

**ADMISSION DENIED:
IN SUPPORT OF A DURESS EXCEPTION TO
THE IMMIGRATION AND NATIONALITY ACT’S
“MATERIAL SUPPORT FOR TERRORISM” PROVISION**

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INTRODUCTION

Imagine the following scenario:

Miguel, a poor farmer, lived in a part of Colombia controlled by a rebel group officially designated as a “foreign terrorist organization.” The rebels threatened to harm Miguel and his family unless they handed over food and “taxes.” Fearing for their lives, the family complied, but when demands and threats escalated, they sought protection in nearby Ecuador. The U.N. High Commissioner for Refugees recognized Miguel as a refugee, and referred him for U.S. resettlement. But even though Miguel paid those “war taxes” under great duress, U.S. officials denied him resettlement. And he is not alone. Officials have denied protection to many who had been coerced into providing “material support” to “terrorist organizations.”¹

¹ Matt Wilch, *Ironic Casualties of the War on Terror*, Lutheran Immigration and Refugee Service Advocacy Update (Sept. 2005), available at <http://www.lirs.org/News/AdvoUpdate.htm> (last visited Oct. 14, 2005).

This account may seem counterintuitive, unfair, and even implausible. Nonetheless, Miguel's predicament is very much a matter of fact and is increasingly common among individuals—notably citizens of Colombia, Burma, India, Nepal and Sri Lanka²—seeking asylum in the United States.³ The problem stems from a congeries of provisions within the Immigration and Nationality Act (INA),⁴ the basic body of U.S. immigration law.⁵ In brief, these provisions make any alien who has engaged in terrorist activity or afforded material support to a terrorist organization inadmissible to the United States.⁶ The INA broadly defines “engaging in terrorist activity,” “terrorist activity,” and “material support,” thus facilitating findings of inadmissibility.⁷

In an era of heightened security-consciousness,⁸ denying asylum to terrorists and their supporters is certainly understandable and even desirable. However, the effect of the above legislation has been the denial of asylum to aliens who, like Miguel, were forced under duress to afford material support to so-called terrorist organizations. The

² See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, EXAMPLES OF MATERIAL SUPPORT CASES (2005) (on file with author) [hereinafter UNHCR EXAMPLES]; see also AILA InfoNet Doc. No. 05112973, 1 (Nov. 29, 2005) (on file with author) (stating that more than 80% of asylum applicants with material support for terrorism issues originate from these countries).

³ The exact number of asylum applicants found ineligible for asylum on the terrorist ground of inadmissibility is difficult to determine. A Department of Homeland Security representative recently stated that the number is approximately 400–500. See Meeting Minutes of Asylum HQ/NGO Liaison Meeting (July 12, 2005) (on file with author) [hereinafter Meeting Minutes].

⁴ INA § 212, 8 U.S.C. § 1182 (2000 & Supp. 2002).

⁵ The INA was enacted in 1952, before which several statutes regulated immigration law. Amended many times over the years, the INA collected and codified already-existing provisions and reorganized the structure of U.S. immigration law. See U.S. Citizenship and Immigration Services, Immigration and Nationality Act, available at <http://uscis.gov/graphics/lawsregs/ina.htm> (last visited Nov. 18, 2005).

⁶ See INA § 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B).

⁷ See *id.*

⁸ See Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in *Our Midst Post-9/11: Legislating Outsiderness within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1689 (2005) (“America’s new concern for national security and its fear of another 9/11 has vastly expanded the scope of immigration and alienage law.”); see also *Miscellaneous Immigration and Claims Issues: Blackhawk Friendly Fire Incident Payments; Removal of Aliens Associated with Terrorists; Increasing Penalties for Alien Smuggling; and Asylum in Guam: Hearing on H.R. 456, H.R. 1745, H.R. 238 and H.R. 945 Before the Subcomm. on Immigration and Claims of the H. Committee on the Judiciary*, 106th Cong. 24 (1999) (prepared statement of Robert E. Andrews, a Congressman from New Jersey) (“Events of recent years have proven that no American at home or abroad is safe from terrorist actions. The World Trade Center bombing in New York City [has] proven that we must be more vigilant in our quest to prevent terrorism.”).

INA currently provides for no explicit duress exception. The lack of an explicit duress exception has effectively commingled terrorists and legitimate asylum applicants.⁹ It is also in tension with well-established principles of criminal law.¹⁰ Finally, it violates U.S. commitments under international law¹¹ and is out of sync with standards embraced by the United Nations, many Western countries, and immigration advocacy groups.¹²

The “material support for terrorism provision,” as this Paper refers to the combination of the above provisions, has given rise to three issues¹³ that have complicated the asylum process for applicants, raised the hackles of immigration

⁹ See, e.g., *Refugees: Seeking Solutions to a Global Concern: Hearing Before the Subcomm. on Immigration, Border Security, and Citizenship Before the Senate Judiciary Committee*, 108th Cong. (2004) (prepared statement of Charles H. Kuck, Adjunct Professor of Law, University of Georgia School of Law and Partner, Weathersby, Howard & Kuck, LLC) (“National security, if that is the primary goal of our immigration system, is most effectively enhanced by improving the mechanisms for identifying actual terrorists, not by implementing harsher or unattainable standards or blindly treating all foreigners as potential terrorists.”), available at http://judiciary.senate.gov/testimony.cfm?id=1310&wit_id=3842 (last visited Nov. 20, 2005) [hereinafter Kuck Testimony].

¹⁰ See *infra* note 85–96.

¹¹ See BRIEF FOR HUMAN RIGHTS FIRST AS AMICUS CURIAE SUPPORTING PETITIONER, WALTER ANTONIO AMAYA ARIAS V. ASHCROFT, FILE NO. A97 133 248 (No. 04-1999) 14–20, available at <http://www.humanrightsfirst.org/asylum/pdf/Brf-Ams-Cre-Walter-Amaya-Arias.pdf> (last visited Nov. 20, 2005) (noting that the lack of an exception violates U.S. obligations under international refugee conventions) [hereinafter HUMAN RIGHTS FIRST BRIEF]. These refugee conventions are the Convention relating to the Status of Refugees (Refugee Convention), July 28, 1951, 189 U.N.T.S. 137, and its successor, the Protocol relating to the Status of Refugees (Refugee Protocol), Jan. 31, 1967, 606 U.N.T.S. 268, 19 U.S.T. 6223. The Refugee Convention and the Refugee Protocol are the fundamental legal documents defining the rights of refugees and the attendant legal obligations of signatory states. As a signatory of both, the United States is bound by their provisions. Accordingly, the United States has promulgated legislation to conform U.S. law to its international obligations, beginning with the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C. (2000)). See U.S. Citizenship and Immigration Services, History of the United States Asylum Officer Corps, available at <http://uscis.gov/graphics/services/asylum/history.htm#II> (last visited Nov. 29, 2005). See generally UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 50TH ANNIVERSARY: THE WALL BEHIND WHICH REFUGEES CAN SHELTER: THE 1951 GENEVA CONVENTION (2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/openssl.pdf?tbl=PUBL&id=3b5e90ea0&page=publ> (last visited Nov. 29, 2005).

¹² See, e.g., EUROPEAN LEGAL NETWORK ON ASYLUM, INTERNATIONAL COURSE ON THE APPLICATION OF ARTICLE 1C AND ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 29 (2003) available at <http://www.ecre.org/research/excl.pdf> (last visited Nov. 20, 2005) [hereinafter ELENA].

¹³ The United Nations High Commissioner for Refugees recently released a document analyzing examples of material support for terrorism cases under U.S. law. The examples generally illustrate these three main issues. See generally UNHCR EXAMPLES, *supra* note 2.

advocacy groups, and been a source of concern to some legislators.¹⁴ First, as mentioned above, the provision includes no explicit duress exception. Thus, the question arises whether such an exception may or should be implied. Second, although U.S. immigration law enumerates examples of material support,¹⁵ it does not, and cannot, do so exhaustively. How much and what kind of support can be construed to constitute material support within the meaning of the provision is thus unclear and, by consequence, vests too much discretion in immigration judges and courts. Finally, the statute's definition of "terrorist activity," despite its enumerated examples,¹⁶ is by necessity only partial and is thus likewise open to interpretation. Because of the complexity of these three issues, this Paper addresses only the first issue.

¹⁴ The author has been informed by immigration and asylum attorneys that the respective staffs of Senators Edward M. Kennedy (D-MA) and Sam Brownback (R-KS) have inquired into problems arising from the current law and are analyzing possible amendments. An article in the *National Review Online* also noted that Senator Brownback "voiced . . . concerns . . . that these asylum reforms might inadvertently harm people genuinely fleeing religious persecution." Editorial, *I Want My Real ID*, NAT'L REV. ONLINE, May 5, 2005, available at <http://www.nationalreview.com/editorial/editors200505050920.asp> (last visited Nov. 20, 2005).

¹⁵ See INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) ("including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.").

¹⁶ See INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii):

As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person; (IV) An assassination; (V) The use of any--(a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; (VI) A threat, attempt, or conspiracy to do any of the foregoing.

Part I of this Paper is divided into three Sections. The first Section synthesizes both the current standards for receiving asylum under U.S. law and the grounds for inadmissibility. The second Section traces the history of legislation affecting the terrorism ground of inadmissibility. The third Section criticizes this legislation and considers the U.S. government's recognition of its ill effects.

Part II is also divided into three Sections. The first Section analyzes how the material support provision runs counter to general principles of criminal law. The second Section examines cases in which the courts have declined to read an implied exception into the material support for terrorism provision. The third Section argues why such an exception should be implied in the absence of a legislative amendment, offers support for this opinion in the form of statutory constructions and comparisons to foreign jurisdictions, and illustrates how the duress defense could be applied in the U.S. asylum context.

I. Background

A. U.S. Asylum Law and the “Material Support for Terrorism” Provision

To receive asylum in the United States, an alien must prove that he or she is a refugee within the definition set forth in section 101 of the INA.¹⁷ To qualify as a refugee, an individual must be unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁸

¹⁷ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

¹⁸ *Id.* The INA's definition of “refugee” is meant to be interpreted consistently with the 1967 United Nations Protocol relating to the Status of Refugees, which establishes that an alien needs to show only that future persecution is a reasonable possibility. See Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432–33 (1987). An alien must prove a reasonable possibility of persecution through credible, direct, and specific evidence in the record. *Mendoza Perez v. U.S. INS*, 902 F.2d 760, 763 (9th Cir. 1990). As a result, aliens generally have difficulty proving their asylum claims.

An alien may be found inadmissible, and thus ineligible for asylum, on a number of grounds set forth in section 212 of the INA.¹⁹ Subsection 212(a) identifies the classes of aliens that are ineligible for admission to the United States.²⁰ The third class of aliens in section 212(a) is inadmissible on security and related grounds.²¹ Among these grounds is the terrorist ground of inadmissibility, which is set forth in section 212(a)(3)(B).²²

Within this third class of inadmissible aliens, subsection 212(a)(3)(B)(i) makes inadmissible any alien who “has engaged in terrorist activity.”²³ Subsection 212(a)(3)(B)(iv)(VI) defines “terrorist activity” as, *inter alia*, committing “an act that the

See generally CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04 (2005). There are two very different paths to permanent residence in the United States for a noncitizen who qualifies as a refugee. The first path to permanent residence based on refugee status occurs while the noncitizen is still outside the United States. The alien must apply to the U.S. refugee program while overseas and be found eligible for a refugee interview. Eligibility is based the alien’s nationality and whether the alien comes under one of the processing priorities used to manage the U.S. refugee program. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 794–95 (5th ed. 2003). The second path to permanent residence based on refugee status requires the alien to file a claim for asylum at a U.S. port of entry or inside the United States. Aliens who apply for permanent status in this way are called asylum seekers or asylum applicants. Unlike refugees who take the first path, asylum seekers must reach the United States on their own and apply for protection against involuntary return. *See* ALEINIKOFF ET AL., *supra*; *see also* U.S. Citizenship and Immigration Services, U.S. Asylum and Refugee Policy, *available at* <http://uscis.gov/graphics/publicaffairs/factsheets/asylum.htm> (last visited Nov. 29, 2005).

