain absurd results and demands reimagining, redefinition, and an unequivocal statement of the significance of duress in ascertaining culpability. While there are inevitably some difficult lines to be drawn in any definition or application of the doctrine, as a general matter, it is well established everywhere *but* in immigration law that varying levels of culpability exist and that those variations matter.[1]

Consider the story of a teenaged girl, Ana,[2] who moves in with her boyfriend after being cast out by her parents. The boyfriend turns physically and sexually abusive, and when Ana tries to run away, he finds her and brings her back, deepening his control over her. He then forces her to carry drugs for him by letting her know he will rape her if she refuses. This is an ugly story, but one that lawyers who work with immigrants know well, in infinite variations of the basic narrative. It is also a story that, even in this general formulation, meets globally accepted elements of the duress defense:[3] an imminent, credible threat of serious consequences, where the person has no reasonable opportunity to escape.

1. *See* discussion of this disparity *infra* Part I.

2. This is a lightly fictionalized story of one of my *pro bono* clients whom I have been representing for more than five years because her case has been made needlessly complex and contentious due to the legal issues identified in this Article. Indeed, the injustices of her case form the core inspiration for this Article.

3. *See* discussion on various contexts *infra* Part I.

As this Article proceeds, we will see how Ana's story reveals how disjointed the application of duress is, not just within U.S. immigration law but between U.S. immigration law and the criminal and international laws whose landscapes are so much more richly theorized. The Article will, in Part I, define the duress doctrine and its philosophical and policy underpinnings in United States criminal law and in international criminal and refugee law. While there are variations within these bodies of law, they share a degree of commonality that is remarkable considering the differences in their domains. Part II.A will turn to the role and position of duress doctrine in immigration law, specifically in these contexts: human trafficking, crimmigration,[4] grounds of inadmissibility and deportability, and denaturalization proceedings. This range of approaches provides the background and contrast for the discussion of duress in asylum law in Part II.B.

But Ana's story helps us see the need for these comparisons. Let us use this basic story as a prism for viewing the morass of conflicting treatments of duress in immigration law. If the story happened within the United States, two things might happen. First, if arrested for carrying drugs, Ana would be able to avail herself of the duress defense in her criminal proceeding in both the prosecution phase and the sentencing phase. In the prosecution phase, proof of duress could remove the *mens rea* requirement for Ana, depending upon the particular statute used to charge her.[5] If she is convicted, duress would be a factor mitigating any possible sentence. In either case, the existence of duress either makes a conviction less likely at all or reduces its impacts—which will be very important to whether the government would seek to remove Ana.

But perhaps there is no criminal prosecution because the prosecutor realizes Ana is more a victim than a perpetrator or because the conduct of carrying drugs never comes to light. Ana could also use these basic facts to seek a visa as a victim of a severe form of human trafficking; that visa would place her on a path to a green card and citizenship.[6] The same facts of coercion and duress that reduce her culpability in the criminal legal system form the basis of meeting that trafficking victim definition[7]

4. "Crimmigration" is a term coined by Professor Juliet Stumpf to encompass the myriad ways that the criminal legal system and immigration laws intersect. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006); *see, e.g.*, Tanvi Misra, *The Rise of 'Crimmigration,'* BLOOMBERG CITYLAB (Sept. 16, 2016), https://www.bloomberg.com/news/articles/2016-09-16/c-sar-garc-a-hern-ndez-on-the-rise-of-crimmigration [https://perma.cc/9A8M-FKML]. The term has since become widely used in the field of immigration law.

5. *See infra* notes 61–63 and accompanying text.

6. *See* INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T).

7. *See* Trafficking Victims Protection Reauthorization Act, 22 U.S.C. § 7102(11). The Trafficking Victims Protection Reauthorization Act defines severe forms of trafficking as

because she has been obtained and used, coercively, for the purpose of involuntary servitude (the drug-carrying but potentially also to provide sex). The fact that her labor (carrying drugs) is illegal is beside the point—indeed, another segment of trafficking law is devoted entirely to coerced sex work, and sex work is criminalized in almost all American states.[8] The trafficking law recognizes her as a victim and is in sync with how the criminal legal system understands her reduced, or nonexistent, complicity in the conduct.

However, let us imagine Ana's story happened in Colombia, and her abuser was a member of the Revolutionary Armed Forces of Colombia (FARC). To simplify the case for the purposes of this Article,[9] let us assume Ana is Afro-Colombian, and race is one demonstrated reason for his abuse of her. First, Ana applies for a visa. Let us assume time has passed, she escaped her abuser and founded a business, and she now wants to travel to California to meet with a prospective client. She applies for a business visitor visa and qualifies for it except she is inadmissible[10] because she has provided "material support" to terrorists (the FARC), by carrying the drugs for her abuser.[11] The terrorism grounds of inadmissibility are notably broad, and even the most minimal actions count as impermissible material support.[12] There is no duress exception to the material support bar, so Ana will not be issued the visa. Although she may

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Id.

8. *US Federal and State Prostitution Laws and Related Punishments*, BRITANNICA PROCON.ORG (May 4, 2018), https://prostitution.procon.org/us-federal-and-state-prostitution-laws-and-related-punishments [https://perma.cc/D7UU-VMTW].

9. *See* Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018). Asylum cases based upon gender and gender-based violence are in a state of heightened contest and uncertainty in the wake of the Attorney General's controversial decision.

10. *See* INA § 101(a)(15); 8 U.S.C. § 1101(a)(15) (for "nonimmigrant" visitors definition); INA § 203; 8 U.S.C. § 1153 (for lawful permanent residents definition). Inadmissibility is a significant concept in immigration law. Someone must both fit within a visa category *and* be admissible. In this hypothetical, Ana qualifies for a nonimmigrant visa under INA § 101(a)(15)(B); 8 U.S.C. § 1101(a)(15)(B). But the immigration law prevents people from coming to the country for a host of reasons set, forth in INA § 212; 8 U.S.C. § 1182, from criminal offense to likelihood of becoming a public charge to involvement in terrorist activity—the last of which is at issue in this hypothetical.

11. *See* INA § 212(a)(3)(B)(iv); 8 U.S.C. § 1182(a)(3)(B).

12. *See* INA § 212(a)(3), 8 U.S.C. § 1182(a)(3)(B)(iv); *see also* Matter of A-C-M-, 27 I. & N. Dec. 303 (B.I.A. 2018) (holding that even *de minimis* support falls within this bar to admissibility).

apply for a waiver of that ground of inadmissibility, that waiver is entirely discretionary and is granted rarely.[13]

Or perhaps Ana escaped from her abuse and made her way to the United States, where she applies for asylum, and her facts meet the requirements for asylum.[14] She has a well-founded fear of persecution (in her case rape, beatings, and perhaps death) at the hands of her abuser on account of her race, and her abuser is someone the Colombian government cannot control. She qualifies for asylum—except that, in carrying the drugs for him, she has perhaps committed a serious nonpolitical crime, which is a bar to protection under our asylum law. The government's position is that there is no duress exception to this bar, and if that position holds, the same duress that would have qualified Ana *for* immigration benefits in the previous paragraph makes her ineligible for immigration protection now.[15]

In the criminal system, duress, at least, mitigates Ana's culpability. It could provide the basis for a special human trafficking visa or support a waiver of the terrorism bar to her admission to the United States. But the government would ignore duress in the asylum context, putting asylum out of reach. How could the same set of facts yield such absurdly different results? As the Immigration and Nationality Act has absorbed laws and priorities from different directions over the years,[16] it has done so without any conceptual harmony, and the diversity of treatments of duress reflect that disjointedness. These absurdly different results undermine confidence in the law. It is also out of step with other domestic and international understandings of the role duress plays in criminal culpability.

U.S. criminal law has long recognized the principle of duress in both common law and criminal statutes.[17] International criminal law and international refugee law both largely mirror these domestic principles. While certainly not reaching the level of a *jus cogens* norm,[18] the synchrony among the bodies of law is striking, and the distinctions are relatively small. These diverse bodies of law share core elements: that the

13. *See infra* Part II.A, notes 144–146 and accompanying text.

14. See INA § 101(a)(42); 8 U.S.C. § 1101(a)(42) for the definition of a refugee for asylum purposes.

15. See *infra* Part II.B for discussion on the Department of Homeland Security's litigation position has been to oppose the relevance of duress in understanding bars to asylum; while the Board of Immigration Appeals within Department of Justice did establish the duress doctrine, the Attorney General immediately certified the case to himself, which he does when he disagrees with Board reasoning.

16. *See infra* Part III.A.

17. *See infra* Part II.A.

18. "*Jus cogens*" from the Latin for compelling law. *Jus cogens* include prohibitions against slavery, torture, and genocide, and are sometimes labeled "peremptory norms." *See, e.g.*, Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331.

person acted from fear of imminent and grave consequences, that the fear was "well-grounded," and that the person had no real opportunity to escape to avoid committing the act. Almost in tandem, the domestic criminal law and international law reflect a concern that punishment be meted out in relationship to culpability and recognize that duress diminishes culpability.

Immigration law is the straggler and outlier to this otherwise richly developed legal landscape. As seen through the small variations in Ana's story, the duress doctrine manifests in very different ways in immigration law and with important gaps. It might reduce the likelihood of a criminal case feeding into immigration removals. It might provide affirmative benefits, in the case of our trafficking law—not merely a way to avoid removal but a means of accessing the elusive path to citizenship.[19] It is an express exception for people who were involuntary members of the Communist Party or other totalitarian parties. But it exists more in principle than in practice for those forced to support terrorists, and it offers nothing to asylum-seekers. As the greatest outlier, the treatment of duress in asylum law reveals the critical importance of expressly incorporating the duress defense and also harmonizing the understanding of the work done by the doctrine throughout immigration law. This Article concludes with a demand for a statutory solution because of the pervasiveness of the disharmony and because the structures that generate administrative common law are too unstable themselves to be trusted with resolving the issue.

I. THE DURESS DOCTRINE'S LANDSCAPE AND JUSTIFICATIONS

The doctrine of duress, in both domestic and international law, helps make sense of culpability for criminal conduct when that conduct is undertaken under great pressure and fear of significant negative consequences. Per *Black's Law Dictionary*, duress is:

> [b]roadly, a threat of harm made to compel a person to do something against his or her will or judgment; . . . Duress practically destroys a person's free agency, causing nonvolitional conduct because of the wrongful external pressure. . . .
>
> The use or threatened use of unlawful force—usu. that a reasonable person cannot resist—to compel someone to commit

19. *See also* AM. IMMIGR. COUNCIL, WHY DON'T IMMIGRANTS APPLY FOR CITIZENSHIP? (2019). *See generally* Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2013).

> an unlawful act. Duress is a recognized defense to a crime, contractual breach, or tort.[20]

Duress reduces, and sometimes removes, criminal culpability.

In both settings, as set forth in greater detail in Parts I.B and I.C, there must be "a threat of force directed at the time of the [individual's] conduct; a threat sufficient to induce a well-grounded fear of impending death or serious bodily injury; and [the individual must] lack a reasonable opportunity to escape harm other than by engaging in the illegal activity."[21] And in the international context, a fourth element, known as the proportionality element, limits the availability of the defense to situations where "the person does not intend to cause a greater harm than the one sought to be avoided."[22]

The literature on the duress defense is broad ranging, from moral philosophy and criminology to exegesis of the common law in domestic, foreign, and international contexts.[23] The intent of this section is to provide sufficient understanding of the rationale for the defense, to identify the major articulations of it, and to help inform the discussion of duress in U.S. immigration law, which follows in Part II.

A. Theoretical Bases for the Duress Defense

Duress complicates two of the principal justifications underlying criminal law: deterrence and punishment. Someone who acts *only* under extreme coercion will not likely be deterred by the prospect of punishment under the law; embedded in the doctrine of duress is the notion that the coercion is fairly extreme. Likewise, someone who commits an act only because of coercion is, per most criminologists, policymakers, and moral philosophers alike, less culpable than someone who acts voluntarily.[24] In the various iterations elaborated upon below, courts and legislatures attempt to balance the somewhat elusive idea of culpability, which includes a moral element, with traditional criminal justice values like

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20. *Duress*, BLACK'S LAW DICTIONARY (11th ed. 2019).

21. United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005).

22. Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 18 INT'L J. REFUGEE L. 81, 107 (2006).

23. See, e.g., *infra* notes 24, 30, and 60 for many of the interesting works.

24. California v. Brown, 479 U.S. 538, 545 (1990) (O'Connor, J., concurring) ("This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is 'sensible to the uniqueness of the individual.' Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.").

deterrence and punishment.[25] Whether (and to what extent) the duress defense exists is crucial to help answer the question of how criminally responsible someone is for actions they may not have wanted to commit.

Deterrence is a core justification for criminal law punishments,[26] and the founding architect of criminology, Cesare Beccaria, held the consequentialist view that the criminal's intent should not matter, only their actions:

> They err, therefore, who imagine that a crime is greater, or less, according to the intention of the person by whom it is committed; for this will depend on the actual impression of objects on the senses, and on the previous disposition of the mind; both which will vary in different persons, and even in the same person at different times, according to the succession of ideas, passions, and circumstances. Upon that system, it would be necessary to form, not only a particular code for every individual, but a new penal law for every crime. Men, often with the best intention, do the greatest injury to society, and with the worst, do it the most essential services.[27]

If intent does not matter, then any duress affecting the person's actions (and diminishing intent) would also be irrelevant. However, as discussed in Parts I.B and I.C, most criminal laws, with the significant exception of homicide laws, *do* consider intent and factor duress into understanding whether that intent exists, or if it exists, whether it is excused.

Duress undermines the deterrent argument for criminal punishments, and laws have evolved to permit questions of duress to affect culpability and criminal consequences. The concern is that someone is acting not because they disregard the (deterrent) consequences but because some greater harm would befall them if they did *not* engage in the conduct.

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25. *See infra* Sections I.B.1 and I.C.

26. *See also* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 857 (2002) ("The principal consequentialist theories of punishment justify punishment based on the good consequences of rehabilitating the offender so that she will not commit future crimes, incapacitating the offender so that he cannot commit crimes during the term of imprisonment, deterring the offender from committing future crimes (specific deterrence), and deterring others in society from committing future crimes (general deterrence)."); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) (citing JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION (1823)). *See generally* CESARE BONESANA DI BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS ch. XII (1764) (W.C. Little & Co. 1872) ("The end of punishment, therefore, is no other, than to prevent others from committing the like offence.").

27. BECCARIA, *supra* note 26.

Coercion thus weakens the deterrent effect;[28] Professor Dressler has commented that for someone "in thrall to some coercive power, the threat of criminal punishment is ineffective."[29] Elsewhere he writes that "we excuse the insane or coerced actor because she is undeterrable."[30] And while someone may commit a criminal act, their lack of criminal intent makes them less worthy of punishment.

Punishment is another core objective of criminal law, separate from deterrence, and reflects the value of retribution (or, alternately, consequences for wrongdoers). Drawing upon Kantian ethics, Professor Russell Christopher writes, "[e]ssentially, retributivism justifies punishment based not on its consequences but solely because an offender deserves it. . . . Under retributivism, morally culpable wrongdoing or guilt deserves, merits, or warrants punishment. It is morally fitting that an offender should suffer in proportion to her desert or culpable wrongdoing."[31]

This question of who deserves punishment clearly raises an assignment of moral responsibility. Professor Stephen Massey grapples with legal philosopher H.L.A. Hart's accounting of moral responsibility:

> [We] want to know to what extent the actor is morally blameworthy or morally obliged to make amends. Thus, the relevant inquiry considers not only the actor's causal relation to the harm, *but also such factors as the actor's knowledge and ability to control his conduct*. Assignment of responsibility in this sense carries with it the implication that the actor must answer or account for his conduct, and that *he is properly blameworthy when he should and could have acted differently*.[32]

Duress factors into these italicized phrases—duress may affect the ability to control conduct and questions whether someone could have acted differently.

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28. That might be the deterrent of incarceration or fines, social stigma, or other deterrents. *See* David Crump, *Deterrence*, 49 ST. MARY'S L.J. 317, 318 (2018) ("[T]he mechanism by which deterrence works remains elusive . . . .").

29. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 300 (3d ed. 2001), *accord* Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 481 (2006).

30. Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1165 (1987).

31. Christopher, *supra* note 26, at 859.

32. Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 138 (1986) (emphasis added).

B. Duress and Culpability in Domestic Criminal Law

1. Defining Duress

The duress defense has old origins in common law.[33] The concept stems from an understanding that the intent—or *mens rea*—of the individual may matter greatly. While strict liability crimes certainly exist, including drug possession or statutory rape, many crimes require that the perpetrator have a requisite mental state.[34] Duress may be a factor in understanding that requisite mental state. It does not negate the *knowledge* element of many crimes, but rather might be offered as a defense to excuse or justify the commission of a crime that might have been committed knowingly.[35]

Defining the precise contours of the duress defense is a more challenging matter. All circuits have addressed the question of where duress exists, but they differ at the margins. Common to all circuits, the duress defense requires that the individual faced a highly serious negative consequences, like "an unlawful threat of imminent death or serious bodily injury."[36] More minor bodily injuries would not suffice nor would harm to property; these would be deemed insufficient excuses.[37] The Court in *United States v. Vigol* explains why this seriousness matters:

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33. *See* Commonwealth v. DeMarco, 809 A.2d 256, 261 (Pa. 2002) (legislature codified duress because the common law defense was too difficult for defendants to meet); State v. Riker, 869 P.2d 43, 51 (Wash. 1994) (legislature created stringent duress statute due to the state's skepticism and "reluctance to allow even the abnormal stresses of life to provide a basis for the defense"); see *infra* Part III for importance of codification. *See generally* Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 166–69 (2019). Increasingly, however, legislatures have stepped in to either codify the clear common law, or to clarify in the absence of such clarity.

34. *See* HAW. REV. STAT. ANN. § 707-702(1)(a) (West 2019) (requisite mental state for manslaughter statute is recklessness); ALA. CODE § 13A-6-3(a)(1) (1975) ("A person commits . . . manslaughter if . . . [they] recklessly cause[] the death of another . . . ."); *see also* N.M. STAT. ANN. § 30-16-6 (West 1978) ("Fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations.").

35. *See* United States v. Haischer, 780 F.3d 1277, 1283–84 (9th Cir. 2015) (duress and the absence of the required *mens rea* are not the same thing, noting that "knowledge is not categorically inconsistent with duress"); United States v. Bailey, 444 U.S. 394, 402 (1980) ("In the present case, we must examine both the mental element, or mens rea, required for conviction . . . and the circumstances under which the 'evil-doing hand' can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present."). For a general discussion of whether duress is a justification or an excuse, see Madeline Engel, Comment, *Unweaving the Dixon Blanket Rule: Flexible Treatment to Protect the Morally Innocent*, 87 OR. L. REV. 1327, 1330–31 (2008).

36. *Bailey*, 444 U.S. at 409.

37. *See* L.I. Reiser, Annotation, *Coercion, Compulsion, or Duress as Defense to Criminal Prosecution*, 40 A.L.R.2d 908 (1955).

> The apprehension of any loss of property, by waste, or fire; or even an apprehension of a slight or remote injury to the person, furnish no excuse. If, indeed, such circumstances could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of society must, inevitably, be laid prostrate.[38]

In some circuits, this principle looks more like a nexus requirement "that a direct causal relationship may be reasonably anticipated between the action taken and the avoidance of the harm."[39] In any event, speculative future harm will not be enough to satisfy this requirement.[40]

Courts also agree that the threat of those consequences are not mere pressures or incentives but are "present, imminent, and impending, and of such a nature as to induce a *well-grounded* apprehension of death or serious bodily injury if the act is not done."[41] While this factor incorporates some of the same analysis as imminence and seriousness, its essence is whether the threat is believable. For example, the Fifth Circuit examined the past history between the defendant and the person making a threat to show whether the threat was "well-grounded."[42] Other formulations require a "reasonable belief" that the threat is true[43] or "reasonable grounds for believing" the threat.[44]

This requires an inquiry into the facts surrounding the threat, as a "fear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant with those applying the threat is such that the defendant can reasonably anticipate being harmed on failure to comply."[45] The Court of Appeals of Maryland urged this kind

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38. United States v. Vigol, 2 U.S. (2 Dall.) 346, 347 (C.C.D. Pa. 1795) (with a footnote well worth reading, questioning why the jury in this case had to be found at a nearby bar before delivering their verdict).

39. Marouf, *supra* note 33, at 1674 (citing United States v. Lomax, 87 F.3d 959, 961 (8th Cir. 1996)); *see also* United States v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989); United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986); United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979).

40. *See* United States v. Nwoye, 663 F.3d 460, 463 (D.C. Cir. 2011) (citing R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 604–05 (1st Cir. 1949) (affirming the denial of duress defense for defendant who was threatened by armed men who said they would "take care of" his family if he did not comply, because the threat was of "future unspecified harm")).

41. Reiser, *supra* note 37, § 2 (emphasis added). This language is tantalizingly close to the core asylum concept of a "well-founded fear." *See infra* Part III.B.

42. *See* United States v. Willis, 38 F.3d 170, 177 (5th Cir. 1994).

43. *See* People v. Williamson, 218 Cal. Rptr. 550, 559 (Cal. Dist. Ct. App. 1985); Byrd v. Commonwealth, 16 S.E. 727, 729 (Va. 1893).

44. *See* Reese v. State, 869 So. 2d 1225, 1227 (Fla. Dist. Ct. App. 2004).

45. Debra Oakes, Annotation, *Availability of Defense of Duress or Coercion in Prosecution for Violation of Federal Narcotics Laws*, 71 A.L.R. Fed. 2d 481 § 4 (2013).

of fact-rich understanding in *McMillan v. State*.[46] The lower court had limited duress to one very specific context, finding that "for duress to occur, there has to be a situation in which someone is, in effect, holding a gun to his head at the time that he commits the crime, and that didn't happen."[47] Instead, the court reasoned that

> [w]hile the trial court's example illustrates an obvious situation of duress, we do not agree that it constitutes the entire universe of the scenarios that can suffice as coercive. Being threatened with weapons is not the only possibility. A jury may infer from witness testimony, including that of a defendant, that threats by identified gang members . . . when no weapons are displayed or when there are no weapons, that the defendant had a "well-grounded apprehension of death or serious bodily injury."[48]

Circuits and legislatures are divided over how objective this standard is in the relatively well-developed setting of Battered Person Syndrome.[49] All circuits do agree that the defense of duress only works where there is a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity.[50] Included in the reasonableness of escape is the idea that the individual must seek out police aid or protection.[51]

The three core requirements of the duress doctrine thus far are that (1) the defendant faced a highly serious negative consequence, (2) the threat of that consequence was believable, and (3) the defendant reasonably believed they would be harmed if they failed to comply. Beyond these three requirements, other circuits have added additional elements. One additional element is akin to an assumption-of-the-risk

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46. *See* McMillan v. State, 51 A.3d 623 (Md. 2012).

47. *Id.* at 637 (quoting the trial court).

48. *Id.*

49. The complexities of that area of law are beyond the scope of this article, but the comparisons are worth exploration in future scholarship. *See generally* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 311 (2003) ("Outside the cases where an abuse victim killed her batterer, courts and feminist legal scholarship have recognized that battered women can be coerced or forced into unlawful conduct, providing a basis for a duress defense."). To the extent the two areas of law have already been compared, the scholarship focuses on "battered women" claims to asylum. *See, e.g.*, Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337 (2009).

50. *See* United States v. Diaz, 736 F.3d 1143, 1150 (8th Cir. 2013); United States v. Gonzalez, 407 F.3d 118, 122 (2d Cir. 2005).

51. United States v. Scott, 901 F.2d 871, 874 (10th Cir. 1990) (A defendant with such "countless opportunities to contact law enforcement authorities or [to] escape the perceived threats" cannot as a matter of law avail herself of the duress defense). *But see* United States v. Lopez, 913 F.3d 807, 822 (9th Cir. 2019) ("[A] jury may consider the defendant's prior experience with police response to abuse in determining whether it was reasonable for her not to contact [the police] once threatened by the coercing party.").

principle; courts have held that the defense is unavailable where an individual voluntarily, recklessly, or negligently placed themselves in a situation in which it was probable that one would be subject to duress.[52] Similarly, the Sixth and Eighth Circuits add a requirement that the illegal conduct lasted only as long as it was "absolutely necessary."[53] As discussed in the next section, international and foreign law addressing duress likewise typically have more than three requirements, so the Sixth and Eighth Circuits are in line with that more detailed understanding.[54]

Concerning proportionality, the individual cannot invoke a duress defense if the act they commit is worse than the harm they fear. This proportionality limitation requires an investigation into and comparison of what the individual fears and what the individual is coerced into doing.[55] Thus, the defense is not available for homicide, as multiple courts and legislatures have made clear.[56] However, even in the homicide context, it may have some impact—it can be a defense to felony-murder[57] and can reduce a homicide charge to manslaughter.[58] One legislature has clarified that it is not available for robbery[59] and another for crimes punishable by death.[60]

The Model Penal Code has also addressed this question, defining duress in these terms:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person

52. *See* United States v. Nolan, 700 F.2d 479, 484 (9th Cir. 1983); *see also* United States v. Paolello, 951 F.2d 537, 541 (3d Cir. 1991) (defendant must not have recklessly put themselves into the situation where the duress arose); United States v. Blanco, 754 F.2d 940, 943 (11th Cir. 1985) (like the *Paolello* holding, except that the standard is "recklessly *or* negligently" (emphasis added)).

53. United States v. Johnson, 416 F.3d 464, 468 (6th Cir. 2005); *see also* United States v. Stover, 822 F.2d 48, 50 (8th Cir. 1987) (finding the duress defense unavailable because when the police arrived, the defendant was "no longer in any imminent danger of death or serious bodily injury").

54. *See infra* Part I.C.

55. PAUL H. ROBINSON, 2 CRIM. L. DEF. § 177 (2020) (duress as an excuse defense).

56. *See generally* R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949); State v. Toscano, 378 A.2d 755, 761 (N.J. 1977); State v. Rumble, 680 S.W.2d 939, 942 (Mo. 1984) ("Section 562.071.2 in unmistakably clear language declares that duress is not a defense to the crime of murder—any murder.").

57. *See* McMillan v. State, 51 A.3d 623, 634–35 (Md. 2012) (permitting the duress defense in reference to felony-murder, where the defense would excuse the underlying *felony*—as opposed to excluding the murder itself (emphasis added)).

58. MINN. STAT. ANN. § 609.08 (West 1963) (by statute, if one is forced to intentionally kill another under duress, murder charge is dropped to manslaughter).

59. IND. CODE ANN. § 35-42-5-1 (West 1977); *see also* Ballard v. State, 464 N.E.2d 328, 330 (Ind. 1984) (no duress defense is available for the crime of robbery).