¹⁹ *See* INA § 212, 8 U.S.C. § 1182. For a detailed discussion of the INA’s grounds of inadmissibility, *see generally* GORDON ET AL., *supra* note 18, ch. 63. Inadmissibility must be distinguished from deportability. Inadmissibility, or exclusion, refers to the treatment of aliens who have not been admitted to the United States. GORDON ET AL., *supra* note 18, §§ 63.01[2]. Deportation, or expulsion, refers to the removal of an alien who has either legally or illegally entered the United States. GORDON ET AL., *supra* note 18, §§ 63.01[3]. There used to be significant differences between inadmissibility and deportability. Before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), the difference turned on whether the alien had “entered” the United States, legally or illegally. Aliens who had entered the United States were subject to deportation. GORDON ET AL., *supra* note 18, §§ 63.01[3]. Post-IIRAIRA, there are still separate grounds of inadmissibility and deportability. However, the difference between exclusion and deportation no longer turns on whether an alien has “entered” the United States but whether the alien has been “admitted.” Currently, grounds of inadmissibility apply to any alien who has not been admitted into the United States. *See* GORDON ET AL., *supra* note 18, §§ 63.01[3], 71.01[1]. For classes of inadmissible aliens, *see* INA § 212, 8 U.S.C. § 1182 (2000 & 2002 Supp.). For classes of deportable aliens, *see* INA § 237, 8 U.S.C. § 1227 (2000 & 2002 Supp.).

²⁰ *See* INA § 212(a), 8 U.S.C. § 1182(a).

²¹ *See* INA § 212(a)(3), 8 U.S.C. § 1182(a)(3). The first two classes of aliens are inadmissible respectively on health-related grounds and criminal and related grounds. *See* INA § 212(a)(1), 8 U.S.C. § 1182(a)(1); INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

²² *See* INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

²³ *See* INA § 212(a)(3)(B)(i), 8 U.S.C. § 1182(a)(3)(B)(i).

actor knows, or reasonably should know, affords material support²⁴ . . . for the commission of a terrorist activity.”²⁵

The INA includes no explicit exception for aliens who afford material support to terrorist organizations under duress. This is at odds with certain other grounds of inadmissibility, which include explicit exceptions for involuntariness.²⁶ The INA does, however, give discretion to the Secretaries of State and Homeland Security, in consultation with each other and the Attorney General, not to apply the terrorist ground of inadmissibility to an alien.²⁷

An asylum applicant found to have afforded material support to a terrorist organization may still defeat a finding of ineligibility. Section 212(a)(3)(B)(iv)(VI) of the INA stipulates that an alien must know or reasonably know that his or her act affords material support to a terrorist organization.²⁸ This means that an alien will not be found inadmissible if he or she did not have knowledge, actual or imputed, that an organization was a terrorist organization.²⁹ This *mens rea* requirement places the burden of proof on the asylum applicant, who must meet high credibility and corroboration standards.³⁰

²⁴ This subsection further provides that “material support” includes “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.” INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

²⁵ See INA § 212(a)(3)(B)(iv)(VI)(aa), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(aa).

²⁶ See, e.g., INA § 212(a)(3)(D)(ii), 8 U.S.C. § 1182(a)(3)(D)(ii) (excepting from inadmissibility aliens whose membership in a totalitarian party was involuntary).

²⁷ See INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i).

²⁸ See INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

²⁹ Lory Diana Rosenberg, *Ask Lory: Special Law and Policy Series*, 10-13 BENDER’S IMMIGR. BULL. 1081, 1082 (July 1, 2005) (noting that the INA “excuses material support exception to excuse only a lack of actual or imputed knowledge that an organization was a terrorist organization”). See also GORDON ET AL., *supra* note 18, § 63.04[3][b][iii][B] n.72 (“If . . . the organization in question is considered a terrorist group, but has not been designated as such, . . . the non-citizen may demonstrate that he did not know, and should not reasonably have known, that the act would further the organization’s terrorist activity.”).

³⁰ See Rosenberg, *supra* note 29, at 1082–83; see also INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (“The burden of proof is on the applicant to establish that the applicant is a refugee.”); see also Meeting Minutes, *supra* note 3, at 2 (“The law states that an applicant can succeed in an asylum claim providing only credible testimony . . . [which is] a high threshold standard.”).

These standards are especially difficult to meet in light of the unlikelihood that an alien fleeing his or her home had either the time or the opportunity to gather documentation and other evidence to confirm his or her persecution claim.³¹ Proving a lack of knowledge is made even more difficult by the INA's broad conception of what constitutes a terrorist organization.³²

Furthermore, section 219 of the INA authorizes the Secretary of State to designate certain organizations as foreign terrorist organizations if she makes three findings.³³ If an alien is found to have afforded material support to an organization designated as a foreign terrorist organization, the alien is *per se* inadmissible; the designation leaves no margin for doubt that the alien supported terrorists.³⁴ Moreover, courts have concluded that challenges to foreign terrorist organization designations on the ground that an organization does not actually threaten U.S. security are non-justiciable.³⁵ An organization not designated by the State Department as a foreign terrorist organization

³¹ See GORDON ET AL., *supra* note 18, § 34.02[9][A] (“Genuine asylum seekers often have great difficulty obtaining evidence to support their claims. They usually have neither the foresight, the time, nor the ability to collect corroborating evidence before fleeing their homes.”); see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER 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 ¶ 196 (rev. ed. 1992), available at <http://www.asylumsupport.info/publications/unhcr/handbook.pdf> (last visited Nov. 18, 2002) (“In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.”) [hereinafter UNHCR HANDBOOK]; but see Meeting Minutes, *supra* note 3, at 2 (noting that an applicant does not necessarily need documents to succeed in an asylum claim).

³² See INA § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi).

³³ To designate an organization as a foreign terrorist organization, the Secretary of State must find that: (1) the organization is a foreign organization, (2) the organization engages in terrorist activity or terrorism as defined by the INA, and (3) the organization's terrorist activity or terrorism is a threat to the security of U.S. citizens or national security. INA § 219(a)(1), 8 U.S.C. § 1189(a)(1).

³⁴ See INA § 212(a)(3)(B)(vi)(I), 8 U.S.C. § 1182(a)(3)(B)(vi)(I).

³⁵ See, e.g., *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (finding that a State Department designation of the People's Mojahedin Organization of Iran, whose sole aim was the overthrow of the Iranian government, was non-justiciable).

may nevertheless be considered a terrorist organization if composed of two or more persons, whether organized or not, who engage in “terrorist activity.”³⁶

B. Legislative History

Before 1990, the INA did not have a terrorist ground of inadmissibility.³⁷ It did, however, provide for exclusion on security-related grounds.³⁸ The Immigration Act of 1990³⁹ added an inadmissibility ground for those engaged in terrorist activity.⁴⁰ Due in part to the 1993 bombing of the World Trade Center, Congress revamped the INA’s anti-terrorist provisions.⁴¹ In 1996 Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁴² which expanded the INA’s definition of “terrorism.”⁴³ The AEDPA fashioned a process by which the United States could classify certain organizations as foreign terrorist organizations and make ineligible for asylum persons involved with these organizations.⁴⁴ The AEDPA also modified section 208(a) of the INA,⁴⁵ which delineates the procedures and requirements of the asylum process.⁴⁶

³⁶ INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(2)(B)(vi)(III). *See also* GORDON ET AL., *supra* note 18, § 63.04[3][b][iii].

³⁷ CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION OF ALIENS 3 (2005), *available at* <http://www.fas.org/sgp/crs/homsec/RL32564.pdf> (last visited Jan. 19, 2006) [hereinafter CRS IMMIGRATION REPORT].

³⁸ *Id.*

³⁹ Pub. L. No. 101-649, 104 Stat. 4978 (1990).

⁴⁰ CRS IMMIGRATION REPORT, *supra* note 37, at 4.

⁴¹ *Id.*

⁴² Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.). The AEDPA’s stated purpose is “[t]o deter terrorism, provide justice for victims, [and] provide for an effective death penalty . . .” *Id.* at Introduction. For further study of the Act, *see generally* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

⁴³ CRS IMMIGRATION REPORT, *supra* note 37, at 4.

⁴⁴ U.S. Citizenship and Immigration Services, History of the United States Asylum Officer Corps, *available at* <http://uscis.gov/graphics/services/asylum/history.htm> (last visited Oct. 22, 2005).

⁴⁵ Pub. L. No. 104-132, § 421, 110 Stat. 1214:

Section 208(a) of the Immigration and Nationality Act (8 U.S.C. 1158(a)) is amended by adding at the end the following: “The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B), unless the Attorney General determines, in the discretion of the Attorney General, that there are not

Shortly after the September 11, 2001 terrorist attacks, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct Terrorism Act (USA PATRIOT Act).⁴⁷ The USA PATRIOT Act further expanded the terrorism ground of inadmissibility by broadening the definition of “terrorist activity” and the range of organizations that could constitute foreign terrorist organizations.⁴⁸

On May 11, 2005, President George W. Bush signed into law the REAL ID Act of 2005.⁴⁹ Part of an omnibus bill,⁵⁰ the REAL ID Act amended section 212 of the INA and had far-reaching consequences for immigration and asylum law.⁵¹ Among other things, the REAL ID Act expanded the terrorist ground of admissibility.⁵² Because a finding that an alien has engaged in terrorist activity or has supported terrorists makes him or her ineligible for asylum, this expansive definition has effectively made more aliens ineligible for asylum.⁵³

reasonable grounds for regarding the alien as a danger to the security of the United States.”

⁴⁶ See INA § 208(a), 8 U.S.C. § 1158(a).

⁴⁷ Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁴⁸ GORDON ET AL., *supra* note 18, § 63.04[2]. See also Meeting Minutes, *supra* note 3, at 5 (“Terrorist provisions were broadened by REAL ID including the definition of [what] it means to be engaged in terrorist activity.”).

⁴⁹ Enacted as Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, signed on May 11, 2005. The White House expressed its support for the REAL ID Act’s passage months earlier on the ground that it would “strengthen the ability of the United States to protect against terrorist entry into and activities within the United States.” Statement of Administration Policy, H.R. 418–REAL ID Act of 2005 (Feb. 9, 2005), available at <http://www.whitehouse.gov/omb/legislative/sap/109-1/hr418sap-h.pdf> (last visited Nov. 20, 2005).

⁵⁰ In broad terms, the bill appropriated emergency supplemental funds for military operations, relief and reconstruction, and other activities in connection with Iraq and Afghanistan as well as regions struck by the December 2004 Indian Ocean tsunami.

⁵¹ See generally Gregory H. Siskind, *REAL ID Act Becomes Law*, 10 BENDER’S IMMIGR. BULL. 1057 (June 15, 2005).

⁵² U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SECURITY, AND U.S. DEP’T OF HEALTH AND HUMAN SERVICES, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2006, at 4 (2005) (on file with author) [hereinafter PROPOSED REFUGEE ADMISSIONS].

⁵³ See Aldana & Lazos Vargas, *supra* note 8, at 1689.

C. Criticism of the Legislation⁵⁴

The global war on terror has caused governments around the world to take legitimate measures to filter out unwanted foreigners.⁵⁵ The U.S. government is no exception, viewing such measures as “a critical tool for bolstering homeland security.”⁵⁶ Despite the United States’ historically welcoming stance toward refugees and asylum seekers,⁵⁷ many of these measures have been over-inclusive.⁵⁸ The material support for terrorism provision is a case in point. Many commentators have noted the inherent unfairness that “every persecuted individual who has ever lent a helping hand, a few

⁵⁴ The USA PATRIOT Act and other legislation affecting immigration law have also come under fire from immigration advocates, though this Section addresses criticism only of the REAL ID Act. *See, e.g.*, Lucas Guttentag, *Immigrants’ Rights in the Aftermath of 9/11: Detention, Discrimination and Secrecy*, in IN DEFENSE OF THE ALIEN 3, 9 (Joseph Fugolo ed., 2003) (“The ACLU and other organizations have vigorously criticized the Patriot Act.”). The U.S. government has also realized problems with such legislation. *See* Philip Shenon, *Report on U.S. Antiterrorism Law Alleges Violations of Civil Rights*, N.Y. TIMES, July 21, 2003, at A1 (“A report by internal investigators at the Justice Department has identified dozens of recent cases in which department employees have been accused of serious civil rights and civil liberties violations involving enforcement of the sweeping federal antiterrorism law known as the USA Patriot Act . . . The report said that credible accusations were also made against employees of . . . the Immigration and Naturalization Service.”).