60. NEV. REV. STAT. § 194.010(8) (West 1911); *see also* Cabrera v. State, 454 P.3d 722, 724 (Nev. 2019) ("The statute plainly states that duress is not a defense when 'the crime is punishable [by] death.'").

> or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.[61]

Notably absent from the Code's definition is a proportionality requirement; nothing in this definition rules out the defense categorically even for the charge of murder.[62]

2. When Duress Matters in the Criminal Legal System

Duress matters in four different phases of the criminal process. First, facts like Ana's, from the introduction, might cause a prosecutor to decline to prosecute as an exercise in prosecutorial discretion.[63] Second, duress might shape what kind of plea deal a prosecutor offers.[64] Third, for cases that avoid plea bargaining and go to trial, proof of duress could sufficiently negate the *mens rea* the prosecutor is required to prove. Finally, duress can be a mitigating factor in sentencing. As Professor Chiao writes, "[a]lthough there are famous disputes about mitigating and aggravating conditions for criminal acts generally, these disputes should not blind us to large swaths of relatively stable agreement—for instance, . . . that duress and infancy tend to exculpate[.]"[65]

C. Duress and Culpability in International Law

A similarly rich body of law is developing in public international law, and specifically in international criminal law and international refugee law. Developments in these two areas then inform a third area:

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61. MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1962).

62. *See* Benjamin J. Risacher, Note, *No Excuse: The Failure of the ICC's Article 31 "Duress" Definition*, 89 NOTRE DAME L. REV. 1403, 1411 (2014) (noting that the Code definition "encapsulates the idea that the will has been overcome and therefore, without a free choice, there can be no moral culpability").

63. "The decision to charge or decline charges is totally within the discretion of the prosecutor." Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1071 (2016).

64. As Professor Peter Margulies describes,

> Equity . . . is equally important to the legitimacy of plea bargaining. In a democratic system, plea bargaining should avoid both the caprice of treating like cases differently and the cruelty of ignoring differences in defendants' circumstances. A plea bargaining system injures the cause of equity if it permits wildly disparate results for similarly situated defendants, singles out particular classes of defendants for harsh treatment, or ignores individualizing factors such as duress, which should mitigate culpability or punishment.

Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN'S STUD. 153, 155 (2001).

65. Vincent Chiao, Ex Ante *Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 291 (2012). *But see* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 141–42 (2008) ("In legal practice, criminal attorneys spend much of their time arguing about the appropriate sentence after a guilty plea, not the best fit between the likely facts and the most apt code section. . . . The real action in criminal practice happens at sentencing, and there the defendant's mental state stays on the periphery—note how little the federal sentencing guidelines discuss mens rea.").

foreign law that incorporates the evolving international legal norms. This section addresses each of these three areas in turn.

1. International Criminal Law

International criminal law has been defined with varying degrees of breadth, but it essentially concerns violations of public international laws, which may arise from traditional norms (such as laws against genocide and piracy) or from treaties. This section briefly describes the two principal developments in this arena that concern duress: (1) crimes against humanity and (2) grounds for excluding criminal responsibility.

First, with the increase in international criminal tribunals since the 1990s,[66] there have been more opportunities to define and examine the understanding of duress in this body of law. The major case doing so is *Prosecutor v. Erdemović* in the International Criminal Tribunal for Yugoslavia (ICTY).[67] In that case, the ICTY court held that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[68] In reaching this decision, the judges searched for a unifying principle from existing international common law; finding none, they decided to interpret the duress doctrine from the perspective of the ICTY's strongly protective purpose and ruled on the unavailability of the defense for murder.[69]

Second, subsequent to *Erdemović*, the major development internationally has been the International Criminal Court (ICC), created through the 1998 Rome Statute, and entering into force in 2002.[70] The

66. The 1990s gave rise to two of the first such tribunals: the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. *See generally International Tribunals*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/repertoire/international-tribunals [https://perma.cc/G433-5U2X].

67. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

68. *Id.* ¶ 19.

69. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) ("We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered."). *But see* Risacher, *supra* note 62, at 1420 ("General deterrence is thought to help prevent future crimes by members of society at large by making an example and punishing an actor for his criminal behavior. The problem is that coerced individuals are not thinking about avoiding punishment from a legal body; rather they have had their free will overcome by a threat that no reasonable person could resist. In a similar vein, an individual who has the unfortunate fate of finding himself under coercion twice is not going to give weight to the fact that he was previously punished for a similar act.").

70. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

Rome Statute codified a definition at Article 31 ("Grounds for excluding criminal responsibility"), Section (1)(d):

> The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.[71]

This definition overlaps with that described in U.S. domestic criminal law: (1) an emphasis on imminent harm, (2) reasonable actions needed to avoid the threat, and (3) proportionality of the conduct.[72] While new to public international law, this third element—the proportionality approach, which essentially precludes the defense in cases of homicide—can be seen throughout common law jurisdictions internationally.[73]

One case before the ICC has raised this defense, the case of Dominic Ongwen, an alleged commander in the Lord's Resistance Army in Uganda.[74] He has sought to avail of the defense under Article 31(1)(d), but as of this writing, there has been no final decision in his case.[75]

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71. *Id.* at art. 31(1)(d).

72. *See generally* Jennifer Bond, *Principled Exclusions: A Revised Approach to Article 1(F)(A) of the Refugee Convention*, 35 MICH. J. INT'L L. 15, 48–56 (2013).

73. Joseph Rikhof, *War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context*, 21 INT'L J. REFUGEE L. 453, 507 (2009) (statement of Joseph Rikhof from his study of Australia, Canada, and New Zealand) ("The defence . . . has been considered in all countries under consideration and, . . . the other four [non-U.S.] countries allow the defence, if all requirements are present, including, most importantly, that of proportionality between the harm to be inflicted and the harm to be received."). *But see* Risacher, *supra* note 62, at 1408 (finding that civil law jurisdictions are far less likely to expressly preclude the defense even for homicide).

74. Prosecutor v. Ongwen, ICC-02/04-01/15, Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence ¶ 5 (Aug. 9, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_05556.pdf [https://perma.cc/RS8D-CN8M] ("(a) Any alleged acts committed during the temporal jurisdiction outlined by Pre-Trial Chamber II would have been committed under duress; (b) The duress would have been caused by Joseph Kony and his close advisors; (c) The duress would have come from a continuing threat of imminent death and imminent threat of serious bodily harm against Mr[.] Ongwen and against other persons which was beyond Mr[.] Ongwen's control; and (d) Mr[.] Ongwen's alleged intended conduct is not alleged to have caused a greater harm than the one which was avoided.").

75. The status of the case can be found at the International Criminal Tribunal's website for the case. *Ongwen Case*, INT'L CRIM. CT., https://www.icc-cpi.int/uganda/ongwen [https://perma.cc/LLK9-EPTD].

2. International Refugee Law

Duress law is far more richly developed in international refugee law. The grounds for denying protection to an otherwise eligible refugee arise from Article 1F(b) of the Refugee Convention,[76] also known as the "exclusion clauses."[77] These clauses are where the duty not to return refugees crosses with the right of states to self-protection, which would be the concern for people accused of criminal or persecutory acts. International understanding of the bars to refugee protection strongly favors a cautious approach to denying protection to otherwise eligible individuals—first by reserving the bars for the most compelling and serious cases, and second by permitting a duress defense.

To establish the Refugee Convention, nations wanted assurance that they would not be required to allow dangerous individuals who would be a threat to the public safety of the receiving country.[78] That context matters, for it is not *every* criminal offense that limits the protections of the Convention, but only highly serious ones. Interpreting both the Convention and its founding documents (the *travaux preparatoires*), the United Nations High Commissioner for Refugees (UNCHR) states that only capital crimes or "very grave punishable act[s]" fall under this ground for denying asylum.[79] Separate UNHCR guidance lists "homicide, rape, arson and armed robbery" as the kinds of crimes covered, and notes that "certain other offenses could also be deemed serious if they are accompanied by the use of deadly weapons, serious injury to persons, evidence of habitual criminal conduct and other similar factors."[80] In short, UNHCR states "[c]onsidering the serious consequences of exclusion for the person concerned . . . the *interpretation of these exclusion clauses must be restrictive*."[81]

Even if someone were to have committed a serious nonpolitical crime by this more stringent definition, though, international refugee law

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76. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. Refugee Convention duties are incorporated by reference in the Protocol Relating to the Status of Refugees, Jan. 31, 1967, art.1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268–70.

77. Off. of the U.N. High Comm'r for Refugees, The Exclusion Clauses: Guidelines on Their Application ¶ 4 (Dec. 1996) [hereinafter The Exclusion Clauses].

78. James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 262 (2001) ("[T]he Refugee Convention's drafters recognized the importance of reassuring states that accession to international refugee law would not require them to admit either international criminals or fugitives from justice.").

79. Off. of the U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 155, U.N. Doc. HCR/IP/4/Eng/Rev.1 (Jan. 1992) [hereinafter UNHCR Handbook].

80. The Exclusion Clauses, *supra* note 77, ¶ 51.

81. UNHCR Handbook, *supra* note 79, ¶ 149 (emphasis added).

allows for a duress defense, and for special consideration of offenses committed by minors. UNHCR offers this balancing test for the duress exception:

> As for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided.[82]

This definition mirrors that of the Rome Statute with its three requirements of imminent harm, proportionality, and reasonableness.[83]

The origins and interpretation of the Refugee Convention also require a special focus on how duress affects the criminal culpability of minors. Despite the Convention's lack of an explicit exception for minors, UNHCR advises that the exclusion clauses do apply to minors, but only for those of sufficient age and mental capacity to be criminally responsible: "Given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined carefully."[84] This understanding of the applicability of the duress defense makes sense in light of the purpose of Article 1(F) of the Refugee Convention, which focuses on the integrity of the refugee system.[85] The system is built upon some notion of who "deserv[es]" protection, and excludes war criminals, human rights violators and others.[86] If someone committed an act without requisite intent—either because of duress or age—then that person is not the kind of danger that the exclusion clauses concern. As one commentator has noted, it would be manifestly unfair to incorporate only some aspects of criminal law in analyzing these bars:

> All of these elements must also be considered in the refugee context—it is arbitrary and unjust for refugee law to rely on criminal concepts while ignoring certain aspects of the doctrine and key underlying principles, including the need for autonomous will.[87]

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82. Off. of the U.N. High Comm'r for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 22, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) [hereinafter UNHCR Exclusion Clauses].

83. Rome Statute, *supra* note 70.

84. UNHCR Exclusion Clauses, *supra* note 77, ¶ 28.

85. Refugee Convention, *supra* note 76, at art. 1F.

86. UNHCR Handbook, *supra* note 79, at ch. IV § B(3); *see also* Matter of McMullen, 19 I. & N. Dec. 90, 97 (B.I.A. 1984) ("This exclusion from refugee status under the Act represents the view that those who have participated in the persecution of others are unworthy and not deserving of international protection.").

87. Jennifer Bond, *The Defence of Duress in Canadian Refugee Law*, 41 QUEEN'S L.J. 409, 418 (2016).

3. Foreign Law Interpreting the Refugee Convention

Countries with case law illuminating the availability of a duress defense generally follow the same principles laid out in both the U.S. criminal law and international law settings but with some inclusion of additional factors, as described here. This section is far from exhaustive but highlights recent or significant cases from countries with well-developed asylum jurisprudence.

Canada looked to international law in formulating its test for duress[88] but has gone beyond it to establish the most detailed test of any country. The Canadian test lays out six factors needed for a successful duress defense. There must be (1) an explicit or implied threat of death or bodily harm; (2) a reasonable belief the threat would be carried out; (3) no safe avenue of escape; (4) a close temporal connection between the threat and harm threatened (but does not include threats of future harm); (5) proportionality between harm threatened and harm inflicted; and (6) the accused did not voluntarily partake in groups activities knowing that threats and coercion were a possible result.[89]

One case from Canada situates the analysis at the very initial stage, whether the exclusion clauses are triggered at all. In *Canada v. Maan*,[90] an Indian man knowingly carried drugs after a militant group threatened him and his family members with death. The Canadian Immigration and Refugee Board, reviewing his case, "found that there were not 'serious reasons for considering' that the Respondent committed a crime, given the presence of duress, and the lack of a *mens rea*, therefore the Convention exclusion does not apply."[91] On appeal by the Government, the court accepted this reasoning.[92] This initial inapplicability of the exclusion grounds matters profoundly because, unlike in the criminal legal system where duress often works as a mitigating factor in sentencing, there is no "mitigation" equivalent in asylum cases because the applicant is either granted asylum or not. As will be discussed in Part IV, the duress doctrine is thus helpful as a funneling device, taking the asylum bars out of contention from the outset.[93]

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88. *See id.* at 426–28. Sources included the Charter of the International Military Tribunal at Nuremberg, Statutes and jurisprudence of the ICTY and ICTR, and the provisions of the Rome Statute of the ICC.

89. R. v. Ryan, [2013] 1 S.C.R. 14 (Can.). Note that the availability of the defense does not mean it is terribly successful. Bond notes that of twenty cases where the defense was raised, 70% failed, most often because they lacked the required "imminence" to prevail in the six-part test. Bond, *supra* note 87, at 424–25.

90. Canada v. Maan, [2007] F.C. 583 (Can. Ont.).

91. *Id.* ¶ 9.

92. *Id.* ¶¶ 24–26.

93. *See infra* Part III.