⁵⁵ *See, e.g.*, THE COALITION INFORMATION CENTERS, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 14 (2001), available at <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.pdf> (last visited Dec. 1, 2005) (noting the reorganization of the Immigration and Naturalization Service as an element of the effort to prevent terrorist attacks).

⁵⁶ U.S. DEP’T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003, at 166 (2004) (discussing The USA PATRIOT Act’s creation of a Terrorist Exclusion List, which “allows the U.S. government to exclude or deport aliens who provide material assistance to, or solicit it for, designated organizations”).

⁵⁷ JULIE FARNAM, US IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM 133 (2005).

⁵⁸ *Id.* (noting that “[i]n the aftermath of 9/11, refugee admissions to the United States were halted on October 1, 2001. A moratorium on admission was declared, to allow a reevaluation of admissions procedures . . . to prevent fraudulent applicants from entering the country. It was not until the end of November that the resettlement program resumed, and the program has since admitted numbers of refugees that fall considerably short of the proposed ceilings”). *See also* Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 451 (2002) (noting that in passing the USA PATRIOT Act, “legislators simply lacked the time and opportunity to develop complex, nuanced definitions that would be neither over-inclusive nor under-inclusive. Given the perceived threat to the country and the pressure from the Administration, they erred on the side of over-inclusiveness”); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, YEARBOOK OF IMMIGRATION STATISTICS: 2004, available at <http://uscis.gov/graphics/shared/statistics/yearbook/YrBk04RA.htm> (last visited Nov. 19, 2005) (noting the precipitous decline of individuals granted asylum in the United States, from 28,677 in 2001 to 14,359 in 2004). *See also* VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 38 (2005) (noting that the government response to criticism of over- and under-inclusive immigration law might be that “in enacting and enforcing general immigration policy, [the government] has no choice but to paint wide brush strokes”).

shekels, or a warm meal to a person or group [considered terrorists could] be barred from asylum.”⁵⁹

Even before its passage, the REAL ID Act loosed a blitz of criticism from immigrant advocacy groups⁶⁰ and commentators,⁶¹ as well as the op-ed pages of newspapers around the country.⁶² The following is emblematic of the myriad cautionary tales:

⁵⁹ BRIEF OF THE JUBILEE CAMPAIGN AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF RESPONDENT, MA SAN KYWE, IN THE MATTER OF MA SAN KYWE 24 (2005) (No. A97-892-253) (on file with author) (noting that it “is anathema to U.S. jurisprudence and tradition, as well as to our treaty obligations with regard to the protection of refugees, that groups of persecuted religious and/or ethnic minorities . . . be labeled ‘terrorist organizations’ and [thus] be barred from seeking asylum”). Human Rights First has also warned that the material support for terrorism provision “allows people who bear no personal responsibility for terrorist acts . . . to be deported and barred from asylum based on overly broad definitions of ‘terrorism’ and of what constitutes ‘supporting’ terrorism.” HUMAN RIGHTS FIRST, REAL ID ENDANGERS PEOPLE FLEEING PERSECUTION, *available at* http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp (last visited Nov. 12, 2005) [hereinafter HUMAN RIGHTS FIRST].

⁶⁰ In a legislative analysis, the National Immigration Forum warned that the REAL ID Act “would expand the definition of ‘material support’ to terrorism, making an alien inadmissible, deportable, barred from asylum, and barred from withholding of removal if she had provided ‘material support’ to any terrorist organization. This would cover anyone who provided material support to a terrorist organization, however vaguely defined, or to any member of a terrorist organization. There would be no requirement that the support be related to terrorist activity. It provides discretion to the Attorney General and the Secretary of Homeland Security to decide not to apply the material support bar in particular cases . . . but this alone will not eliminate the negative consequences of such a broad expansion in the material support definition.” NATIONAL IMMIGRATION FORUM: LEGISLATIVE ANALYSIS, REAL ID ACT OF 2005 (H.R. 418) 4 (2005), *available at* http://www.immigrationforum.org/documents/PolicyWire/Legislation/Analysis_REALIDPassed.pdf (last visited Oct. 26, 2005). Similarly, in a policy resolution, The Hebrew Immigrant Aid Society (HIAS) wrote that it was “troubled that legitimate policies designed to bar the admission of individuals who provide ‘material support’ to terrorists are resulting in the denial of protection to bona fide asylees from Colombia, Burma and other countries who made these contributions under duress or have other justifiable explanations for the alleged ‘material support’ . . . HIAS encourages the Administration and Congress to take immediate steps to ensure that legitimate asylum seekers are not prevented from receiving protection through the ‘material support’ provisions of law.” HIAS POLICY RESOLUTION: PROTECTING POLITICAL ASYLUM IN AMERICA 1–2 (2005), *available at* <http://www.hias.org/News/Docs/Asylum%202005.pdf> (last visited Oct. 26, 2005).

⁶¹ See Rosenberg, *supra* note 29, at 1082 (“Serious potential consequences, including involuntary family separation and corresponding physical and mental hardships, deprivation related to economic, nutritional, medical, educational, professional, or other personal needs, and exposure to social and political strife, physical danger, discrimination, and even persecution, may result.”).

⁶² See Editorial, *Half-Measures*, WASH. POST, May 6, 2005, at A22 (“[The Real ID Act] will still make it harder to prove claims of asylum, and easier for judges to issue deportation orders—hardly the right message to send to the victims of religious and political persecution around the world.”); Editorial, *A License for Overkill*, CHIC. TRIB., May 11, 2005, at 24 (“[The REAL ID Act] is an anti-immigration bill parading as a national security directive.”); Editorial, *Obstructing Asylum*, BALT. SUN, May 16, 2005, at

According to the [the REAL ID Act], an immigrant whose mother supported the African National Congress' lawful, nonviolent anti-apartheid work during the 1980s would be deportable today because the ANC fought apartheid with sabotage and other illegal acts of violence as well as with nonviolent protests. So would an immigrant who supported the Northern Alliance in Afghanistan, the Israeli military, the Nicaraguan contras, or the Palestinian Authority, all of which have illegally used or threatened to use weapons against people or property. Your only shot at a winning defense is to show that you had no idea that the group you supported ever engaged in violence. It doesn't matter if you can prove that you had no connection to the group's violent actions, or that the U.S. government also supports these groups. Indeed, in the same bill that includes these provisions, Congress allotted \$5 million to help the Palestinian Authority with an audit.⁶³

The U.S. government itself has begun to take stock of the plight of asylum applicants with legitimate claims who are turned away because of their involuntary support for so-called terrorist organizations.⁶⁴ In a joint report to Congress, the Departments of State, Homeland Security, and Health and Human Services recognized the mounting controversy.⁶⁵ In their report, the federal agencies acknowledged that the material support for terrorism provision in particular exemplifies the difficulty in

10A ("The new restrictions on asylum seekers . . . will cap a long effort by misguided congressional lawmakers to convert asylum laws into asylum barriers.").

⁶³ David Cole, *Keep Out: Border Control Joe McCarthy Would Have Loved*, SLATE, May 11, 2005, <http://slate.msn.com/id/2118522> (last visited Nov. 14, 2005).

⁶⁴ See PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 4 ("A challenge that the Refugee Corps and the program as a whole will continue to face in FY 2006 is the issue of refugee applicants who have offered material support to a terrorist group or terrorist activity."). At present, reforming the language concerning the material support provision does not appear to be a matter of great urgency within the Department of Homeland Security (DHS). During a July 2005 meeting between DHS's Asylum Office and various non-governmental organizations, the Asylum Office reported that it "is trying to figure out how to deal with [material support for terrorism] waivers. Consultations regarding this process are still going on. [We] will do it sooner rather than later. It will be delegated down from the Secretary but how far down it is [sic] still not been decided." Meeting Minutes, *supra* note 3, at 5.

⁶⁵ See PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 4 (indicating that the United States is aiming "to strive to achieve a balance between humanitarian commitments and national security concerns").

achieving a balance between U.S. humanitarian obligations and national security.⁶⁶ The report encapsulates the dilemma:

Under these provisions, an individual who provides money, food, shelter, or other assistance to an organization which engages in terrorist activities is inadmissible to the United States, even when the individual was compelled or coerced to provide such support under duress.⁶⁷

The U.S. government has further recognized that the situation for Colombian asylum seekers is particularly worrisome,⁶⁸ in part due to Colombia's continuing instability.⁶⁹ Colombia is only one of many conflict-afflicted countries whose citizens are suffering under similar circumstances.⁷⁰

The report also indicates that the United Nations Commissioner for Refugees has begun to refer⁷¹ substantially fewer Colombians to the U.S. refugee resettlement program⁷² because of the material support for terrorism provision.⁷³ The government's

⁶⁶ *Id.* (noting that “[c]ases involving material support to a terrorist group or terrorist activity highlight the challenge of striking this balance”).

⁶⁷ *Id.*

⁶⁸ *Id.* (noting that the “‘material support’ ground has already slowed Colombian [refugee] processing considerably and other populations may be affected as well”).

⁶⁹ *Id.* at 33 (“The ongoing conflict in Colombia generated the most significant numbers of refugees and [internally displaced persons] in the region. [The United Nations High Commissioner for Refugees] reports that there are approximately 46,000 Colombian asylum seekers in the region and over two million internally displaced persons in Colombia.”). “Internally displaced persons” is defined as “persons or groups of persons who have been forced to leave or flee their homes or places of habitual residence as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.” See Luke T. Lee, *Strengthening Legal Protection in Internal Conflicts: Protection of Internally Displaced Persons in Internal Conflicts*, 3 ILSA J. INT’L & COMP. L. 529, 530 (1997).

⁷⁰ See HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 10 (listing Sri Lanka, Lebanon, the Philippines, Liberia, Peru, Sudan, Congo and Afghanistan as countries whose citizens are in positions similar to that of Colombians).

⁷¹ The U.S. refugee program accepts referrals for resettlement of refugees from the United Nations High Commissioner for Refugees and U.S. embassies or consulates. For an overview of this process, see generally Daniel J. Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J.L. REFORM 951, 958–61 (2003).

⁷² The U.S. refugee program is the U.S. government’s program for resettling refugees in their own countries, in third countries, or in the United States. For an overview, see U.S. Citizenship and Immigration Services, *How Do I Apply for Resettlement in the United States as a Refugee?*, available at <http://uscis.gov/graphics/howdoi/refapp.htm> (last visited Nov. 19, 2005).

proposed solution is to increase the use of the discretion of the Secretaries of State and Homeland Security not to apply the terrorist ground of inadmissibility.⁷⁴ The solution would encourage more frequent use of section 212(d)(3)(B)(i) of the INA, which vests discretion in the Secretaries of State and Homeland Security, after consultation with each other and the Attorney General, not to apply the material support for terrorism bar to asylum applicants.⁷⁵ The government hopes that extending the discretionary non-applicability clause to asylum seekers otherwise barred by the terrorist ground of inadmissibility will increase the number of referrals from the United Nations High Commissioner for Refugees to the U.S. refugee resettlement program.⁷⁶

II. The Material Support Provision Needs an Explicit Exception

A. The Lack of a Duress Exception Runs Afoul of Basic U.S. Jurisprudence

1. The Origins of Duress

⁷³ PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 34 (“Many Colombian refugee applicants have made payments or provided other forms of assistance to armed guerrilla or paramilitary groups as a form of protection tax or ‘vacuna,’ often made under the threat of harm to themselves or their families.”).

⁷⁴ *Id.* at 4 (“The Departments of State and Homeland Security have been working closely in recent months to examine possible approaches to utilizing the discretionary non-applicability clause in this inadmissibility ground.”). *See also* Meeting Minutes, *supra* note 3, at 5 (“The Asylum Office is trying to figure out how to deal with waivers.”).

⁷⁵ *See* INA § 212(d)(3)(B)(i), 8 U.S.C. 1182 § 212(d)(3)(B)(i):

The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) shall not apply to an alien, that subsection (a)(3)(B)(iv)(VI) shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity, or that subsection (a)(3)(B)(vi)(III) shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection . . .

⁷⁶ PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 34 (“A positive resolution may result in the resumption of larger numbers of [United Nations High Commissioner for Refugees] referrals, given the continuing instability and violence in Colombia.”).

The Supreme Court has ruled that noncitizens have the right to certain constitutional protections once within U.S. borders⁷⁷ but do not enjoy the same breadth of Constitutional rights and privileges as U.S. citizens.⁷⁸ Nevertheless, one of the basic purposes of the INA and the U.S. refugee program is to showcase the United State's embrace of noncitizens in need and to encourage other countries to follow suit.⁷⁹ In theory, the United States has recognized the need to accommodate persons fleeing persecution⁸⁰ and to afford such persons some measure of due process.⁸¹ In practice, immigration law has in many ways deviated from the law applied to U.S. citizens.⁸²

⁷⁷ See *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (finding that noncitizens are “entitled . . . to the safeguards of the Constitution” if “residing in the United States for a shorter or longer time”).

⁷⁸ The Supreme Court has repeatedly emphasized that “over no conceivable subject is the legislative power of Congress more complete than it is over [immigration].” *Oceanic Navigation Co. v. Stanahan*, 214 U.S. 320, 339 (1909). It has been argued that the Supreme Court's deference to the political branches of government is logical; the Supreme Court should not prevent the executive branch from giving effect to the legislature's exclusion of an alien on the basis of the security risk he poses to the United States and the benefit his exclusion brings to Americans. See, e.g., ROMERO, *supra* note 58, at 10. For further information about alienage as a legal category, see generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

⁷⁹ See Kuck Testimony, *supra* note 9, at 13 (“[B]eginning really in 1952, we realized that the refugee program could be a tool for us to use to drive home the point that we were the country of freedom, that we were the country that others should emulate, that we were the country that people should seek to be like.”). See also GORDON ET AL., *supra* note 18, § 2.01 (“[A] dominant trend of liberality on an emergency or selective basis emerged in the years following World War II. This was reflected in special legislation for refugees and displaced persons by private relief legislation to avoid hardships produced by the general legislation.”).

⁸⁰ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, USCIS STRATEGIC PLAN: SECURING AMERICA'S PROMISE 1 (2005), available at <http://uscis.gov/graphics/aboutus/repsstudies/USCISSTRATEGICPLAN.pdf> (last visited Nov. 18, 2005) (“The opportunity for social equality, for economic independence, for a brighter future; these are the beacons that have attracted people throughout history and from every part of the world to become Americans.”).

⁸¹ See, e.g., *Selgeka v. Carroll*, 184 F.3d 337, 344 (4th Cir. 1999) (noting that “a refugee is entitled to some due process”); *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (“[W]e doubt Congress intended the Attorney General to establish an asylum procedure . . . that fails to provide basic due process.”); *Yiu Sing Chun v. Sava*, 708 F.2d 869, 876 (2d Cir. 1983) (“Our construction of the statute and the regulations is aided to some extent, if not guided, by what we perceive to be the dictates of procedural due process.”).

⁸² See *Zadyvdas v. Davis*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”). This quotation applies to asylum applicants because asylum applicants have effected an entry into the United States. For more information on asylum applicants, see *supra* note 18. See also *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to

That said, there are certain legal principles applied in criminal cases because of the gravity of the consequences for a defendant.⁸³ The consequences of a failed asylum application can be equally devastating.⁸⁴ Duress, for example, is a well-established principle of criminal law.⁸⁵ Although legal scholars and society as a whole have tussled over the precise contours of the doctrine,⁸⁶ its basic rationale flows from the notion that people should not be punished for crimes they do not commit voluntarily.⁸⁷

Several theoretical bases have been advanced in favor of the duress defense. One such theory is utilitarianism.⁸⁸ Conventional utilitarianism posits that when an individual is under duress the specter of criminal prosecution carries no dissuasive force.⁸⁹

regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’”)

⁸³ See *Jordan v. De George*, 341 U.S. 223, 243 (1951) (finding that “deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation”).

⁸⁴ See, e.g., Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 *GEO. IMMIGR. L.J.* 367, 377 (2003) (“The stakes in refugee cases are grave; an incorrect decision can lead a person to detention, torture, execution, or other severe human rights violations.”).

⁸⁵ See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 *S. CAL. L. REV.* 1331, 1331 (1989) (“Despite criticisms, our society has retained the [duress] defense, expanded it over the years, and paid close attention to the calls of those who would apply the defense in novel ways.”); see also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 415–16 (2d ed. 1960).

⁸⁶ See Dressler, *supra* note 85, at 1331.

⁸⁷ See HALL, *supra* note 85, at 415–16 (noting that it is “ingrained in the criminal law that normal persons sometimes commit serious harms justifiably”).

⁸⁸ This theory is called utilitarian because it accords with the ethical theory known as utilitarianism put forward by Jeremy Bentham and James Mill. The theory holds that human acts should be geared toward achieving the greatest happiness for the greatest number of people. See *Dictionary.com*, <http://dictionary.reference.com/search?q=utilitarianism> (last visited Nov. 18, 2005). As an illustration of classic utilitarianism, it may be argued that “duress is justified when D avoids his or another’s death at the hands of a coercer by committing a property offense.” See Dressler, *supra* note 85, at 1351 n.132. Similarly, a utilitarian might argue that it is preferable that a Colombian farmer pay taxes to guerrillas than have his family killed.

⁸⁹ See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 300 (3d ed. 2001) (noting that when a person is “in thrall to some coercive power, the threat of criminal punishment is ineffective”). However, Professor Dressler has also stated, “As is now commonly accepted by nearly all but the most die-hard utilitarians, deterrence theory does not adequately explain the existence of excuses in the criminal law.” See Dressler, *supra* note 85, at 1357 n.155.

Utilitarians also assert that an individual under duress not only has done no wrong but is in fact a victim.⁹⁰

Another such theory is retributivism.⁹¹ Retributivists justify the duress defense on the ground that an individual who does not act freely does not deserve to be punished.⁹² To punish such an individual would be unfair.⁹³

The Modern Penal Code (MPC) allows a duress defense.⁹⁴ Many states have adopted this defense in some form.⁹⁵ Moreover, the U.S. Supreme Court has specifically recognized that the duress defense may be implied even where a criminal statute has been violated.⁹⁶

In applying principles of criminal law to the asylum context,⁹⁷ the question arises whether an asylum applicant is individually responsible for his or her excludable act.⁹⁸

The United Nations High Commissioner for Refugees has framed the issue as follows:

⁹⁰ See DRESSLER, *supra* note 89, at 300 (noting that the coercing party, not the victim, is criminally disposed and thus needs to be incapacitated and rehabilitated).

⁹¹ Under retributivism, punishment is justified when deserved. Punishment is deserved when the wrongdoer chooses to violate society's rules of his own free will. See *id.* at 16 (noting that retributivists believe that the wrongdoer should be punished even if punishment will not result in a reduction in crime).

⁹² See *id.* at 301–02.

⁹³ See *id.*

⁹⁴ MODERN PENAL CODE (MPC) § 2.09(1) (Official Draft, 1962), available in DRESSLER, *supra* note 89, at 1000 [hereinafter MPC]: “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 or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.” MPC § 2.09(2) specifies further that the duress defense is unavailable “if the actor recklessly [or negligently] placed himself in a situation in which it was probable that he would be subjected to duress.” *Id.*

⁹⁵ See Dressler, *supra* note 85, at 1343 (noting that “[t]hirteen states have adopted in whole or in substantial part the definition of duress framed by the American Law Institute (ALI) in the MPC”).

⁹⁶ See, e.g., *United States v. Bailey*, 444 U.S. 394, 411 n.8 (1980) (finding that “duress excuses criminal conduct . . . ‘because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise’”) (citing Working papers of the National Commission on Reform of Federal Criminal Laws Relating to the Study Draft of the New Federal Criminal Code 123 (1970)).

⁹⁷ See 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 10 (2005) (noting that “[e]qual regard should also be given to general principles of criminal liability in order to determine whether a valid defence, such as duress, exists for the crime in question”).

⁹⁸ See Letter from Kolude Doherty, UNHCR Regional Representative, to Edward Neufville, III, Esq., Attorney-at-Law (June 15, 2005) (on file with author) [hereinafter UNHCR Letter].

In determining individual responsibility, the adjudicator must first determine whether the individual perpetrated the acts in question himself or herself or facilitated or assisted the commission of such acts through conduct which had a significant effect. The adjudicator must then determine whether the individual had the necessary *mens rea* for commission of all material elements of the crime. To satisfy the *mens rea* requirement, the individual must have acted with both “intent” and “knowledge” . . . Individual responsibility can be negated if, for example, the necessary *mens rea* is absent or if the circumstances give rise to a defense, such as coercion or self-defense. These principles would apply equally with regard to the provision of funds or goods/services to a “terrorist organization.”⁹⁹

In essence, courts should evaluate “the individual’s personal culpability . . . along a continuum of conduct.”¹⁰⁰ Indeed, as the boundary between criminal law and immigration has grown blurrier¹⁰¹ and “terrorist” has been increasingly conflated with “immigrant,”¹⁰² the need for criminal law defenses has become increasingly urgent.

The parallels between criminal law and immigration are even more compelling in light of the similarity between the INA’s material support for terrorism provision and a separate criminal provision that originated in the Anti-Effective Death Penalty Act of 1996 (AEDPA).¹⁰³ That provision, codified at 18 U.S.C. §§ 2339A and 2339B, imposes criminal liability on U.S. citizens and lawful permanent residents of the United States who provide material support or resources to a foreign terrorist organization,¹⁰⁴ as

⁹⁹ *Id.*

¹⁰⁰ *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) (quoting *Riad v. I.N.S.*, No. 96-70898, 1998 U.S. App. LEXIS 21452, at *9 (9th Cir. 1998)).

¹⁰¹ See ROMERO, *supra* note 58, at 36–37 (noting the government’s practice of invoking criminal laws as opposed to immigration laws with regard to terrorist aliens).

¹⁰² See Dan Eggen, *Tough Anti-Terror Campaign Pledged; Ashcroft Tells Mayors He Will Use New Law to Fullest Extent*, WASH. POST., Oct. 26, 2001, at A1 (“Let the terrorists among us be warned,” Ashcroft said. “If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.”).

¹⁰³ Pub. L. No. 104-132, 110 Stat. 1214 (1996). See *supra* note 42.

¹⁰⁴ 18 U.S.C. § 2339B(a)(1); 18 U.S.C. § 2339B(d)(1)(A). This provision has been used in high-profile prosecutions. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002); *United States v.*

designated by the Secretary of State.¹⁰⁵ Under § 2339B, “to engage in terrorist activity” is defined in the INA.¹⁰⁶ The definition of “material support” is somewhat similar to that in the INA but is different in two important respects.¹⁰⁷ First, § 2339A’s list of enumerated examples of material support is more exhaustive than the INA’s.¹⁰⁸ At first blush, this suggests that more activities may constitute material support under § 2339A than under the INA. However, § 2339A states that material support “means” any of the enumerated examples, while the INA’s definition states that material support “includes” any of the enumerated examples.¹⁰⁹ Thus, the INA’s definition of what might constitute material support is arguably more expansive and could encompass virtually any activity.

Second, like its INA counterpart, § 2339B does not explicitly exonerate defendants who provide material support or resources under duress. There are no reported cases in which a defendant facing prosecution for providing material support under § 2339B has pleaded a duress defense. Generally speaking, the duress defense arises rarely in court¹¹⁰ and therefore does not lend itself to statistical analysis. However, there is little reason to project that a court would not entertain a duress defense in the case

Stewart, No. 02-395, 2002 U.S. Dist. LEXIS 10530 (S.D.N.Y. 2002). For a critique of the provision, see generally Jennifer Van Bergen, *In the Absence of Democracy: The Designation and Material Support Provisions of the Anti-Terrorism Laws*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 107 (2003).

¹⁰⁵ See INA § 219(a)(1), 8 U.S.C. § 1189(a)(1).

¹⁰⁶ See 18 U.S.C. § 2339B(a)(1); INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B).