New Zealand has focused on the individual's intent in duress (or coercion) cases, looking at whether the individual had a "shared common purpose" with the people directing them to commit the crimes.[94] One such case involved a Sri Lankan young man whom the Sri Lankan Army (SLA) forced (by credible death threats against him and remaining family members) to report on members of the Liberation Tigers of Tamil Elam (LTTE), which put those people at "grave risk of being tortured by the SLA."[95] The central issue for the court was "the *mens rea* ingredient and the degree of appellant's complicity in the actions of the LTTE and the SLA."[96] The court did "not consider that the appellant at any time shared a common purpose with either the SLA or the LTTE. He was coerced into providing assistance by both organisations. The LTTE threatened to kill him and his family."[97] The court engaged in no further analysis of components of duress, except to cite to the treatise by refugee law scholar James Hathaway that seeks the absence of intent where someone acted "only in order to avoid grave and imminent peril" that a reasonable person would believe was imminent and that the conduct was not "in excess of that which would otherwise have been directed at the person alleging coercion."[98]

The United Kingdom makes the duress defense an initial evidentiary burden to "raise a ground for excluding criminal responsibility" to see if the person actually comes under the application of the Refugee Convention's Exclusion Clauses[99] and applies the Rome Statute for substantive understanding of those clauses.[100] In 2016, the U.K.'s administrative Upper Tribunal issued a decision in *AB and The Secretary of State for the Home Department*.[101] The Tribunal considered both the Rome Statute and the *Erdemovic* case in grappling with duress. The case involved a former Iranian women's prison guard who, after a decade in lower level work, assumed a position where she transferred inmates over to the Intelligence Services, where they were presumably tortured.[102] She testified fearing that, "if she had left without permission[,] she would have been treated as a traitor, imprisoned, tortured and perhaps raped."[103] Citing

94. Refugee Appeal No. 74646, [2003] NZRSAA 261 ¶ 52 (June 26, 2003) https://forms.justice.govt.nz/search/Documents/IPTV2/RefugeeProtection/ref_20030626_74646.pdf [https://perma.cc/7PYR-5GUB]. *See generally* Rikhof, *supra* note 71.

95. *Refugee Appeal No. 74646*, [2003] NZRSAA ¶ 51.

96. *Id.* ¶ 52.

97. *Id.* ¶ 53.

98. *Id.* ¶ 54 (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 218 (1st ed. 1991)).

99. AB v. Sec'y of State for the Home Dep't, [2016] UKUT 00376 (IAC).

100. *Id.* [19].

101. *Id.* [82]–[83].

102. *Id.* [8]–[13].

103. *Id.* [16].

Rome Statute Art. 30(2),[104] the court found there were serious reasons to believe she had committed a crime against humanity and then turned to the question of duress as an excuse.[105] It found that *Erdemovic* was not binding and had been superseded by the Rome Statute.[106] Significantly, the court placed the burden on the Government to "establish that there are serious reasons for considering that the appellant did *not* act under duress."[107]

The U.K. court read Article 31 of the Rome Statute as having five components: (1) threat of imminent death or other serious harm; (2) threat made beyond the control of the applicant; (3) threat directed against the applicant or "some other" undefined person; (4) the applicant acted "necessarily and reasonably to avoid this threat;" and (5) the harm caused was not greater than the harm avoided (the proportionality requirement).[108] The particular applicant in *AB* failed to meet several aspects of this test, and her appeal failed, raising the important point—before this Article turns to duress in immigration law—that the existence of a duress defense clearly does not mean the defense will be *successful*. However, the ability to plead that defense decreases the chances that someone will be erroneously excluded from protection, against the intentions of the Refugee Convention.

II. DURESS INCOHERENCE IN IMMIGRATION LAW

This Part of the Article will consider the different areas where duress matters, in a descending order from most beneficial to the noncitizen, to least. Interestingly, two of those more preferential areas exist in the realm of the government's two longstanding high priorities for removal: people involved in *criminal* activity, and people engaged in *terrorist* activity. As will be shown, for these two groups the existence of duress matters greatly—a fact that is *implicit* in noncitizen engagement in the criminal legal system, and *explicit* in the context of the terrorism grounds of inadmissibility and removability. At the opposite end of the scale is the deeply puzzling realm of asylum law, where the mere idea of the duress doctrine is deeply contested. This section lays out the state of the duress doctrine in each area before turning to the rationales and methods for resolving this puzzle in the conclusion.

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104. *Id.* [21] ("For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." (quoting art. 30 of the Rome Statute)).

105. *Id.* [80].

106. *Id.* [52].

107. *Id.* [62] (emphasis added).

108. *Id.* [63].

A. A Descending Hierarchy of Duress

The descending hierarchy sketched out below rests upon two assessments. First, eligibility for immigration benefits is the ideal and avoiding removal proceedings is less ideal but still valuable for the noncitizen. Second, in looking at grounds of inadmissibility and deportability, it is better to meet an exception (and thus not have the ground apply at all) than to qualify to apply for a discretionary waiver. But both of these are better than legal scenarios where relief is foreclosed entirely. With those assessments in mind, this section looks at duress as the basis for a trafficking visa, duress as a limiting factor in crimmigration-based removals, duress as an exception and waiver to inadmissibility and removal grounds, and then denaturalization and asylum, where the relevance of duress remains contested.

1. Duress as a Basis for Relief: Human Trafficking

As discussed in the opening story about Ana, immigration law expressly provides a benefit to a subset of people who have endured duress: victims of "a severe form of human trafficking."[109] The Act defines this as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or *coercion*, or in which the person induced to perform such act has not attained 18 years of age; or
>
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or *coercion* for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[110]

Although the definition of a trafficking victim uses the word "coercion" and not "duress," the two terms are used interchangeably in criminal law to mean the same thing.[111] Notably, age functions as a proxy for duress in the definition of sex trafficking in Subsection A. While older victims of sex trafficking need to establish some aspect of force, fraud, or coercion in order to qualify as a victim of a severe form of trafficking, those below the age of eighteen qualify without making any such showing; their young age removes their culpability in commercial sex work and makes them victims rather than perpetrators.[112]

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109. INA § 101(a)(15)(T)(i)(I); 8 U.S.C. § 1101(a)(15)(T)(i)(I).

110. 22 U.S.C. § 7102(11) (emphasis added).

111. *See* United States v. Logan, 49 F.3d 352, 359 (8th Cir. 1995); State v. Baker, 197 P.3d 421, 427 (Kan. 2008).

112. Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 39–43 (2011) (tracing the

The benefits of meeting this definition are significant. A successful applicant for the "T" visa, which is available to victims of trafficking, will have a visa and work authorization for a four-year period.[113] In the fourth year, the applicant may apply for permanent residence, which puts them on the track to citizenship five years later.[114] Furthermore, the individual may initially receive an array of time-limited public benefits, from food stamps to public housing.[115]

How does duress show up in typical T visa cases? As in the story told at the outset, a nineteen-year-old forced (under threat of rape) by a gang member to engage in extortion or carry drugs could be defined by law enforcement as a trafficking victim and not as a perpetrator. The gang member has obtained her for involuntary servitude through coercion—a clear fit within the statutory eligibility requirements. She would also have to be willing to cooperate in a criminal investigation of his trafficking and show why returning to her home country would cause extreme hardship. Upon showing these things, she can earn the valuable T visa.

These visas are not limited to such dramatic stories. A domestic worker compelled by threats against her family members to work in her employer's office, where the employer commits Medicare fraud, would be a victim of trafficking and not be considered someone who aided and abetted fraud. An undocumented day laborer whose employer threatens him with his gun when he asks for a month of unpaid wages would be eligible to apply for a T visa, instead of being removable for having entered illegally. And a girl below the age of eighteen who engages in sex work at someone else's behest is defined as a victim of trafficking whether she perceived herself to be coerced or not. In each of these diverse cases, the duress the individuals experience is more significant than any illegal conduct that they engaged in under duress.[116]

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evolving understanding of minors' culpability in sex work); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2989–90 (2006).

113. *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 5, 2018), https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status [https://perma.cc/YNL6-6DY7].

114. *Id.*

115. *Id.*

116. *See, e.g.*, Elizabeth Keyes, *CASA of Maryland and the Battle Regarding Human Trafficking and Domestic Workers' Rights*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 14, 17 (2007). It is possible that the conduct (from illegal entry to prostitution) would need a waiver of inadmissibility for the visa to be granted, but in the author's extensive experience with T visa applications, waivers are more easily obtainable in that context than many others—precisely because any illegal conduct is usually linked to the trafficking itself.

2. Duress as a Means of Avoiding the Removal Process: "Crimmigration"

The intersection of criminal law with immigration law, known popularly as crimmigration, refers in large part to the ways that criminal conduct triggers a variety of immigration consequences.[117] While this might simply refer to how an arrest brings an individual to the attention of Department of Homeland Security, through the imposition of an immigration "detainer," it often refers to the way criminal conduct[118] makes an individual either inadmissible to the country (if never legally admitted before) or deportable (for all those who had been, at some point prior, legally admitted). Particularly for the latter category of people, the conduct might be the *only* basis the government has to remove someone, so for them to establish deportability, they must show that the conduct fits one of the criminal grounds of deportability—for example, showing that it was an "aggravated felony" (defined for immigration purposes at INA § 101(a)(43) and famously not required to be either aggravated *or* a felony) or that it was a Crime Involving Moral Turpitude committed within five years of entry, among others.[119]

Duress does not directly appear in any of the exceptions or waivers for these criminal grounds of inadmissibility or deportability. However, because those grounds are almost entirely based upon *convictions*, the duress defense is implicitly incorporated completely co-equivalent to how it shows up in criminal law (domestic or foreign, depending on where the conviction occurred).[120] For example, imagine someone arrested in New York and charged with committing the crime of assault in the first-degree, which requires intent and which would constitute an aggravated felony if the sentence imposed after a conviction were more than one year.[121] In the course of the criminal legal process, if the person establishes a duress defense, the charges might be dropped to a lesser crime with less severe

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117. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006). As described in the introduction, this term was coined by Professor Juliet Stumpf to encompass the myriad ways that the criminal legal system and immigration laws intersect.

118. *See generally* Alia Al-Khatib & Jayesh Rathod, *Equity in Contemporary Immigration Enforcement: Defining Contributions and Countering Criminalization*, 66 U. KAN. L. REV. 951, 954 (2018). The word "conduct" is carefully chosen because there are a number of ways that conduct, absent an arrest or conviction, is sufficient to bar individuals from securing status or fighting removal.

119. *See generally* INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii).

120. The criminal grounds of inadmissibility include criminal activity (not necessarily convictions) committed in the United States and other countries. INA § 212(a)(2); 8 U.S.C. § 1182(a)(2).

121. N.Y. PENAL LAW § 120.10 (McKinney 1996). For analysis of the immigration consequences, see REPRESENTING IMMIGRANT DEFENDANTS IN NEW YORK Appendix A (5th ed. 2011).

immigration consequences.[122] The individual who can avail themselves of the duress defense in the criminal proceeding will either avoid an immigration removal case or have much easier time in the immigration system as a result.[123]

The cases that reach Immigration Court through the criminal legal system thus already benefit from the duress defense to the extent that defense was available in the criminal case.

3. Duress as an Express Exception: The "Totalitarian Bar"

Another ground of inadmissibility to the U.S. applies to "any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign."[124] However, the statute provides two ways that an otherwise inadmissible immigrant could legally enter the United States: (1) an exception *specifically* for those whose membership "is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes"[125] and (2) the opportunity to apply for a waiver.[126]

With regard to the exception, not only is there this double safeguard built into this particular ground of inadmissibility, but for more than fifty years, courts have broadened the understanding of this exception even beyond the plain text. For example, a 2020 case discussed a Chinese woman who became a Communist Party member in China as an adult, believing it was the only way to get a job later. When U.S. Citizenship and Immigration Services (USCIS) denied her naturalization application, she argued both the express exception "membership for purposes of obtaining employment" and the "jurisprudential 'meaningful association' exception."[127] This jurisprudential line flows from cases like *Galvan v. Press*, in 1954, where the Court expressed discomfort with First Amendment issues as the United States attempted to deport Communists

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122. *Id.* I do not know what the typical alternate charge would be, or if a duress case would simply be dropped, but lesser assault offenses are not likely to rise to the level of aggravated felonies.

123. *See generally* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 129–51 (8th ed. 2019).

124. INA § 212(a)(3)(D)(i); 8 U.S.C. § 1182(a)(3)(D)(i).

125. *Id.* In *Rowoldt v. Perfetto*, Justice Frankfurter also read a kind of "de minimis" approach into the language of the preceding version of this statute, allowing a long-time permanent resident to stay in the United States despite his voluntary membership. Rowoldt v. Perfetto, 355 U.S. 115 (1957).