¹⁰⁷ See 18 U.S.C. § 2339A(b)(1):

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

¹⁰⁸ *Id.*

¹⁰⁹ See INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

¹¹⁰ Peter Westen and James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse – And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 833 (2003).

of a U.S. citizen or lawful permanent resident who provides material support to a foreign terrorist organization. As previously discussed,¹¹¹ courts have held in criminal cases that a defendant who satisfies the elements of the duress defense may assert such a defense.¹¹² As long as the requirements of the defense are met—this will vary among jurisdictions—courts are unlikely to impose full liability on criminal defendants. After all, courts have held that a “[i]t is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.”¹¹³ This places a very low threshold burden on the defendant.¹¹⁴ Furthermore, courts have held that a jury instructions that exclude a defense that has such a foundation is erroneous.¹¹⁵ Of course, this analysis is only speculative in the asylum context. But assuming that courts will allow criminal defendants to plead a duress defense, it is only logical that asylum seekers who provide material support under duress should be afforded the same opportunity. After all, the potential burden to a criminal defendant who is found guilty under § 2339B—the imposition of fines and several years of imprisonment—is on equal footing with the potential burden to asylum applicants whose claims are denied—the forcible return to what could amount to a lifetime of additional persecution and even torture. In fact, there is an even stronger argument in favor of allowing asylum applicants to raise a duress defense. Under the INA, there is a potentially infinite universe of activities that could

¹¹¹ See *supra* note 96.

¹¹² *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984).

¹¹³ See *Perez v. United States*, 297 F.2d 12, 15–16 (5th Cir. 1961); *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951).

¹¹⁴ See *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995).

¹¹⁵ See *Perez*, 297 F.2d at 15; *Hyde v. United States*, 15 F.2d 816, 821 (4th Cir. 1926).

constitute material support, which contrasts with the more definite parameters of material support under § 2339A.

2. The *Fedorenko* Analysis: A Bar on Involuntariness Considerations?

The Supreme Court has ruled that involuntariness inquiries may not be read into a statute in the case of aliens who have given assistance in persecution. In the leading case on the matter,¹¹⁶ *Fedorenko v. United States*,¹¹⁷ the Court held ineligible for a U.S. visa Feodor Fedorenko, a Ukrainian member of the Russian Army,¹¹⁸ who, following capture by the German army, was posted as an armed guard at Treblinka, the Nazi death camp.¹¹⁹ Following the war, Fedorenko applied for and was granted permanent admission to the United States under the Displaced Persons Act of 1948 (DPA),¹²⁰ which excluded as “displaced persons” persons who had “assisted the enemy in persecuting civilians.”¹²¹ After wending through the district court¹²² and the Fifth Circuit,¹²³ the case reached the Supreme Court, which rejected a voluntariness requirement “[u]nder traditional principles of statutory construction.”¹²⁴ The ensuing “Fedorenko analysis” has been used in subsequent cases to determine whether an individual assisted or participated in persecution,¹²⁵ an affirmative answer to which prohibits asylum under the INA.¹²⁶ The

¹¹⁶ The case has been cited in asylum adjudications as support for the proposition that an implied duress defense may not be read into the INA. *See, e.g., In re Rajeshkumar Kumarasamy*, No. A97-447-879 (N.J. EOIR, Immigr. Ct. May 9, 2005) (Tadal, IJ) (on file with author) [hereinafter *Kumarasamy*].

¹¹⁷ 449 U.S. 490 (1981). For a full discussion of the case, *see* Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986).

¹¹⁸ *Fedorenko*, 449 U.S. at 494.

¹¹⁹ *Id.* at 493.

¹²⁰ Pub. L. No. 80-774, 64 Stat. 1009 (1948), *amended by* Act of June 16, 1950, Pub. L. No. 81-555, ch. 262, 64 Stat. 219.

¹²¹ *Fedorenko*, 449 U.S. at 495.

¹²² *United States v. Fedorenko*, 455 F. Supp. 893, 921 (S.D. Fla. 1978), *rev'd*, 597 F.2d 546 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981).

¹²³ *United States v. Fedorenko*, 597 F.2d 946, 954 (5th Cir. 1979), *rev'd*, 449 U.S. 490 (1981).

¹²⁴ *Fedorenko*, 449 U.S. at 512. For a critique of the Court’s analysis, *see* Massey, *supra* note 117, at 112–20.

¹²⁵ *Hernandez v. Reno*, 258 F.3d 806, 812 (8th Cir. 2001).

Court criticized the lower court's having read a voluntariness requirement into the DPA on the ground that courts "are not at liberty to imply a condition which is opposed to the explicit terms of the statute."¹²⁷ The solution, the Court reasoned, lay "not in 'interpreting the [DPA] to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in *persecution of civilians.*'"¹²⁸ The Department of Homeland Security has relied on this interpretation of *Fedorenko* to assert that because there is no explicit voluntariness requirement in the INA for asylum applicants who assist terrorist groups, such a requirement was not intended and does not exist.¹²⁹

However, a closer reading of *Fedorenko* actually supports a duress defense. First, the *Fedorenko* Court and lower courts have held that "a court faced with difficult 'line-drawing problems' should engage in a particularized evaluation in order to determine whether an individual's behavior was culpable . . ."¹³⁰ In other words, courts should adopt a totality-of-the-circumstances approach in assessing, based on credibility findings, whether an asylum applicant's support for a terrorist organization truly invokes any degree of personal liability or responsibility. In the absence of personal liability or responsibility, any finding that an applicant afforded material support to a terrorist organization should be disregarded in determining asylum eligibility. It is true that the *Fedorenko* Court relied on the fact that the two provisions of the DPA under scrutiny

¹²⁶ See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); INA § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A).

¹²⁷ *Fedorenko*, 449 U.S. at 512–13.

¹²⁸ *Id.* at 512–513 n.34).

¹²⁹ See Telephone Interview with Confidential Source, Amnesty International (Oct. 26, 2005) (notes on file with author) [hereinafter Amnesty Interview].

¹³⁰ *Hernandez*, 258 F.3d at 813 (quoting *Fedorenko*, 449 U.S. at 512–13).

differed.¹³¹ It is also true that section 212 of the INA contains an exception for involuntariness in the section addressing membership in the Communist or any other totalitarian party, but not in the material support for terrorism section.¹³² However, the intent to apply a voluntariness standard to one provision and not to the other is clearer in the DPA than in the INA because the DPA's provisions are closely related and placed next to each other within the statute. Conversely, the INA's Communist ground of inadmissibility is separate and distinct from the terrorist ground. In this respect, the INA is distinguishable from the DPA. This argument may appear to fly in the face of standard canons of statutory construction.¹³³ However, the Supreme Court has acknowledged that "that Congress . . . legislates against a background of Anglo-Saxon common law" and may therefore contemplate the defense of duress in the process.¹³⁴ In fact, the Court has left unanswered the question whether a defense may be read into a federal statute that does not explicitly provide for an exception.¹³⁵

Moreover, certain scholars have argued that statutes must encompass some "overall policy rationality."¹³⁶ The Supreme Court has echoed this view, holding that

¹³¹ See *Fedorenko*, 449 U.S. at 512. One provision stipulated that an applicant's assistance in persecution be voluntary; the other did not. See *supra* note 120 (denying eligibility for immigration to the United States to "2. Any . . . persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries . . .; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war").

¹³² See INA § 212(a)(3)(B)(vi)(D)(i)–(iii), 8 U.S.C. § 1182(a)(3)(B)(vi)(D)(i)–(iii).

¹³³ See, e.g., *United States v. Rutherford*, 442 U.S. 544, 559 (1979) ("Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.").

¹³⁴ *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980).

¹³⁵ See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) ("We need not decide . . . whether necessity can ever be a defense when the federal statute does not expressly provide for it.").

¹³⁶ See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1036 (1989) ("Policy rationality suggests [that] different provisions of the same statute fit together in a coherent way and embody a reasonable public policy."). See also *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

while the plain meaning of a statute may control in some instances,¹³⁷ courts may draw on traditional tools of construction such as inquiries into a statute's underlying purposes.¹³⁸ Applying these principles, it may be argued that one of the DPA's purposes was to give refuge to persons fleeing Fascist or Soviet persecution, but not to active participants in persecution.¹³⁹ One of the purposes of U.S. asylum law is to give refuge to persons fleeing persecution but not to knowing, active terrorist supporters.¹⁴⁰ To make an exception for involuntary members of the Communist party but not for persecuted people pressed into the service of terrorists would be wholly inconsistent with this purpose. It also conflicts with the established canon of statutory construction that seeks to impose coherence on a statute to serve its ultimate object and policy.¹⁴¹

3. Current Law Leads to Irrational Results

Some commentators have argued, and some U.S. courts have held, that even a lesser defense than duress should mitigate an asylum applicant's actions that might otherwise make him or her inadmissible. A working paper by the United Nations High Commissioner for Refugees offers by way of example the case of a peasant who has no viable economic alternatives to cultivating coca, an illicit enterprise.¹⁴² In Colombia and other major drug-producing and conflict-riven countries, peasants are frequently forced to

¹³⁷ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (holding that an administrative agency's interpretation of a statute was not entitled to deference because it went beyond the dictionary-derived meaning of "modify").

¹³⁸ See, e.g., *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (analyzing "the language, structure, and purpose" of the Paperwork Reduction Act to discern congressional intent).

¹³⁹ See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13 (1981).

¹⁴⁰ See *supra* notes 79–80. See also Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT'L L. REV. 47, 69 (2004) (commenting that "the paramount purpose of asylum law [is] to establish a robust regime of international protection for defined categories of persons deprived of national protection").

¹⁴¹ See Eskridge, *supra* note 136, at 1037 ("One established canon of construction is the purposive whole act rule, which seeks to impose some degree of coherence within a single statute.").

¹⁴² See GOTTWALD, *supra* note 97, at 21.

commit drug-related violations on pain of bodily harm or death and thus do not actually make a moral choice.¹⁴³ The Ninth Circuit adopted a similar view in *United States v. Contento-Pachon*,¹⁴⁴ a criminal case in which the court held that a duress defense applied where a Colombian defendant smuggled cocaine into the United States after being told that his wife and child would be harmed if he did not comply.¹⁴⁵

As discussed above, currently the only way for an asylum applicant to defeat a finding of inadmissibility on terrorist-related grounds is to show a lack of knowledge that the organization he or she supported was engaged in terrorist activity.¹⁴⁶ This *mens rea* requirement is such an evidentiary catch-22 that most asylum applicants will be unable to prove a lack of knowledge. Take, for instance, the case of a Colombian who was forced to pay off a guerrilla group¹⁴⁷ that is not designated as a foreign terrorist organization but is nevertheless found by an immigration judge to be a terrorist organization. If the Colombian applicant wishes to prove that he did not know and had no reason to know that the group was a terrorist organization, the immigration judge would inevitably ask why the applicant felt compelled to pay the group in the first place. The applicant's very act of paying the group that threatened him would have put the alien on notice that the group was a terrorist organization. The Department of Homeland Security has argued that an alien facing such a scenario makes a conscious decision to pay a terrorist organization and would be better off disrupting his or her lifestyle and career by leaving

¹⁴³ *Id.* at 23 (noting that peasants in such situations “could disengage from the drug offences only at risk of grave danger to their lives and/or the lives of their relatives”).

¹⁴⁴ 723 F.2d 691 (9th Cir. 1984).

¹⁴⁵ *See id.* at 695 (holding that “a defendant who has acted under a well-grounded fear of immediate harm with no opportunity to escape may assert the duress defense”).

¹⁴⁶ *See supra* notes 28–30.

¹⁴⁷ This hypothetical assumes that the guerrillas are not associated with the Revolutionary Armed Forces of Colombia or the National Liberation Army, both of which are on the State Department's foreign terrorist organization list. *See* U.S. Dep't of State, Foreign Terrorist Organizations, *available at* <http://www.state.gov/s/ct/rls/fs/2003/17067.htm> (last visited Nov. 20, 2005).

the area.¹⁴⁸ The illogical and surely undesirable consequence of such reasoning would be the mass displacement of persons in any strife-ridden country.¹⁴⁹ The applicant's other recourse would be to convince an immigration judge or court that the organization to which he afforded material support posed no threat to U.S. security.¹⁵⁰

Current law poses yet another oddity for asylum applicants. There is a de facto inconsistency resulting from the difference between affording material support to a designated foreign terrorist organization (FTO) and affording material support to a non-designated organization that an asylum adjudicator deems to be a terrorist organization within the meaning of the INA. As mentioned, affording material support to a designated FTO is a strict liability offense.¹⁵¹ Thus, an alien found to have afforded material support to such an organization is per se inadmissible and by consequence ineligible for asylum.¹⁵² Thus, the alien cannot raise the defense that he or she did not know that the organization was a FTO. Conversely, an alien who is found to have afforded material support to a group not designated as a FTO but deemed by an asylum adjudicator to constitute a terrorist organization may defeat a finding of inadmissibility on the ground that he or she did not know the group was a terrorist organization.

¹⁴⁸ HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 25. This position of the Department of Homeland Security was also told to the author by an attorney in Amnesty International's Washington, D.C. office. Amnesty Interview, *supra* note 129.

¹⁴⁹ HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 26 ("If taken to its logical conclusion, [the Department of Homeland Security's] position would require civilians facing extortion by terrorist organizations to flee, regardless of physical dangers and economic uncertainties, and potentially join the ranks of displaced, unemployed persons seeking refuge.").

¹⁵⁰ *See, e.g.,* Cheema v. Ashcroft, 372 F.3d 1147, 1155 (9th Cir. 2004) (finding that an alien who afforded material support to an organization that engaged in terrorism was not necessarily inadmissible where there were no reasonable grounds for regarding the alien to threaten U.S. security). This decision was analyzed in a publication periodically released by the Office of Immigration Litigation, a subdivision within the Department of Justice. *See* OFFICE OF IMMIGRATION LITIGATION, IMMIGRATION LITIGATION BULLETIN 1 (Dec. 31, 2003), available at <http://www.usdoj.gov/civil/oil/7news12.pdf> (last visited Nov. 20, 2005).

¹⁵¹ *See supra* note 34.

¹⁵² *See id.*

This bizarre discrepancy has no readily visible foundation; it seems to issue from mere oversight. It also calls into question the very purpose of maintaining a list of FTOs. Indeed, if one of the list's purposes is to put aliens on notice about which groups are terrorist organizations, then imposing strict liability on aliens who manifestly cannot be expected to access the list is senseless. In fact, it is highly probable that aliens may believe that many of the groups on the list may not be terrorist organizations in the least. After all, many FTOs are heavily involved in non-terrorist activities such as social welfare projects.¹⁵³ Indeed, some FTOs practically function as local governments, managing infrastructural fundamentals such as hospitals, schools, and orphanages.¹⁵⁴ Consequently, many FTOs may actually be perceived as specifically benevolent organizations with no ties to terrorism.¹⁵⁵

In a similar vein, the FTO list is necessarily a product of politics and ideology. It revives the oft-repeated truism that “one man's terrorist is another man's freedom

¹⁵³ See Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 870 (2004) (“The designated groups often do much more than commit terrorist acts. They also undertake important and worthwhile charitable, humanitarian, educational, or political activities.”). For example, Israel has stated that a significant amount of the activities of Hamas, a designated FTO, are geared toward charitable and social welfare projects. See Press Release, Israel Ministry of Foreign Affairs, Hamas's Use of Charitable Societies to Fund and Support Terror (Sept. 22, 2003), available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/9/Hamas-s%20use%20of%20charitable%20societies%20to%20fund%20and%20su (last visited Jan. 19, 2006).

¹⁵⁴ See, e.g., *Implementation of the USA PATRIOT Act: Prohibition of Material Support under Sections 805 of the USA PATRIOT Act and 6003 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearings Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 25 (2005) (statement of Ahilan T. Arulanantham) (“Although the LTTE [in Sri Lanka] is designated as a terrorist organization, in the territory it controls it functions as a government. The LTTE runs a court system, a police force, orphanages, a set of health clinics, and even its own traffic police. It is for all practical purposes the government for well over 500,000 people who live in the LTTE-controlled areas. And, because the LTTE governs its territory as an authoritarian military regime, it exerts a significant amount of control over all of the institutions in its territory. As with civil war situations around the globe—Somalia, Indonesia, Sudan, Ethiopia, to name a few—providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by—and dealing directly with—a group that is designated as, or at least meets the very broad definition of, a foreign terrorist organization.”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:21139.pdf (last visited Jan. 19, 2006).

¹⁵⁵ See Jonakait, *supra* note 153, at 870 (“[O]rganizations that might seem praiseworthy to many, and indeed may in fact be praiseworthy, can be designated.”).

fighter.” For instance, Colombia’s main guerrilla organizations, the FARC and the ELN, are both designated as FTOs.¹⁵⁶ Both claim to maintain their armed struggle against the Colombian government on behalf of their oppressed Colombian compatriots.¹⁵⁷ Despite fear of and contempt for these organizations by many Colombians in certain quarters, many Colombians throughout the country consider both as positive forces rightfully combating an autocratic elite.¹⁵⁸ There is little reason to punish an innocent farmer without an internet connection who may not know, for example, that the FARC bombed a Bogotá country club, killing more than 30 people, including six children,¹⁵⁹ and may instead be swayed by the group’s calls for agrarian reform and social welfare programs.¹⁶⁰ Many also do not regard as terrorist-related the guerrillas’ involvement in coca cultivation.¹⁶¹ The U.S. government, on the other hand, considers narcotrafficking a serious threat to national security and thus tags groups involved in the drug trade as terrorist organizations.¹⁶²

¹⁵⁶ See U.S. Dep’t of State, Foreign Terrorist Organizations, *available at* <http://www.state.gov/s/ct/rls/fs/2003/17067.htm> (last visited Jan. 19, 2006).

¹⁵⁷ See FARC-EP, *Las FARC-EP: 30 años de lucha por la paz, democracia y soberanía*, *available at*, http://six.swix.ch/farcep/Nuestra_historia/30_anos_de_lucha_por_la_paz.htm (last visited Jan. 19, 2006); Ejército de Liberación Nacional, *Somos ELN*, *available at* <http://www.eln-voces.com/> (last visited Jan. 19, 2006).

¹⁵⁸ Confidential interviews with various Colombian nationals in Colombia and Venezuela (June 2004, Dec. 2005, Jan. 2006).

¹⁵⁹ See Juan Forero, *Blast at Social Club Struck at Colombia’s Elite*, N.Y. TIMES, Feb. 9, 2003, at section 1, page 13.

¹⁶⁰ Elisabeth Malkin and Suzanne Timmons, *Colombia: A Very Bizarre ‘Peace Laboratory’: A Province Adapts to Rebel Rule as the Government Tries to Negotiate an End to the Guerrilla War*, BUSINESSWEEK ONLINE, July 26, 1999, http://www.businessweek.com/1999/99_30/b3639223.htm (last visited Jan. 21 2006). I use the example of the FARC in Colombia only for illustrative purposes. The FARC’s popularity throughout Colombia has waned considerably. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, INTERNATIONAL PROTECTION CONSIDERATIONS REGARDING COLOMBIAN ASYLUM SEEKERS AND REFUGEES 7 (2005), *available at* <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=RSDLEGAL&id=422c832e4&page=publ> (last visited Nov. 29, 2005) (“[A] perceived lack of commitment to a political and social agenda have meant that the FARC now have minimal popular support in Colombia.”) [hereinafter COLOMBIAN ASYLUM SEEKERS].

¹⁶¹ See *supra* note 158.

¹⁶² See, e.g. International Office of National Drug Control Policy, *The U.S.–Colombia Initiative*:

By way of another example, the Ninth Circuit held in *Cheema v. INS*¹⁶³ that activity that may objectively be adjudged as terrorist activity may not necessarily represent a threat to U.S. interests.¹⁶⁴ The court discussed the case of the paramilitary branch of the African National Congress, led by Nelson Mandela, which engaged in an armed struggle against the ruling white government.¹⁶⁵ The court remarked that the U.S. Congress had pressured the South African government to release Mandela from prison. Thus, the court reasoned, “[i]t would not be sensible to conclude that Congress, in aiding a man convicted of treason by his own government, endangered the security of the United States or that the alien supporters of Mandela in this country were all deportable as terrorists endangering our national security.”¹⁶⁶

B. The Courts Keep Getting it Wrong

Few cases deal directly with the material support for terrorism provision. Furthermore, most proceedings before immigration judges are unpublished and remain confidential.¹⁶⁷ The decisions that have circulated in immigration law circles evince a split among immigration judges over whether to adopt an implied duress defense.¹⁶⁸

ONDCP FACT SHEET, *available at* <http://www.whitehousedrugpolicy.gov/publications/international/factsht/us-columbia.html> (last visited Jan. 19, 2006).

¹⁶³ 350 F.3d 1035 (9th Cir. 2003).

¹⁶⁴ *See Cheema*, 350 F.3d at 1043.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ ALEINIKOFF ET AL., *supra* note 18, at 841 (“Information about asylum applications is supposed to remain confidential, both to protect family members and friends still in the home country, and to help assure that the mere fact of filing for asylum will not add in any measure to the risks that might be faced by the applicant.”).

¹⁶⁸ *Compare* Kumarasamy, *supra* note 116, at 6, 8 (“The plain language of [INA section 212] does not expressly require that the alien voluntarily commit the act that he or she knows or reasonably should have known affords material support to a terrorist organization . . . An alien who commits an act that he knows or reasonably should know affords material support to a terrorist organization, whether voluntary or involuntary, is inadmissible. Congress is capable of adopting a voluntariness exception if it elects to do so.”) *with* e-mail from Brian D. O’Neill, Senior Trial Attorney, Maynard & Truland, LLC, to Susan Benesch, Refugee Advocate, Amnesty International USA (forwarded to author by Stephen Yale-Loehr, Adjunct Professor of Law, Cornell Law School, on Dec. 2, 2005) (on file with author) [hereinafter O’Neill].

However, even where immigration judges have adopted the defense, they have set the bar high, suggesting that the level of duress to which applicants must be subjected for the defense to apply would have to exceed situations involving extortion of money and other support.¹⁶⁹ The following two Sections present overviews of two circuit court cases on point.

1. *Perinpanathan v. Ashcroft*¹⁷⁰

The material support for terrorism provision provides no explicit duress exception for membership in a foreign terrorist organization. Nonetheless, in *Perinpanathan v. Ashcroft*, the Eighth Circuit appeared amenable to the notion that an asylum applicant could obtain asylum despite an association with a foreign terrorist organization if that association had been forged under duress.¹⁷¹

Asylum applicant Kirupanathan Perinpanathan was a Sri Lankan citizen who had attempted to enter the United States using a forged Canadian passport.¹⁷² During his interview with an immigration officer, he disclosed his membership in the Liberation Tigers of Tamil Eelam (LTTE), an organization that Perinpanathan stated “fights for the Tamil people,”¹⁷³ but that was, and is still today, on the State Department’s foreign terrorist organization.¹⁷⁴ Although Perinpanathan made no reference to coerced membership at his initial screening interview, he later told a second immigration officer,

E-mail] (noting that an immigration judge granted asylum to a Nepalese asylum applicant who had been forced on pain of death by Maoist rebels to given medical treatment to other Maoist fighters on the ground that the applicant was acting under an imminent threat to his life).

¹⁶⁹ See, e.g., O’Neill E-mail, *supra* note 168, at 2–3.

¹⁷⁰ 310 F.3d 594 (8th Cir. 2002).

¹⁷¹ See *id.*

¹⁷² *Id.* at 596.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 598; U.S. Department of State, Foreign Terrorist Organizations, available at <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Oct. 2, 2005).

after having retained legal counsel, that he had joined the LTTE under pain of death.¹⁷⁵ After explaining that this discrepancy was due to a translation error, Perinpanathan was referred to an immigration court.¹⁷⁶ The immigration judge concluded that Perinpanathan had changed his story after learning that his voluntary association with the LTTE would have rendered him inadmissible.¹⁷⁷ The Board of Immigration Appeals (BIA) upheld the immigration court's ruling that Perinpanathan did not have a credible fear of being tortured if he returned to Sri Lanka.¹⁷⁸

In his appeal to the Eighth Circuit, Perinpanathan reiterated his claim that he was forced to aid the LTTE.¹⁷⁹ After agreeing with the lower courts' determination regarding his lack of credibility on this issue, the court reasoned that "if Perinpanathan provided 'material support' to the LTTE, which is listed by the Department of State as a foreign terrorist organization, he is barred from claiming asylum."¹⁸⁰ The court held that "the substantial evidence shows that [Perinpanathan] voluntarily participated in LTTE activities, and because it is a terrorist organization, he is barred from claiming asylum relief."¹⁸¹

Most striking about the court's opinion is its suggestion that Perinpanathan might have been able to obtain asylum if he had demonstrated that his affiliation with the LTTE had been involuntary. Nowhere does section 212 of the INA afford an exception for

¹⁷⁵ *Perinpanathan*, 310 F.3d at 596.

¹⁷⁶ *Id.* at 597.