126. INA § 212(a)(3)(D)(iv); 8 U.S.C. § 1182(a)(3)(D)(iv).

127. Mingyu Zhu v. Miller, No. 3:19-CV-00035-AC, 2020 WL 1330235, at *3 (D. Or. Feb. 3, 2020), *report and recommendation adopted sub nom.* Crosby v. Miller, No. 3:19-CV-00035-AC, 2020 WL 1324996 (D. Or. Mar. 20, 2020).

in the 1940s and 1950s.[128] The Supreme Court was concerned with too broadly assigning culpability to Communist Party members, first reaching into the legislative history in *Galvan v. Press* to require a meaningful association,[129] and later redefining what membership itself meant even for self-identified party members in *Rowoldt v. Perfetto*.[130]

This lenient jurisprudence met with criticism at the time, in a dissent by Justice Harlan to *Rowoldt v. Perfetto*. Harlan wrote, "I regret my inability to join the Court's opinion, for its effort to find a way out from the rigors of a severe statute has alluring appeal. The difficulty is that in order to reach its result the Court has had to take impermissible liberties with the statute."[131] He paints a picture of a man who clearly knew he was a party member.[132] While Justice Harlan acknowledges the "severe consequences," and suggests that a Fifth Amendment Due Process argument might have been persuasive, he found that as a statutory matter, the Court had invented a result the statute did not permit.[133]

Professor Frickey has suggested that this, and other Warren-era jurisprudence, emerged in response to the excesses of the McCarthy era:

> These 1950s progenitors arose in a time of political hysteria about Communism that threatened to drag the Court, already vulnerable because of southern opposition to *Brown*, into a maelstrom of congressional reprisals that would have not merely overturned cases, but would have entrenched disturbing values into the public law and institutionally wounded the Court. By generally deciding these cases at the subconstitutional level through the rules of avoidance, the Court used techniques that might defuse political

128. Galvan v. Press, 347 U.S. 522, 522 (1954). Important dissents in the 1940s and 1950s also showed discomfort with the way that the executive branch was denying entry to suspected Communists. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 550 (1950) (Jackson, J., dissenting); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.").

129. *Galvan*, 347 U.S. at 527 ("Congress could not have intended to authorize the wholesale deportation of aliens who, accidentally, artificially, or unconsciously in appearance only, are found to be members of or affiliated with an organization of whose platform and purposes they have no real knowledge." (quoting 97 Cong. Rec. 2373)). The Court found the statute to be constitutional. *Id.* at 532.

130. 355 U.S. at 115.

131. *Id.* at 121 (Harlan, J., dissenting).

132. *Id.* at 125 ("The petitioner has freely admitted that he was a member of the Party for about a year; that he paid Party dues; that he attended Party meetings; and that he worked, without pay, in the Party bookstore, which he recognized as 'an official outlet for communist literature.' Beyond this, petitioner's testimony betrayed considerable, albeit rudimentary, knowledge of Communist history and philosophy.").

133. *Id.* at 126.

> opposition while incrementally adjusting public law to better respect individual liberty.[134]

While Professor Frickey does not include the *Rowaldt* case in his analysis, it certainly fits the argument. Notably, in *Galvan*, the majority questioned the wisdom of the statute, even while finding it constitutional.[135] And Justice Harlan's dissent in *Rowoldt* makes clear his view that the Court is trying to work around an ill-advised statute.[136] Regardless of the reasons, the leniency continues today, as illustrated famously by permitting First Lady Melania Trump's Communist Party-member parents to migrate as lawful permanent residents to the United States in 2018.[137]

4. Duress via Waiver: Terrorism-Related Inadmissibility Grounds

While the duress defense in crime-related removal cases emerges as an issue litigated (in most cases) before the individual faces removal as an additional consequence, the defense exists as an explicit exception for cases related to the so-called terrorism bars. Furthermore, this defense exists both as grounds of inadmissibility (the "Terrorism-Related Inadmissibility Grounds" or "TRIG" bar)[138] and deportability (an identical provision, applied to those who had been previously lawfully admitted whom the government is now seeking to deport).[139]

The terrorism bars are purposefully broad and cover a wide range of actions defined statutorily as "terrorist activity."[140] The statute also separately defines what it means to "engage in terrorist activity" and states material support as one of the prohibited activities, including "a safe house, transportation, communications, funds . . . or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training."[141] As a result, the Board of Immigration Appeals (Board)

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134. Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 401 (2005).

135. Galvan v. Press, 347 U.S. 522, 528 (1954) ("A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.").

136. *Rowoldt*, 355 U.S. at 121 (Harlan, J., dissenting).

137. Glenn Kessler, *What's the Immigration Status of Melania Trump's Parents?*, WASH. POST (Feb. 13, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/02/13/whats-the-immigration-status-of-melania-trumps-parents/?hpid=hp_rhp-more-top-stories_factchecker-325am:homepage/story [https://perma.cc/86YB-P7VY].

138. INA § 212(a)(3); 8 U.S.C. § 1182(a)(3).

139. INA § 237(a)(4); 8 U.S.C. § 1182(a)(4).

140. INA § 212(a)(3)(B)(iii); 8 U.S.C. § 1182(a)(3)(B)(iii).

141. INA § 212(a)(3)(B)(iv)(VI); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

has determined that even *de minimis* material support, like cooking and cleaning clothes for terrorists, justifies application of this ground of inadmissibility.[142]

Despite the likelihood that this broad interpretation could lead to harsh results, the Board, in 2016's *Matter of M-H-Z-*, rejected the idea that there is an implicit duress exception to any such activity. *Matter of M-H-Z-* considered the situation of a Colombian woman who provided food and merchandise from her store under threat from the Revolutionary Armed Forced of Colombia (FARC).[143] After reviewing federal court cases that had declined to find such an exception, the Board reasoned against an implied duress exception in two ways. First, a different part of the grounds of inadmissibility (in regard to membership in a totalitarian or Communist Party) *did* include a duress exception, and the Board reasoned that "[i]f Congress intended to make involuntariness or duress an exception for aliens who provided material support to a terrorist organization, it would reasonably be expected to have enacted a provision similar to that in [the totalitarian and communist provision] of the Act."[144] Second, the Board relied on the creation of a discretionary waiver of TRIG, "for deserving aliens to avoid the consequences of the bar."[145] Specifically, the Board reasoned that "the inclusion of the waiver was a means of balancing the harsh provisions of the material support bar and an indication that Congress's omission of ameliorative provisions in section 212(a)(3)(B) of the Act was intentional."[146] In other words, the waiver theoretically functions hand in hand with the harshness and breadth of the inadmissibility ground.

To understand the flexibility that exists in the context of terrorism (and which is as yet lacking in the presumably more sympathetic asylum context), it is important to examine how this waiver authority is exercised. Within the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has authority to grant waivers for material support provided to Tier III terrorist organizations,[147] and it may do so either for situational reasons or for entire groups. Between 2006 and September 2016, USCIS had granted 22,000 such waivers.[148] The

142. Matter of A-C-M-, 27 I. & N. Dec. 303 (B.I.A. 2018). *See generally* John Flud, *Duress and the Material Support Bar in Asylum Law: Finding Equity in the Face of Harsh Results*, 59 S. TEX. L. REV. 537 (2018) (examining the purpose for the bar, and the ways in which the procedure is flawed and leaves the waivers out of reach of many applicants).

143. Matter of M-H-Z-, 26 I. & N. Dec. 757 (B.I.A. 2016).

144. *Id.* at 761.

145. *Id.*

146. *Id.* at 762 (citing Matter of S-K-, 23 I. & N. Dec. 936, 941 (B.I.A. 2006)).

147. Defined at I.N.A. § 212(a)(3)(B)(vi); 8 U.S.C. § 1182(a)(3)(B)(vi).

148. Mica Rosenberg & Yeganeh Torbati, *Trump Administration May Change Rules that Allow Terror Victims to Immigrate to U.S.*, REUTERS (Apr. 21, 2017), https://www.reuters.com/article/us-

situational reasons focus on duress,[149] which USCIS guidance defines through a multi-factor analysis that largely tracks the definitions of duress in domestic and international criminal law and in international refugee law.[150] The factors include whether someone "reasonably could have avoided, or took steps to avoid" the action; the severity, imminence, and likelihood of harm that was threatened; and how direct the threat was (was it to the applicant, their family, or the community more generally).[151] USCIS has also designated approximately twenty groups as being exempt from these bars, ranging from the Oromo Liberation Front of Ethiopia to the Iraqi National Congress (INC), Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK).[152]

In immigration law, as in other areas of law, exceptions are more powerful than waivers for at least two reasons. First, they remove someone from the purview of a rule—the rule exists but does not apply to people covered by an exception. Second, they work automatically—if they are not included in the general rule, they do not need to engage in extra procedures to justify themselves. That second difference matters profoundly to the TRIG analysis because, while the duress waiver exists in the law, it is granted only as a matter of discretion and individual grants are limited.[153] As Judge Droney wrote in a concurrence to *Hernandez v. Sessions*:

> [T]he facts of this case, the nature of the discretionary waiver process, and the limited public information available regarding the waiver prevent me from concluding that the waiver system necessarily complies with the Protocol; indeed, these issues leave me with serious concerns that at least in some cases, the waiver

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usa-immigration-terrorism-exceptions/trump-administration-may-change-rules-that-allow-terror-victims-to-immigrate-to-u-s-idUSKBN17N13C [https://perma.cc/Z45F-U8XU].

149. Interoffice Memorandum from Jonathan Scharfen, Deputy Dir., U.S. Citizenship & Immigr. Servs., to Assoc. Dirs. and Chief Couns., U.S. Citizenship & Immigr. Servs., and Chief, Off. of Admin. Appeals, Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorists (May 24, 2007) [hereinafter USCIS Interoffice Memorandum], https://www.uscis.gov/sites/default/files/files/pressrelease/MaterialSupport_24May07.pdf [https://perma.cc/D25D-S33B].

150. *See id.* §§ I(B), (C).

151. USCIS Interoffice Memorandum, *supra* note 149, at 5.

152. *Terrorism-Related Inadmissibility Grounds—Exemptions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 19, 2019), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig/terrorism-related-inadmissibility-grounds-exemptions [https://perma.cc/RCJ3-4EZ3].

153. As of 2015, the total number of grants given since the program's inception was approximately 6,300 (USCIS did not provide data on how many were requested, so there is no percentage approval rate available). *USCIS Provides TRIG Statistics from 8/13/15 Meeting*, AM. IMMIGR. LAW. ASS'N, https://www.aila.org/infonet/uscis-trig-statistics-from-08-13-15-meeting [https://perma.cc/JP3G-ND52].

> system does not comply with our treaty obligations and Congress's intent to create an effective waiver system.[154]

Nonetheless, at least in theory, a waiver does exist for those swept under the broad terrorism bars—a waiver that does not exist in the contexts that follow.

5. Duress Debated: Denaturalization

Much of the remaining contest over the role of duress in immigration law stems from the legacy of *Fedorenko v. United States*.[155] Fedorenko was an armed guard at the Treblinka Death Camp in Poland who came to the United States as a refugee under the Displaced Persons Act (DPA).[156] At that time, he failed to disclose his time at the Treblinka Camp.[157] He later became a U.S. citizen, but when his work at Treblinka came to light, the U.S. Government commenced denaturalization proceedings because he had assisted the enemy in civilian persecutions, and under section 2(a) of the DPA, he was ineligible to naturalize.[158] In these proceedings, Fedorenko admitted to his work at Treblinka and further admitted to shooting at escaping inmates.[159] But he claimed that his service as a guard was coerced (the factual record on the level of coercion is mixed, at best).[160]

The Supreme Court upheld the denaturalization and dismissed the availability of a duress defense.[161] The Court interpreted the DPA to reach its conclusion that Congress had not meant to distinguish between voluntary and involuntary assistance.[162] In *Fedorenko*, the Court did not hold that duress never mattered. Instead, it compared two side-by-side provisions of the DPA to show that one omitted the word "voluntarily" and the other used it. The Court writes:

> Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b), which excludes only those

154. Hernandez v. Sessions, 884 F.3d 107, 115 (2d Cir. 2018) (Droney, J., concurring).

155. Fedorenko v. United States, 449 U.S. 490 (1981). The Court, in *Negusie v. Holder*, 555 U.S. 514 (2009), declined to extend the holding in *Fedorenko*.

156. *Fedorenko*, 449 U.S. at 494–96; Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).

157. *Fedorenko*, 449 U.S. at 496.

158. *Id.* at 497–98; Pub. L. 80-774, 62 Stat. 1009 (1948).

159. *Fedorenko*, 449 U.S. at 512 n.34.

160. *Id.* at 496.

161. *Id.* at 518.

162. *Id.* at 512 ("Under traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.").

> individuals who "*voluntarily* assisted the enemy forces . . . in their operations . . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from § 2(a) compels the conclusion that the statute made all those who assisted in the persecution of civilians ineligible for visas.[163]

This decision has received criticism on its own merits as a philosophical matter concerning moral responsibility. Shortly after the decision was issued, lawyer Abbe Dienstag wrote that the Court "blindly encountered-and blithely ignored-another issue of profoundly greater moral consequence. The question of whether individuals are to be held accountable for capital crimes committed under life-threatening circumstances is one that has engaged legal scholars for centuries."[164] Moreover, Professor Stephen J. Massey adds, "Rather than openly acknowledge that it was making a moral decision regarding the level of moral responsibility necessary to find that an individual has met the legal standard, the Court pretended that its conclusion was dictated by neutral arguments of statutory construction."[165]

Dienstag notes how this marked a dramatic divergence from prior denaturalization (or "expatriation" law) where voluntariness had always been a factor.[166] Perhaps the Court itself recognized this implicitly, in oft-quoted footnote 34,[167] where it emphasized the need to focus "on whether particular conduct can be considered assisting in the persecution of civilians."[168] The Court immediately continues with this particularized analysis of Fedorenko's culpability, comparing him (unfavorably) to someone whose conduct was much less grave:

> Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on

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163. *Id.*

164. Abbe L. Dienstag, Fedorenko v. United States*: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 130–31 (1982) ("The issue remains unsettled though the weight of contemporary scholarship accords considerable sympathy to the accused in such circumstances.").

165. Massey, *supra* note 32, at 116.

166. Dienstag, *supra* note 164, at 134 n.49 ("Before *Afroyim*, the Supreme Court had long held that in order to result in loss of citizenship the statutorily prescribed expatriating acts had to be voluntarily performed.").

167. *Fedorenko*, 449 U.S. at 512 n.34.

168. *Id.*; *see also* Laufer, *supra* note 29, at 456–67; Petkiewytsch v. INS, 945 F.2d 871, 880 (6th Cir. 1991) (emphasizing the need for particularized analysis of conduct).

> orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems, but we need decide only this case.[169]

Once the BIA began applying the *Fedorenko* decision, the import of this footnote faded, and the emphasis on case-by-case line drawing was replaced with "a form of strict liability" in the assessment of Professor Kate Evans.[170] In *Matter of Laipenieks*, the Government was seeking to deport a Latvian man who had joined the Nazis in 1941 to help identify Communists in Communist-occupied Latvia.[171] He interrogated suspected Communists, and did not otherwise harm them, but he did know the interrogations resulted in persecution for some of those identified as Communists.[172] "[The BIA] crafted a rule," writes Evans, "that looks only to the 'objective effects' of an individual's actions, not his intent, level of participation, ability to avoid harming others, nor even his knowledge of the effect of his actions."[173]

In her view, this strict liability is all the worse because her research casts doubt on the correctness of *Fedorenko* as a historical matter.[174] Professor Evans also shows that international legal history favors reading a duress exception into the persecutor bar, even in the context of the DPA and the Constitution of the International Refugee Organization (IRO) whose provisions were adopted "wholesale" in the DPA.[175] Specifically, she explores the history of the provision and explains why one provision references voluntariness, and not the other—simply put, voluntariness was already presumed to be part of the meaning of "persecution," but it needed forceful articulation in the conscription context because the Soviet Union and Eastern Bloc wanted recruits to be exempted from protection, that they might be repatriated back to the Eastern Bloc:

> Over the objections of the Eastern bloc countries, the word "voluntarily" was used to ensure that conscripted soldiers and prisoners of war would not be forced to return to their home countries if they had political objections to the governments in place after the war. In contrast, the term "persecution" had already acquired a common meaning from its use in prior refugee documents. The isolated use of the term "voluntarily" does not reflect a policy choice to exclude all who assisted in the

169. *Fedorenko*, 449 U.S. at 512 n.34.
170. Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453, 470–73 (2016).
171. Matter of Laipenieks, 18 I. & N. Dec. 433 (B.I.A. 1983).
172. *Id.* at 451–52.
173. Evans, *supra* note 170, at 470 (quoting *Laipenieks*, 18 I. & N. Dec. at 433).
174. *Id.* at 478–86.
175. *Id.* at 477.

> persecution of others from IRO coverage, regardless of circumstance, because the term "persecution" already required deliberate, intentional, and direct action.[176]

Moreover, in implementation of the IRO, the persecutor exclusion did not apply to any person who claimed they were a victim of Nazis or other fascist regimes.[177] She concludes that "evidence of individual innocence in the actions of the group was a defense and victims were not considered persecutors. Consequently, the bar applied only to individuals who took specific and direct action to cause the persecution of others or to benefit from it."[178]

Why does this World War II era statute, interpreted in the context of a 1981 denaturalization case, matter? Because the Government invokes *Fedorenko* as dispositive in the context of the Immigration and Nationality Act.[179] When a decision is based upon statutory interpretation, it is necessarily limited to the statute in question. The Government's sweeping embrace of *Fedorenko* in relation to the INA is simply wrong, as the Supreme Court eventually made clear in *Negusie v. Holder*, discussed in the following section.[180]

B. Duress Unresolved: Bars to Asylum

1. Infirmities of Administrative Common Law in Immigration

Before turning to the current unresolved issues in asylum law, it is vital to understand some unusual features of how administrative common law is created in the immigration law context.[181] Immigration judges, who form the first line of interpretation of the Immigration and Nationality Act and accompanying regulations, are administrative law judges within the Department of Justice (DOJ), and they serve at the pleasure of the Attorney General.[182] The appeals body, the BIA, likewise sits within DOJ and is

176. *Id.* at 486.

177. *Id.* at 499.

178. *Id.* at 510.

179. Matter of Negusie, 28 I. & N. Dec. 120 (A.G. 2020); Brief for the Respondent at *8–10, Negusie v. Mukasey, 552 U.S. 1255 (2008) (No. 07-499).

180. Negusie v. Holder, 555 U.S. 511, 520 (2009).

181. The phenomenon of "administrative common law" has been well explored in the scholarship. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Henry J. Friendly, Book Review, *Administrative Law Treatise (2d ed. Volumes 1 & 2). By Kenneth Culp Davis*, 8 HOFSTRA L. REV. 471 (1980).

182. 8 U.S.C. § 1101(b)(4) ("The term 'immigration judge' means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties

frequently the last court to review a decision.[183] The vulnerability to politicization shared by the immigration judge corps and the BIA is well understood; scandals erupted during the George W. Bush Administration[184] and are simmering in 2020 as well.[185] Writing on the politicization of this administrative law agency, Professor Maureen Sweeney adds that:

> Sessions was not subtle in reminding judges and Board Members that they served at his pleasure and were expected to implement his decisions. In his certified decisions, he explicitly emphasized the "extraordinary and pervasive role" that the Attorney General has over immigration matters as "virtually unique" and the power accorded him as "an unfettered grant of authority" including "broad powers."[186]

But even more critical for this issue is the unusual regulatory power the Attorney General has to refer BIA decisions to him or herself.[187] Should there be a decision from the BIA that the Attorney General disagrees with, they may refer the case from the BIA to themselves for a different result (or to offer different reasoning). This power is well-settled,[188] and has found a strong advocate in the Administrative

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as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.").

183. This is partly because Congress narrowed the right to appeal to federal circuit courts in 1996, but it is also for at least two other reasons. First, there is no guarantee of a stay of removal during the federal appellate process. Second, circuit court litigation is expensive and beyond the financial abilities of many immigrants.

184. DOJ led an investigation into the politicized hiring practices done by, among others, Monica Goodling. U.S. DEP'T JUST., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 1 (2008), https://www.justice.gov/opr/page/file/1206586/download [https://perma.cc/HE4S-CJYH].

185. *See* Joel Rose, *Senate Democrats Accuse Justice Department of Politicizing Immigration Courts*, NAT'L PUB. RADIO (Feb. 13, 2020), https://www.npr.org/2020/02/13/805657208/senate-democrats-accuse-justice-department-of-politicizing-immigration-courts [https://perma.cc/TBT6-JQQX]; Lorelei Laird, *Whose Court Is This Anyway? Immigration Judges Accuse Executive Branch of Politicizing Their Courts*, AM. BAR ASS'N J. (Apr. 1, 2019), https://www.abajournal.com/magazine/article/immigration-judges-executive-politicizing-courts [https://perma.cc/HC8E-GQKH].

186. Maureen A. Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 141 (2019) (quoting Attorney General Sessions opinion in *Matter of A-B-*, 27 I. & N. Dec. 316, 323–24 (A.G. 2018)).

187. 8 C.F.R. § 1003.1(h)(1)(i) (2020) ("The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.").

188. *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458 (2007).

> Among the strongest defenses of agency head review were the 1992 Administrative Conference recommendations on the federal administrative judiciary and the comprehensive consultants' report on which they were based. Both documents repeatedly extolled the benefits of agency head review, portraying it as a way for agency heads to

Conference of the United States.[189] Professor Margaret Taylor describes how the power conflicts with a familiar "core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome."[190] Professor Taylor notes, however, that "[a]djudication within executive branch agencies has long been a controversial exception to this model."[191] In particular, Professor Legomsky, later General Counsel to USCIS during the Obama Administration, has criticized the practice, stating that it "entails the substitution of one person's judgment for the collective judgment of several adjudicators. And the probability that a strong ideological bias will influence the result is greater when one person is deciding."[192] Professor Legomsky prefers the restraint of rule-making to the case-by-case power that referral permits, undermining the independence of the immigration judges.[193] More recently, Professor Sweeney has pointed to this process as one of many reasons why such decisions should receive extremely limited, if any, deference under *Chevron*.[194] She describes how, "as the head of the Justice Department, the Attorney General has considerable power to influence the immigration court system in a number of strikingly direct ways, from the bureaucratic to the jurisprudential."[195] Professor Richard Frankel likewise takes issue with the application of *Chevron* deference to such decisions, writing that "*Chevron* deference should not apply because none of the three primary justifications for *Chevron* deference—procedural formality, specialized expertise, or democratic accountability—are present in Attorney General immigration decisions."[196]

> assure inter-decisional consistency and to maintain control over basic policy at the same time.

Id.

189. Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310). However, that same document also states the importance of *independent* administrative law judges: "The need for impartial factfinders in administrative adjudications is evident. To ensure the acceptability of the process, some degree of adjudicator independence is necessary in those adjudications involving some kind of hearing." *Id.* at 61,760.

190. Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 19 (2016).

191. *Id.*

192. Legomsky, *supra* note 188, at 461.

193. "These arguments are not generically compelling, however, and they seem especially vulnerable in the asylum context. Inter-decisional consistency, while important for all the reasons acknowledged in Part II of this Article, does not require the agency head's intrusion into the adjudicative process." *Id*. at 458.

194. *See* Sweeney, *supra* note 186, at 136–46.

195. *Id.* at 138.

196. Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference*, 54 U.C. DAVIS L. REV. 547, 547–48 (2020).

This power, which has been used at an unusually high rate during the Trump Administration,[197] is the reason for the current instability in the state of the duress doctrine in asylum law, as the next section illustrates.

2. The Persecutor Bar: The *Negusie* Cases

The Refugee Convention[198] and subsequent Protocol[199] prohibit states from returning people to countries where they face a well-founded fear of persecution. This obligation, known as *nonrefoulement*, is a minimal obligation and manifests in U.S. law as "withholding of removal": a promise of non-deportation, and nothing more.[200] Asylum is a more preferential status, as it places individuals on a path toward citizenship which is more than the Refugee Convention requires. Because it goes beyond the Convention's minimum requirements, asylum status is subject to certain limits and bars.[201] It is discretionary relief,[202] which means that criminal convictions typically disqualify people from asylum; applicants must apply for it within their first year in the United States; and the law bars asylum for people who have committed serious nonpolitical crimes or who have been persecutors of others.[203] These last two bars to asylum are also bars to withholding of removal; unfortunately, this is where the availability of duress is utterly unresolved.

The Supreme Court took up this issue in *Negusie v. Holder* in 2009.[204] Mr. Negusie, an Eritrean man, had been denied both asylum and withholding of removal because of the persecutor bar. Negusie had been

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197. As of October 2019, not quite three years into one term, Attorneys General certified cases to themselves nine times (Sessions four times, and Barr five). By contrast, in two terms, the Bush Administration did this sixteen times, the Obama Administration did so four times, and the Clinton Administration three times. Adiel Kaplan, *AG Barr Issues 2 Decisions Limiting Ways Immigrants Can Fight Deportation*, NBC (Oct. 29, 2019), https://www.nbcnews.com/politics/immigration/ag-barr-issues-2-decisions-limiting-ways-immigrants-can-fight-n1073026 [https://perma.cc/RSR7-BS92].

198. United Nations Convention Relating to the Status of Refugees, art. 33, ¶ 1, July 28, 1951, 189 U.N.T.S. 137.

199. United Nations Protocol Relating to the Status of Refugees, art. 1, ¶ 1, Jan. 31, 1967, 606 U.N.T.S. 267.

200. INA § 241(b)(3); 8 U.S.C. §§ 1231(b)(3)(A)–(E). For a comparison of asylum and withholding of removal, see generally U.S. DEP'T OF JUST., FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS (2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf [https://perma.cc/YW4H-NPTB].

201. INA § 208(a)(2); 8 U.S.C. § 1158(a)(2).

202. INA § 208(b)(1)(A); 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum . . . ." (emphasis added)); *cf.* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3) ("Notwithstanding paragraphs (1) and (2), the Attorney General *may not* remove an alien . . . ." (emphasis added)).

203. INA §§ 208(a)(2)(B), (b)(2)(A)(ii), (b)(2)(A)(iii); 8 U.S.C. §§ 1158(a)(2)(B), (b)(2)(A)(ii), (b)(2)(A)(iii).

204. Negusie v. Holder, 555 U.S. 511 (2009).

incarcerated and tortured by the Eritrean Government, and when released after two years, they forced him to work for four years as a prison guard:

> It is undisputed that the prisoners he guarded were being persecuted on account of a protected ground—i.e., "race, religion, nationality, membership in a particular social group, or political opinion." [Negusie] testified that he carried a gun, guarded the gate to prevent escape, and kept prisoners from taking showers and obtaining fresh air. He also guarded prisoners to make sure they stayed in the sun, which he knew was a form of punishment. He saw at least one man die after being in the sun for more than two hours. [Negusie] testified that he had not shot at or directly punished any prisoner and that he helped prisoners on various occasions.[205]

In upholding the denial of asylum and withholding of removal, the Board of Immigration Appeals relied upon the *Fedorenko* decision.[206] The Court questioned this reliance, noting that *Fedorenko* addressed "a different statute enacted for a different purpose"[207] and contrasted the DPA at issue in *Fedorenko* with the Refugee Act.[208] First, the Court looked at the statutory language and found that unlike the DPA, this bar does not mention voluntariness anywhere, so the statutory interpretation must necessarily be different.[209] Second, the Court contrasted the contexts and purpose of the two laws:

> Congress enacted the DPA in 1948 as part of an international effort to address individuals who were forced to leave their homelands during and after the Second World War. The DPA excludes those who "voluntarily assisted the enemy forces since the outbreak of the second world war," as well as all who "assisted the enemy in persecuting civil populations of countries." The latter exclusion clause makes no reference to culpability . . . . The persecutor bar in this case, by contrast, was enacted as part of the Refugee Act of 1980. Unlike the DPA, which was enacted to address not just the postwar refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons.[210]

205. *Id.* at 515 (internal citations omitted).
206. *Id.* at 514.
207. *Id.* at 520.
208. *Id.* at 522–23.
209. *Id.* at 519.
210. *Id.* at 520 (internal citations omitted).