¹⁷⁷ *Id.* The immigration judge also found that even if Perinpanathan had established his eligibility for asylum, he would have been deemed inadmissible anyway because he had "attempted to gain admission to the United States by using a falsified passport." *Id.*

¹⁷⁸ Perinpanathan appealed the immigration judge's initial determination of inadmissibility to the BIA, which remanded the case to the immigration judge "to develop the record regarding . . . whether any young Tamil has a good reason to fear torture." *Id.*

¹⁷⁹ *Id.* at 598.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 598-99.

involuntary membership in a foreign terrorist organization. The only escape hatch the statute offers an asylum applicant is in the provision that he “knows, or reasonably should know” that his act “affords material support.”¹⁸² It is not entirely clear from the court’s opinion whether it might have entertained a duress exception. However, the court specifically upheld the BIA on the ground that Perinpanathan had *voluntarily* participated in the LTTE.¹⁸³ This language leaves open the possibility that the court might have taken a different tack had there been evidence of coercion.

2. *Amaya Arias v. Gonzales*¹⁸⁴

As discussed above, the state of affairs regarding Colombian asylum seekers is particularly alarming.¹⁸⁵ There are approximately 46,000 Colombian asylum seekers in Central and South America and more than two million¹⁸⁶ internally displaced persons.¹⁸⁷

In 1991, Walter Antonio Amaya Arias, a Colombian citizen, joined the Colombian police force as an anti-narcotics officer.¹⁸⁸ He worked for the next few years against the Revolutionary Armed Forces of Colombia (FARC),¹⁸⁹ which regularly compels Colombian citizens to pay it money under threat of harm.¹⁹⁰ The FARC is also

¹⁸² See INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

¹⁸³ *Perinpanathan*, 310 F.3d at 598–99.

¹⁸⁴ 2005 U.S. App. LEXIS 15999 (3d Cir. 2005).

¹⁸⁵ See *supra* notes 68–70.

¹⁸⁶ The Central Intelligence Agency reports that this number may be between 2,730,000 and 3,100,000. See Central Intelligence Agency, The World Factbook, available at <http://cia.gov/cia/publications/factbook/geos/co.html> (last visited Nov. 20, 2005).

¹⁸⁷ PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 33 (“The ongoing conflict in Colombia generated the most significant numbers of refugees and [internally displaced persons] in the region. UNHCR reports that there are approximately 46,000 Colombian asylum seekers in the region and over two million internally displaced persons in Colombia.”). For a definition of “internationally displaced persons,” see *supra* note 69.

¹⁸⁸ *Amaya Arias*, 2005 U.S. App. LEXIS 15999, at *2.

¹⁸⁹ The FARC is a leftwing paramilitary group that has been locked in conflict with Colombia’s central government for the last several decades. For more information, see U.S. Dep’t of State, Background Note: Colombia, available at <http://www.state.gov/r/pa/ei/bgn/35754.htm> (last visited Nov. 20, 2005).

¹⁹⁰ *Amaya Arias*, 2005 U.S. App. LEXIS 15999, at *3 (noting that the FARC “has been known to extort so-called war taxes from civilians in order to finance its operations”).

on the State Department's list of foreign terrorist organizations.¹⁹¹ The court also acknowledged that "payment of war taxes is especially common in sections of Colombia controlled by the FARC. Refusal or inability to pay these war taxes is viewed as an act of political opposition and often results in reprisal."¹⁹²

Following his anti-narcotics stint, Amaya Arias became the manager of a fish farm in a town called El Morro, located in a region of the country he knew to be under FARC control. As a former police officer, Amaya Arias was aware of the FARC's status as a terrorist organization.¹⁹³ Several uneventful years passed before Amaya Arias' subsequent contact with FARC.¹⁹⁴ In 1997, a civilian-clothed man approached Amaya Arias and told him to give his boss an envelope marked "Armed Revolutionary Forces of Colombia."¹⁹⁵ Amaya Arias' boss told him that the envelope contained a demand for monthly payments to the FARC and ordered Amaya Arias to make the payments on the boss's behalf and with the boss's money.¹⁹⁶ Every month, several dozen armed guerrillas would arrive in El Morro,¹⁹⁷ some of whom would come to the farm and receive payments from Amaya Arias.¹⁹⁸ Though the guerrillas never threatened Amaya Arias, he believed that he had to pay them to save his life.¹⁹⁹ Amaya Arias testified that he did not

¹⁹¹ *Id.* at *6. The State Department still lists the FARC as a foreign terrorist organization. See U.S. Dep't of State, Foreign Terrorist Organizations, available at <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Nov. 20, 2005).

¹⁹² 2005 U.S. App. LEXIS 15999 at *3. The U.S. government has also acknowledged such involuntary payments: "Many Colombian refugee applicants have made payments or provided other forms of assistance to armed guerrilla or paramilitary groups as a form of protection tax or 'vacuna,' often made under the threat of harm to themselves or their families." PROPOSED REFUGEE ADMISSIONS, *supra* note 52, at 34. For more information on Colombia's refugee crisis, see generally COLOMBIAN ASYLUM SEEKERS, *supra* note **Error! Bookmark not defined.**

¹⁹³ *Amaya Arias*, 2005 U.S. App. LEXIS 15999 at *3.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at *4.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

personally back the FARC's political agenda.²⁰⁰ Nevertheless, he paid the guerrillas because he and his family were doing well on the farm.²⁰¹

After a few years of this arrangement, the United Self-Defense Forces of Colombia ("AUC")²⁰² infiltrated El Morro in 2000 and made a list of local residents who had paid the FARC.²⁰³ Within the same year, the AUC attacked the homes of alleged FARC supporters, killing approximately eighteen people.²⁰⁴ Amaya Arias was one of the AUC's targets but escaped.²⁰⁵ The AUC manhandled his girlfriend and killed both her brothers.²⁰⁶ After this episode, Amaya Arias left El Morro with his girlfriend and daughter for another region of Colombia, where the FARC no longer threatened them.²⁰⁷

Amaya Arias applied for asylum after entering the United States using a false passport.²⁰⁸ The immigration judge denied Amaya Arias asylum on the ground that his payments to the FARC constituted "an act that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization."²⁰⁹ The immigration judge reasoned that the provision encompassed no exception for involuntariness and therefore "mandated a finding of inadmissibility."²¹⁰ The immigration judge also found that Amaya Arias gave money to the FARC when asked by his boss, that the FARC had not threatened him, that he kept his farm job on account of the money he made, and that he

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² The AUC is a confederation of paramilitary groups that were created in the late 1970s and early 1980s to combat guerrillas, including FARC members. *See* COLOMBIAN ASYLUM SEEKERS, *supra* note 192, at 8. The State Department has designated the AUC as a foreign terrorist organization. *See* U.S. Dep't of State, Foreign Terrorist Organizations (FTOs), *available at* <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Nov. 29, 2005).

²⁰³ *Amaya Arias*, 2005 U.S. App. LEXIS 15999 at *4-5.

²⁰⁴ *Id.* at *5.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at *2.

²⁰⁹ *Id.* at *5-6.

²¹⁰ *Id.* at *6.

never again encountered the FARC once he finally left.²¹¹ These findings, held the Third Circuit, supported the inference that Amaya Arias could have left the farm before without fear of the FARC.²¹² There was also evidence that he had acted voluntarily and had “a reasonably opportunity to leave El Morro before the onset of any possible duress.”²¹³ The court therefore upheld the BIA and the immigration judge’s decisions, denying relief on the ground that “Amaya Arias had acted voluntarily when he made payments to the FARC” and skirting the statutory construction argument the lower proceedings had centered on but ultimately rejected.²¹⁴

C. Interim Remedies and International Standards

The *Perinpanathan* and *Amaya Arias* courts refused to read into the material support provisions a duress exception, rendering inadmissible for asylum purposes two aliens who otherwise may have had legitimate applications.²¹⁵ Their reluctance might derive from any number of reasons, not least of which is the simple lack of an explicit exception. However, there are grounds on which immigration judges and courts could base an implied duress exception.

1. Courts Can Fashion an Interim Remedy

Asylum adjudicators should read into the provision an implied exception by way of analogy. Some of the logical justifications of permitting the defense of duress have already been identified above.²¹⁶ But courts can adopt other commonsense approaches that likewise have jurisprudential substance. Commentators and scholars have remarked

²¹¹ *Id.* at *7.

²¹² *Id.* at *11.

²¹³ *Id.*

²¹⁴ *Id.* at *12, *2.

²¹⁵ *Cf.* HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 12 (“The practical effect of . . . hyper-literalist interpretation[s] is to deny refugee protection to a significant portion of the world’s population that happens to live in areas of the world dominated by terrorists.”).

²¹⁶ *See supra* notes 142–150.

that judicial interpretation of statutes in general, and immigration statutes in particular, are complicated and encompass multifaceted federal policies.²¹⁷ They have noted that statutory language is imperfect,²¹⁸ drafting mistakes occur,²¹⁹ and issues may arise from a statute that were not contemplated by legislators.²²⁰ When one or many of these circumstances are present, the statute opens itself to judicial interpretation.²²¹ Faced with a lack of statutory clarity, judges have recourse to several aids, including statutory construction principles and the statute’s legislative history.²²² Of course, a judge’s reading of a statute will depend on whether he adheres to a textualist approach or believes in an “archeological”²²³ role for judges.²²⁴ These divergent approaches can have great consequences in immigration cases.²²⁵ The U.S. Supreme Court has a long history of

²¹⁷ See, e.g., John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 204 (2001) (“Statutes are often highly complex, particularly those that enact into law broad or multifaceted federal policies. Social security, immigration, and tax legislation are examples.”).

²¹⁸ *Id.* (noting that “careful draftsmanship is all too often absent; perhaps it is impossible in the crush of competing interests and activities that occur in the final moments of legislative enactments”).

²¹⁹ *Id.*

²²⁰ *Id.* (“[P]erhaps the case involves factual circumstances, such as technological advances, that could not have been imagined when the statute was passed, but that nonetheless now seem to fall within the scope of its terms.”).

²²¹ *Id.* (“In light of all of these potential pitfalls, how should a judge go about interpreting a statute?”).

²²² *Id.* at n.3 (“These rules and methods include, *inter alia*, ‘intrinsic’ aids, such as presumptions and canons of construction, including textual canons (e.g., *nocitur a sociis*, or ‘it is known by its companions’), grammar canons (e.g., the ‘and’ versus ‘or’ rule), and substantive canons (e.g., statutes in derogation of the common law should be strictly construed); and ‘extrinsic’ aids, such as the common law, statutes that may aid in interpreting a different statute, and the legislative background of a statute.”).

²²³ Professor Thomas Alexander Aleinikoff suggested the term “archeological.” See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 611 n.13 (1990).

²²⁴ *Id.* at 205–06 (noting that a textualist believes that a statute is “complete when it is ordained by the legislature [and] acquires its status as law, the law, at the moment of enactment, before the judge grapples with it,” while “[t]he second conception regards the statutory command as not fully determined until the judge has finally articulated and applied it. Under this conception, the judge is not simply to apply the statutory law as stated, but to read it in such a way as to ‘improve’ upon it by reaching an interpretation that comports with the larger purpose (or purposes) of the enactment and any practical concerns, as well as general notions of justice, social purpose, and morality”).

²²⁵ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In *Cardoza-Fonseca*, the meaning of two sections of the INA dealing with deportation was in question. INA § 243(h) required the Attorney General not to deport an alien who establishes that his ‘life or freedom would be threatened’ by deportation. The U.S. Supreme Court, in a previous case, had held that this standard requires an alien to show that ‘it is more likely than not’ that he would be subject to persecution. *INS v. Stevic*, 467 U.S. 407 (1984). The other section, INA § 208(a), gave the Attorney General discretion to grant asylum to a “refugee” unable or

construing immigration statutes narrowly,²²⁶ sometimes in favor of noncitizens.²²⁷ For example, the Court held in *Fong Haw Tan v. Phelan*²²⁸ that a statutory provision might be interpreted “generously” when “the stakes are considerable” for noncitizens.²²⁹ Such generous interpretations have been called “the most important rule of statutory interpretation peculiar to immigration.”²³⁰

The stakes are indeed considerable for an asylum applicant facing possible persecution in his or her native country.²³¹ On the basis of the Supreme Court’s recurrent interpretations of statutes in favor of noncitizens,²³² asylum adjudicators could infer the legislative intent of the INA through extrajudicial indicia.²³³ For example, a court facing a situation similar to the one in *Amaya Arias* could study the INA’s overall purpose with

unwilling to return to home because of “a well-founded fear” of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The applicant, Cardozo-Fonseca, requested not to be deported pursuant to INA § 243(h) and also to be granted asylum pursuant to INA § 208(a). The Immigration Judge used the ‘more likely than not’ standard for both requests. The BIA affirmed. Based on the INA’s text and structure, the Ninth Circuit reversed, reasoning that the ‘well founded fear’ standard applies in asylum cases, while the ‘clear probability’ standard governs deportation proceedings. The U.S. Supreme Court affirmed the Ninth Circuit. *See also* Karin P. Sheldon, “*It’s not my Job to Care*”: *Understanding Justice Scalia’s Method of Statutory Interpretation Through Sweet Home and Chevron*, 24 B.C. ENVTL. AFF. L. REV. 487, 505–07 (1997).