The Court held that *Fedorenko* did not control interpretation of the persecutor bar in the Refugee Act: "The BIA is not bound to apply the *Fedorenko* rule that motive and intent are irrelevant to the persecutor bar at issue in this case. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency."[211]

Applying *Chevron* deference, the Court remanded the case to the BIA to do the required statutory interpretation.[212] Nine years later, the BIA issued its decision in *Matter of Negusie*.[213] The BIA found that the implicit duress exception is a permissible and desirable reading of the statute:

> Recognizing a narrow duress exception is reasonable because it fulfills the purposes of the persecutor bar and the overall purposes of the Refugee Act. A narrow duress exception is also consistent with the purposes and implementation of the Convention and Protocol. And it is the best of the permissible approaches.[214]

In reaching this decision, the BIA applied the statutory interpretation requested by the Supreme Court and gave particular weight to the observation "that Congress enacted the Refugee Act to bring United States law into conformity with the Convention and the Protocol."[215] After going through extensive legislative history, the BIA also recognized "that Congress intended that the persecutor bar be interpreted in a way that not only comports with our obligations under Article 1F(a) of the Convention but also reflects the international understanding of those obligations."[216]

The BIA adopted a five-element test for the existence of duress that an applicant needs to show by a preponderance of the evidence:

> [T]hat he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others. Only if the applicant establishes each element by a preponderance of

211. *Id.* at 522–23.
212. *Id.* at 523–25.
213. Matter of Negusie, 27 I. & N. Dec. 347 (B.I.A 2018).
214. *Id.* at 353.
215. *Id.*
216. *Id.* at 356.

> the evidence would it be appropriate to consider whether the duress defense applies.[217]

This definition adheres closely to the versions established internationally and in domestic criminal law, described in Part I. The only addition here is the fourth element—the "assumption of the risk" principle that some, but not all, U.S. circuits have adopted in the criminal setting.[218] Within the predictable range of duress definitions, it is at the narrower, more restrictive end of those definitions but well within the range.

Shortly after the BIA issued its thoughtful decision, then-Attorney General Sessions certified *Negusie* to himself in *Matter of Negusie*. As expected, when the next Attorney General finally issued his decision in 2020, it reversed the Board, spinning an alternative interpretation wherein statutes (like the DPA at issue in *Fedorenko*) play a far more compelling role than international law.[219] Future litigation is all but assured if this Attorney General opinion endures past the Trump Administration.

3. Expanding *Negusie* to the Serious Nonpolitical Crimes Bar

The bar to asylum for those who have committed serious nonpolitical crimes is distinct, of course, from the persecutor bar. Nonetheless, because it exists within the same part of the same law (the Refugee Act of 1980), the Supreme Court's reasoning in *Negusie* must apply equally—i.e., whether duress is a permissible consideration for this bar must be addressed as a matter of statutory interpretation of *this* particular statute.[220] As with the BIA's decision in the remanded *Negusie* case, there are strong grounds to argue that the statute does permit an implied duress exception.[221]

These arguments benefit substantially from the traditional reliance upon international law that is a core aspect of asylum jurisprudence in the United States. Under the foundational *Schooner Charming Betsy* code of statutory interpretation, formulated by Chief Justice John Marshall, "an act

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217. *Id*. at 363.

218. *See* cases cited *supra* note 51 and accompanying text.

219. Matter of Negusie, 28 I. & N. Dec. 120 (A.G. 2020).

220. The Second Circuit adopted such reasoning in Nderere v. Holder, 467 F. App'x 56, 58–59 (2d Cir. 2012) (considering the "particularly serious crime" bar to withholding of removal).

221. Massey contrasts individual criminal culpability with the organizational behemoth required for Nazi persecution.

> The paradigm of criminal responsibility is the individual actor who has individually harmed identifiable persons. Even when there is more than one actor and a differentiation of roles between principals and accomplices, the number of individuals involved is usually small. The harm the Nazis wrought, however, was of necessity accomplished by an organized effort integrating the actions of many individuals who themselves occupied different roles in a variety of organizations.

Massey, *supra* note 32, at 136.

of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[222] Equally importantly, Congress explicitly understood the Refugee Act of 1980 as comporting with treaty obligations under the U.N. Refugee Convention, and the United Nations Protocol Relating to the Status of Refugees.[223] The BIA has recognized this as well,[224] while it is equally true that the influence is at the persuasive and not binding level.[225] As a result, U.S. refugee and asylum case law is replete with examples of reliance upon international interpretations of issues relating to the Refugee Convention and Refugee Protocol, including the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (UNHCR Handbook).[226] In his decision in the certified *Negusie* decision, Attorney General Barr emphasizes the non-binding nature of such guidance, noting that "our international agreements do not compel" particular interpretations,[227] but his view of how persuasive such agreements are is far from unanimous.

In one of the few cases to consider the serious nonpolitical crimes bar, the Ninth Circuit stated that "[s]ince the only clear signal that can be gleaned from the legislative history is that Congress intended the nonpolitical crimes exception to withholding of deportation to be consistent with the Convention and Protocol, we *must* look first to those documents for guidance."[228] And the BIA itself noted in the *Negusie* remand that"[c]ertain provisions of the Act obviously correspond to those in the Convention because the language is the same. For example, the 'serious nonpolitical crime' provisions of sections 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) of the Act correspond to Article 1F(b) of the

222. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

223. *See* S. REP. NO. 96-256, at 4 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 144 ("[T]he new definition will bring United States law into conformity with our international treaty obligations under the . . . [Refugee Convention] which is incorporated by reference into United States law through the Protocol"); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [U.N. Refugee Protocol] . . . .").

224. *See, e.g.*, Matter of Rodriguez-Palma, 17 I. & N. Dec. 465, 468 (B.I.A. 1980) ("The Conference Report which accompanied the final version of the Refugee Act of 1980 indicates that it was Congress' intent that the provisions of section 243(h) be construed consistently with the Protocol.").

225. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) ("The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.").

226. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 439 (using the UNHCR Handbook to interpret the definition of "refugee"); Matter of Acosta, 19 I. & N. Dec. 211, 221 (B.I.A. 1985) (noting that the UNHCR Handbook is a "useful tool" in interpreting the United States' obligations).

227. Matter of Negusie, 28 I. & N. Dec. 120, 143 (A.G. 2020).

228. McMullen v. INS, 788 F.2d 591, 595 (9th Cir. 1986) (emphasis added).

Convention."[229] The BIA in *Negusie* continued by writing that "Congress intended that the persecutor bar be interpreted in a way that not only comports with [its] obligations under Article 1F(a) of the Convention but also reflects the international understanding of those obligations."[230] As established in Part I.C, international refugee law resoundingly recognizes the duress defense with only modest variations in the limitations of the defense.

The clear existence of a duress defense in related contexts perhaps explains the unstated analysis that has occurred around the serious nonpolitical crimes bar to date. The Sixth Circuit acknowledged a possible duress defense, although it declined to apply it in the case itself. *Urbina-Mejia v. Holder* concerns a young Honduran man who joined a gang after they beat him severely.[231] As a gang member, he engaged in extortion for the gang, which the immigration judge found to be a serious nonpolitical crime, despite his claims of coercion. The BIA did consider the claim of duress but agreed with the Immigration Judge who said he had a "fair amount of autonomy,"[232] making the duress argument unpersuasive. The Sixth Circuit upheld that finding.[233] As Professor Marouf observes, "While *Urbina-Mejia* shows that the BIA and Sixth Circuit were willing to consider an argument resembling a common law duress defense, the decision makes no reference to the elements for establishing duress and never mentions the common law."[234] Nonetheless, while it was a very light treatment of the defense, there appears to have been shared agreement from the immigration judge level up to the circuit court that the duress defense *could* exist, even if it failed here as a factual matter.

The BIA also opened the door to a possible duress defense in *Matter of E-A-*, again finding it inapplicable factually to the case before it. Specifically, in *E-A-*, the applicant's fears of harm were too speculative for the defense to be persuasive: his "generalized fear is not sufficient to show that he would have suffered any dire consequences."[235] While not tying this analysis to a specific standard, the BIA was invoking two elements of the widely accepted duress doctrine: that there be imminent harm and that the consequences be akin to "an unlawful threat of imminent death or serious bodily injury."[236]

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229. Matter of Negusie, 27 I. & N. Dec. 347, 355 (B.I.A. 2018).
230. *Id.* at 356.
231. Urbina v. Holder, 597 F.3d 360, 362 (6th Cir. 2010).
232. *Id.* at 363.
233. *Id.*
234. Marouf, *supra* note 33, at 189.
235. Matter of E-A-, 26 I. & N. Dec. 1, 8 (B.I.A. 2012).
236. United States v. Bailey, 444 U.S. 394, 409 (1980).

To the extent that duress is recognized in immigration case law, the duress defense occurs at the third level of analysis—after other legal findings are made. The first level is whether the crime rises to the level of atrociousness needed to qualify as a serious nonpolitical crime.[237] In *INS v. Aguirre-Aguirre*, the Supreme Court supported the BIA's test, which balances the political aspects of a crime and its "common-law character,"[238] inquires about disproportionality between the two, and "whether the acts are atrocious."[239] This focus on atrociousness, as opposed to mere criminality, resonates with the seriousness that UNCHR has articulated:

> [Article 1F] excludes persons whose past criminal acts in another jurisdiction are especially egregious. The "seriousness" of a crime may depend on such factors as the extent of physical or property harm it causes, and the type of penal sentence it attracts within the particular legal system. Rape, homicide, armed robbery, and arson are examples of offences which are likely to be considered serious in most States.[240]

In other contexts, a related argument would be that the underlying crime was political.[241] However, this Article is concerned primarily with acts committed under duress, not acts committed intentionally for political reasons.

The second level of analysis is whether there are "serious reasons for believing"[242] a crime was committed. The Government has the burden to prove a "probable cause" exists that the asylum-seeker committed a crime, not that the asylum-seeker was convicted.[243] The Government will typically meet that burden through the applicant's own answers to the asylum application, which requests such information.[244] The "serious reason" language comes directly from the Refugee Convention, and its intent was to ensure that asylum-seekers not be erroneously excluded from

237. INS v. Aguirre-Aguirre, 526 U.S. 415, 422 (1999).

238. *Id.* at 416.

239. *Id.*

240. The Exclusion Clauses, *supra* note 77, ¶ 16.

241. Matter of McMullen, 19 I. & N. Dec. 90, 97–98 (B.I.A. 1984) ("In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.").

242. INA § 208(b)(2)(A)(iii); 8 U.S.C. § 1158(B)(2)(a)(iii).

243. Matter of E-A-, 26 I. & N. Dec. 1, 3 (B.I.A. 2012).

244. *Id.*

Convention coverage.[245] The probable cause standard marks an area of departure from the international standards, which are more protective.[246]

It is only at the third stage of analysis that a duress analysis would exist—as a kind of waiver after a court finds that there are serious reasons to consider that the bar applies. As the next section discusses, there are sound reasons to consider duress in the first stage of analysis.

III. A NEW FRAMEWORK: TOWARD A UNIFORM APPLICATION OF THE DURESS DOCTRINE

This section of the Article provides a new framework for the duress doctrine in immigration law. It will consider two possibilities for creating uniformity: statutory solutions and judicial applications. The statutory solution would create a duress standard common to all immigration cases, positioning the duress analysis *first* in considering whether any immigration consequences might exist. The judicial improvement in how a judge's familiarity with the elements of the five-part test for duress will create a more uniform application and resolution of cases.

A. Statutory Solutions

The creakiness of the immigration statute is a well-known, well-studied problem. The basic 1952 framework has absorbed, over the decades, concern for Civil Rights[247] and asylum-seekers,[248] and anxieties about undocumented immigrants in the workplace,[249] fraud,[250] crime,[251]

245. "Although the application of the exclusion clause does not require a 'determination of guilt' in the criminal justice sense, and therefore, the standard of proof required would be less than 'proof of guilt beyond reasonable doubt', [sic] it must be sufficiently high to *ensure that refugees are not erroneously excluded*." U.N. HIGH COMM'R FOR REFUGEES, UNHCR STATEMENT ON ARTICLE 1F OF THE 1951 CONVENTION 10 (2009) (emphasis added), https://www.refworld.org/pdfid/4a5de2992.pdf [https://perma.cc/7HPY-ZKXX].

246. Canada seeks "compelling and credible information," and the United Kingdom seeks "clear and credible" or "strong" evidence, requiring "the considered judgment of the decision-maker." Frances Webber, *Exclusion from Refugee Status under Article 1F of the Convention*, RIGHTS IN EXILE PROGRAMME, http://www.refugeelegalaidinformation.org/exclusion-refugee-status-under-article-1f-convention [https://perma.cc/GFD7-3Z2S] (citing Mugesera v. Canada, [2005] 2 S.C.R. 100 (Can.); Al-Sirri v. Sec'y of State for Home Dep't, [2012] UKSC 54).

247. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

248. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

249. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

250. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

251. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

welfare,[252] and terrorism.[253] The experience of amending the INA has been one of subject-by-subject changes with no conceptual overhaul.[254]

Beyond the incoherence that plagues the INA currently, the power of the Attorney General to act independently of their own Board of Immigration Appeals makes a more architecturally coherent law from Congress vital. As it is, described in Part II.B, the Attorney General has the unique power to resolve some of the most difficult and unsettled issues in immigration law at their discretion. Professors Sweeney and Frankel have compellingly argued that such decisions merit little or no deference under *Chevron*, and litigation of certified decisions—including the newly-issued *Negusie* decision—may prove them right.[255] But clear guidance from Congress is preferable. To properly overhaul the INA and create a uniform approach to immigration law, three statutory solutions are necessary from Congress.

1. A Common Duress Standard

The standard for duress elaborated in the remanded *Negusie* decision provides an excellent basis for testing how uniformity might work. That five-part test fits well within the bounds of tests used in domestic criminal law[256] and in international refugee law.[257] While the five-factor test forms a relatively narrow understanding of the duress doctrine, the test is well within the bounds of what jurisprudence across diverse fields has developed. The standard would give adjudicators the ability to make case-by-case determinations about everything from trafficking to terrorism, with clear guideposts, but with flexibility to avoid absurd results.

Returning to the introduction's story, would Ana meet the *Negusie* test for duress? For the first element, she acted under an imminent threat of serious bodily injury to herself. For the second element, she reasonably believed that threat would be carried out, because it had been carried out before. She had no reasonable opportunity to escape, and her past attempts at escape had failed, meeting the third element. She knew that carrying

252. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110. Stat. 2015.

253. Homeland Security Act of 2002, Pub. L. No. 107-296, tit. V, § 503, 116 Stat. 2135 (codified 6 U.S.C. § 101).

254. Congress came closest to such an overhaul in 2013, but the proposal for comprehensive immigration reform only passed the Senate; House leadership never brought the bill to a vote. *See generally* Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 915–24 (2014).

255. Sweeney, *supra* note 186; Frankel, *supra* note 196.

256. *See supra* Part I.B.

257. *See supra* Part I.C.2.

drugs was not a greater harm than the harm she herself would experience, which meets the fifth element.

The fourth element, "assumption of the risk," places this test on the narrower end of the duress doctrine, which is more challenging, and needs more facts than were given in the introduction. Did Ana place herself in a "situation in which [s]he knew or reasonably should have known that [s]he would likely be forced to act?"[258] In the real case upon which Ana's is based, she was very young when she first turned to the man who became her abuser, and she did not know what she would have to do until years into the experience. There is also room to argue that she did not so much "place herself" as go to the only place she had to go once her family kicked her out of the family home. Such a determination is highly contextual, but as shown in the following section, is well within judges' fact-finding abilities. Ana thus might also meet even this narrower definition.

With that duress standard met, Ana could be eligible to apply for a T visa, could qualify for the exception to the totalitarian party ground of inadmissibility, and could plausibly seek a waiver under the material support for terrorism ground. With a duress exception enshrined in asylum law, Ana, and others like her, could qualify for asylum or, if failing as a matter of discretion, could qualify for withholding of removal. However, for the duress test to truly improve the INA, whether duress occurred must be determined before analysis of whether a crime occurred.

2. Requiring that Duress Be Determined First

Clarifying the duress standard only goes so far toward improving the existing incoherence with INA. Because duress is, at its heart, an analysis of culpability, it must be part of any initial analysis of whether the ground of inadmissibility, deportability, or bar to asylum applies at all. The criminal legal system shows this well. In criminal law, the existence of duress affects whether conduct is considered criminal in the first place—it is a preliminary question that affects what charges may be brought and what verdicts might be sustained. The doctrine does not question the existence of undesirable conduct, but it determines the legal significance of that conduct. As Part I.B showed, if a person kills another while under duress, the charge drops from murder to manslaughter. For lesser crimes, duress may negate required *mens rea* making convictions impossible. If criminal conduct is found, duress also re-enters at the later stage of mitigation, meaning someone might have two opportunities to affect a legal outcome.[259] In Ana's story, the duress she experienced from

258. Matter of Negusie, 27 I. & N. Dec. 347, 363 (B.I.A. 2018).

259. *See supra* Part I.B.

her boyfriend would likely either preclude charges being filed, or reduce those charges.

This same method of analysis is necessary when considering the immigration, terrorism, and asylum context. Yet, for immigration law purposes, there are only two places that have an analogous *a priori* approach to duress. The first is in the use of the criminal legal system, which identifies and funnels cases into the immigration removal system.[260] If the case resolves favorably in the criminal system because of duress, that person may no longer be removable at all.[261] The second is in the exception to the "membership in Communist and totalitarian parties" ground of inadmissibility for those whose membership was under duress;[262] the existence of duress means that ground simply does not apply. No further analysis, action, or waiver is required.

In the terrorism context, however, the law first considers whether someone has supplied material support for terrorists, and only secondarily concerns itself with duress through the discretionary waiver process.[263] If duress recognizes a lack of culpability, why could it not be an exception to the material support bar? The existence of an exception does not mean that every adjudicator will find that duress exists—indeed, the strict five-factor standard set by *Negusie*[264] will be hard for many people to meet. In so many of the criminal and international cases concerning duress, the courts apply a test (whether the five-factor one, or something less strict)—and find the person has not met the standard. However, treating duress as an exception makes more conceptual sense as a normative matter, since someone who *can* meet the standard should not be defined first as a terrorist and then have that finding waived—they should not be defined as a terrorist in the first instance.

Likewise, in asylum law, the concept of duress logically fits earlier, in the threshold inquiry for deciding if someone has committed a serious nonpolitical crime: the question of atrociousness of the asylum-seeker's

260. This happens in two major ways. First, a crime could render someone "deportable" under INA 237, and DHS initiates removal proceedings on that basis. Second, a crime could simply bring someone to the attention of DHS through a complex interface of databases that notify DHS when a noncitizen is arrested. *See generally Detainers*, U.S. IMMIGR. & CUSTOMS ENF'T (Nov. 13, 2019), https://www.ice.gov/detainers [https://perma.cc/9DE2-HLXA].

261. INA § 212(a)(2); 8 U.S.C. § 1182(a)(2) and INA § 237(a)(2); 8 U.S.C. § 1227(a)(2) detail which convictions matter for immigration purposes; without a conviction, those sections would not apply (although for some removability grounds, simply *committing* an offense is enough, absent a conviction).

262. INA § 212(a)(3)(D)(ii); 8 U.S.C. § 1182(a)(3)(D)(ii) (creating an exception for "involuntary" membership).

263. INA § 212 (a)(3)(B); 8 U.S.C. § 1182(a)(3)(B). The applicable waiver authority is found at INA § 212(d)(3).

264. *See* Matter of Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).

conduct.[265] Conduct committed under duress is understood throughout all the law discussed in Part I as making an individual less culpable than conduct committed without duress, and culpability matters to a finding of atrociousness.[266] Contemplating duress at this initial stage might result in a finding that conduct was not "atrocious"; this would mean there is *no* bar to asylum at all, not that there is a bar that needs to be examined for the existence of, perhaps, an exception.

Setting a uniform test for duress and making duress as an initial legal inquiry are steps forward. However, clarifying the role of UNHRC guidance in the course will ensure consistency between U.S. immigration law and international immigration guidance.

3. Clarifying the Role of UNHCR Guidance

Because no law can anticipate all applications and future legal questions, the ideal inclusion, in the law and not just (as at present) the legislative history, would be a statement to the effect that guidance issued by the UNHCR is presumed to be followed, unless there is a specific and compelling reason to adopt a different interpretation. Such a standard would respect the specialized expertise that UNHCR has in both understanding the Convention's provisions and history and monitoring and guiding the development of interpretive caselaw worldwide.

B. Judges Can Do This

Ana's story is one the judges have the ability to examine, understand, and analyze, despite the anxiety that the *Fedorenko* Court[267] expressed about the challenges of line-drawing. While agreeing that duress begets complicated decisions, the kinds of findings that the major tests require are well within the capacities of the existing immigration court system, and the alternative—the wrongful exclusion of people whose claims should be found to merit protection—is too steep a cost to washing judicial hands of the issue.

The elements of the five-part test for duress are actually quite familiar to immigration adjudicators. Consider the question of "imminent" threats of "death or serious bodily injury." This is very close to the analysis asylum officers and immigration judges routinely make concerning the existence of persecution, which has a richly developed caselaw focused on "deprivations of life and liberty."[268] Indeed, the standard is even more

265. *See id.* at 353.

266. INS v. Aguirre-Aguirre, 526 U.S. 415, 430 (1999) ("In common usage, 'atrocious' suggests a deed more culpable and aggravated than a serious one.").

267. Fedorenko v. United States, 449 U.S. 490 (1981).

268. Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

complex in asylum adjudication, because the factfinder must examine the motive before finding persecution exists. These factfinders must also ascertain, often from the surrounding context of an applicant's claim, how real the threats of persecution are, whether the threatened conduct *counts* as persecution[269] and so forth. In Ana's story, a judge could inquire into why Ana thought the harm was likely to occur, and evidence of past abuse would be helpful to that inquiry.

Likewise, another element of the definition is establishing that the threat is "well-grounded," meaning the fear is reasonable.[270] This is strikingly close to the core concept of a "well-founded fear" in immigration law, basic to all asylum claims. The definition elucidated through case law, just as with duress caselaw, focuses on the reasonableness of the fear. The foundational case *Matter of Mogharrabi* requires an applicant to show that a "reasonable person in his circumstances would fear persecution."[271] In other words, such findings are what immigration adjudicators do. In Ana's case, the judge would consider the plausibility of her account—do the kinds of abuse she experienced happen in her country? With how much impunity? What evidence concerning country conditions supports such a contention? All of this is exactly what judges must already do in the asylum context.

Judges' adjudicatory discretion remains profoundly important to this issue.[272] As noted above, the existence of the duress exception does not mean that judges will find it exists in every case. A judge could find that Ana did not undertake a reasonable opportunity to escape, or that the threat was not imminent, and so forth. Judges retain significant interpretive discretion, even in immigration law where discretion has narrowed significantly over recent decades.[273] To the extent there are concerns that

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269. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 730–43 (16th ed. 2018) (providing summary of the wide variety of cases treating many different aspects of persecution).

270. *See* MODEL PENAL CODE § 2.09(1) (stating that the defense of duress will only be made available to a defendant if the defendant was coerced by force or threats of force which "a person of reasonable firmness in his situation would have been unable to resist"); *see also* State v. Glidden, 487 A.2d 642, 645 (Me. 1985) (explaining that objective analysis requires two inquiries: the first being whether a reasonable person in the defendant's situation would qualify an act as a threat, and second, if the act is treated as a threat, whether a reasonable person in the circumstances have been prevented from resisting to the pressures of the threat).

271. Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987).

272. Dan Kanstroom calls this "factual interpretive discretion." Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 763–66 (1997).

273. *See generally* Philip L. Torrey, *The Erosion of Judicial Discretion in Crime-Based Removal Proceedings*, 14-02 IMMIGR. BRIEFINGS 1 (Feb. 2014). *See also* Kanstroom, *supra* note 272 (looking at the interstitial qualities of decision-making); Elizabeth Keyes, *Deferred Action: Considering What Is Lost*, 55 WASHBURN L.J. 129, 130 (2015) ("This kind of remedial, equitable discretion is a kind of discretion that has been steadily whittled down over the past twenty-five years in immigration law.").

a duress exception will lead to errors, admitting people who are culpable for offenses barred by the immigration law, adjudicators have the skill and ability to serve as effective gatekeepers.

CONCLUSION

Immigration law has no coherent understanding of when and how the duress doctrine applies. This state of the law leads to the same conduct receiving wildly different treatment, which is not the hallmark of sound jurisprudence. It also marks immigration law as an outlier, as other bodies of law have developed robust interpretations of duress. The gaps are most urgent in asylum law, which is—bewilderingly, given its protective function—presently the least amenable to understanding how an asylum-seeker's conduct might be excused or mitigated by the existence of duress. But this article has shown that even in its other applications, immigration law's treatment of duress is highly inconsistent.

Duress is a doctrine that has been developed equally in common law jurisprudence, and in statutes and civil codes. If Congress does not act, then judges are highly capable of administering an effective standard, as shown by the Board of Immigration Appeals' decision in the remanded *Matter of Negusie*.[274] However, a judicial approach suffers from the special instability of immigration law in an era where Attorneys General are aggressively using their powers of referral to undo the careful decisions of their own administrative law judges. Those powers have been and will continue to be critiqued, and perhaps the decisions flowing from these political actions will be vulnerable if circuit courts decline—rightly, in this article's view—to extend deference to them under *Chevron*.

Until such time as the Attorney General power to undo immigration common law is curtailed, however, a codification of the duress doctrine in the immigration statute is gravely needed so that duress will be understood in affecting whether particular bars and grounds of inadmissibility exist at all—not whether those bars and grounds should be waived as a matter of discretion. Congress must amend the nation's immigration law to resolve the absurd and contradictory results that flow from the current disharmonies. Ana's culpability for wrongdoing should be understood in the context of duress, and U.S. immigration law should not hold her coerced conduct against her. The might principle of the duress defense, embraced throughout criminal and international law, must be enshrined in the nation's immigration law as well.

274. Matter of Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).