²²⁶ *See* Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519 (2003).

²²⁷ *Id.* at 519–20 (noting that the Supreme Court has held that “‘because deportation is a drastic measure and at times the equivalent of banishment or exile,’ deportation provisions are to be strictly construed in favor of the noncitizens” (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))). The narrow construction of uncertain statutes is borrowed from criminal law’s “rule of lenity.” For further discussion, *see* DRESSLER, *supra* note 89, at 47–48.

²²⁸ 333 U.S. 6 (1948).

²²⁹ *Id.* at 10 (“But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”).

²³⁰ STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 156 (1987).

²³¹ *See* Kagan, *supra* note 84, at 377.

²³² *See, e.g.,* *Woodby v. INS*, 385 U.S. 276 (1966); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

²³³ *See, e.g., In re Banks*, 295 N.C. 236, 239–40 (1978) (listing as examples of indicia a statute’s legislative history and circumstances surrounding its adoption).

respect to asylum²³⁴ as well as the stated objectives of the government's asylum program.²³⁵ Because the material support for terrorism provision is silent on the issue of an exception, a court could conclude that Congress could not have intended to exclude a farmer who simply paid off armed militiamen in an effort to spare his family.

This methodology could be attacked on several grounds. First, the Supreme Court has ruled that courts “are not at liberty to imply a condition which is opposed to the explicit terms of the statute.”²³⁶ Second, Congress explicitly provided an involuntariness exception in the case of membership in a totalitarian party.²³⁷ Thus, in the absence of such explicitness in another provision of the same section of the statute, it could be argued that Congress intended an exceptionless, blanket rule for all other grounds of inadmissibility. Moreover, the fact that Congress recently amended certain provisions of the INA by passing the REAL ID Act without appending a duress exception suggests that

²³⁴ The INA was amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), which intended to conform U.S. immigration law to the Convention relating to the Status of Refugees (Refugee Convention), entered into force April 22, 1954, art. 32, 189 U.N.T.S. 150, G.A. Res. 429(V), U.N. GAOR, 5th Sess., Supp. No. 20(A/1775) at 122 (1950). The U.S. Supreme Court has recognized that Congress intended to realign U.S. refugee law to accord with the Refugee Convention. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (noting that “[i]f one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire [Refugee Act of 1980], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [Refugee Convention]”).

²³⁵ *See* U.S. Citizenship and Immigration Services, *Asylum*, available at <http://uscis.gov/graphics/services/asylum/> (last visited Nov. 20, 2005) (noting that the government’s mission is to “implement U.S. asylum laws in a manner that is fair, timely, and consistent with international humanitarian principles”). These “international humanitarian principles” stem in part from the great need for humanitarian aid for the nearly eight million displaced persons after World War II. Because of this humanitarian crisis, the international community, including the United States, fashioned new standards to protect refugees by establishing an immigration program that would allow victims of World War II to resettle in countries other than their own and rebuild their lives. *See* Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L.J. 443, 444 (1998). The U.S. Commission on Immigration Reform, a bipartisan group mandated by the Immigration Act of 1990 to examine and make recommendations regarding the implementation and impact of U.S. immigration policy, stated in a 1997 report to Congress that “[r]efugee admissions based on human rights and humanitarian considerations [are] one of several elements of U.S. leadership in assisting the world’s persecuted.” U.S. COMM’N ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS: BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 69–70, available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf> (last visited Nov. 29, 2005).

²³⁶ *Fedorenko v. United States*, 449 U.S. 490, 512–13 (1981).

²³⁷ *See* INA § 212(a)(3)(D)(ii), 8 U.S.C. § 1182(a)(3)(D)(ii).

Congress may have intended that no exception would apply.²³⁸ However, despite the U.S. Supreme Court's holding that the plain language of a statute should control in interpreting congressional intent,²³⁹ the Court has also held that when the result of a plain-language interpretation is irrational or counterintuitive, an adjudicator should look beyond the statute's language to follow the purpose, not the words, of the statute.²⁴⁰ The circuit courts have adhered to this principle.²⁴¹

Strict constructions are difficult to overcome with statutory interpretive tools alone. From the perspective of common sense, however, it is practically inconceivable, regardless of post-September 11 security concerns, that Congress truly intended to punish victims of the FARC in Colombia or of the LTTE in Sri Lanka, to name but two examples. One commentator has contended that “statutory definitions of ‘terrorist activity’ and ‘engaging in terrorist activity’ are extraordinarily broad, so broad that Congress surely never intended that they be enforced against all aliens who come within them. Congress has cast a very broad net in order to facilitate the effective enforcement of restrictions against a narrower class of terrorists on a discretionary basis.”²⁴² If it is true that Congress afforded such wide latitude, there is a strong basis to assume that

²³⁸ Cf. *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991) (concluding that amendments to a law were indicia of legislative intent); *Edelman v. Lynchburg College*, 535 U.S. 106, 118 (2002) (“By amending the law without repudiating the regulation, Congress ‘suggests its consent . . .’” (citing *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981))).

²³⁹ *See United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.”).

²⁴⁰ *See id.* (“When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”) (citation omitted).

²⁴¹ *See, e.g., Fogleman v. Mercy Hospital*, 283 F.3d 561, 569 (3d Cir. 2002) (noting that “there are cases in which a blind adherence to the literal meaning of a statute would lead to a patently absurd result that no rational legislature could have intended”).

²⁴² Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322–23 (2000).

Congress recognized the fact-specific nature of asylum proceedings and conferred on asylum adjudicators the tools to assess “all aspects relevant to an individual’s conduct . . .”²⁴³ This same philosophy may be applied to courts confronted with problematic asylum claims.²⁴⁴ In fact, the legislative histories of the INA and the acts that have amended it do not lay bare any meaningful dialogue about the material support provision. There is, quite simply, no sign of legislative intent to prohibit considerations of duress, to punish victims of extortion by armed terrorist organizations, or to exclude these victims from seeking asylum in the United States on account of persecution.²⁴⁵

2. U.S. Law is at Variance with Foreign and International Norms

If analogies to other statutory provisions fail to persuade judges to imply a duress exception, there is yet another answer. Constitutional courts around the world consistently draw on foreign sources of law.²⁴⁶ Aside from the U.S. Supreme Court’s misgivings and fluctuating attitude toward reliance on foreign jurisprudence,²⁴⁷ nothing,

²⁴³ *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001).

²⁴⁴ See ALEINIKOFF ET AL., *supra* note 18, at 1226 (“[T]here are other judicial techniques for ameliorating . . . the application of severe provisions by means of unconstitutional rulings and interpretations and thereby serving the underlying the constitutional values.”). For a general discussion of statutory interpretation in the immigration context, see generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

²⁴⁵ See HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 11 (“Nothing in the legislative history of that Act nor subsequent legislation indicates that Congress intended to punish civilians subjected to extortion by armed terrorist organizations, or bar such civilians from seeking shelter in the United States from persecution or torture.”).

²⁴⁶ Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 519 (2005) (commenting that foreign courts “seem to find it perfectly natural to rely on [foreign] sources, noting simply that the experiences and insights of other jurisdictions are instructive in interpreting their own domestic constitutional provisions”).

²⁴⁷ The U.S. Supreme Court has traditionally resisted relying on foreign sources of law. In his concurring opinion denying certiorari in *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari), Justice Thomas wrote that “the Court . . . should not impose foreign moods, fads, or fashions on Americans.” However, the Court’s meditations over the propriety of injecting foreign sources of law into U.S. jurisprudence are still developing. Increasingly, legal commentators favor greater borrowing from international sources of law. See Waters, *supra* note 246, at 519 (noting that “the Justices are beginning to debate vigorously the legitimacy of using foreign and international sources in constitutional interpretation”). See also *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (relying in part on decisions from

save for the fear of superior-court reversal, is hindering asylum adjudicators from at least partially bolstering arguments for an implied exception with references to foreign jurisdictions.

For example, asylum law in Canada, where strong anti-terrorism measures have also been implemented,²⁴⁸ makes inadmissible noncitizens who engage in terrorism. Like U.S. Law, Canadian law does not include an explicit duress exception.²⁴⁹ On its face, this aspect of Canadian law is not so dissimilar to U.S. law. Nevertheless, Canadian courts have held that “issues of duress or coercion may be relevant [in] determining membership in a terrorist organization.”²⁵⁰ Canadian courts have not specifically applied a duress exception in asylum cases.²⁵¹ However, there is reason to believe that Canadian courts would be receptive to the idea based on their treatment of asylum applicants who are found to be complicit with members of terrorist organizations.²⁵² In *Ramirez v. Canada (Minister of Citizenship and Immigration)*,²⁵³ the Federal Court of Appeal²⁵⁴ established a three-part test for determining whether complicity could be grounds for exclusion.

the European Court of Human Rights and foreign jurisdictions to affirm the “protected right of homosexual adults to engage in intimate, consensual conduct”).

²⁴⁸ See Foreign Affairs Canada, Terrorism, available at

<http://www.dfait-maeci.gc.ca/internationalcrime/terrorism-en.asp> (last visited Dec. 6, 2005); Department of Justice Canada, Government of Canada Introduces *Anti-Terrorism Act*, available at

http://canada.justice.gc.ca/en/news/nr/2001/doc_27785.html (last visited Dec. 6, 2005).

²⁴⁹ See Immigration and Refugee Protection Act §§ (34)(1) and (34)(1)(c), 2001 S.C., ch. 27 (Can.).

²⁵⁰ See *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] C.R.D.J. 1933 (addressing the possibility of an exemption for minors from the terrorist ground of inadmissibility on the basis of duress or coercion).

²⁵¹ The author conducted an exhaustive search of online databases encompassing the whole of Canadian case law.

²⁵² See *Ramirez v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 F.C. 306. The court explicitly excluded a duress defense in this case because the harm to which the asylum applicant, a member of the Salvadoran armed forces, would have exposed himself had he not complied with his superiors’ orders would not have outweighed the harm he caused others in obeying such orders. See *id.* at 306, 327–28.

²⁵³ *Id.*

²⁵⁴ The Federal Court of Appeal is the second-highest court in Canada, below the Supreme Court of Canada. For more information, see Dep’t of Justice Canada, Canada’s Court System, available at <http://canada.justice.gc.ca/en/dept/pub/trib/page3.html> (last visited Nov. 29, 2005).

Holding that mere acquiescence or membership in a terrorist organization is insufficient to exclude an individual, the court emphasized that there must be a finding of voluntary complicity, active personal involvement, and a shared common purpose.²⁵⁵ The court also held that this standard comported with Canadian criminal law principles and represented the “best interpretation of international law.”²⁵⁶ If Canadian courts have already required voluntary affiliations with terrorist groups to find asylum applicants excludable and superimposed criminal law principles on asylum cases, the logical next step would be to apply a duress defense in asylum cases. Moreover, Canadian courts have already held that criminal exclusionary grounds may not apply where an applicant was under duress or coercion in committing illegal acts.²⁵⁷ Finally, the Supreme Court of Canada has confirmed the application of the duress defense in criminal exclusion cases in a case whose facts were analogous to those in *Contento-Pachon*, discussed above.²⁵⁸

Like the United States and Canada, Germany has actively participated in the global war on terror.²⁵⁹ Nevertheless, German courts have applied the duress defense to

²⁵⁵ See *Ramirez*, 2 F.C. at 316–18. For a discussion of the three-part test, see BEN SAUL, EXCLUSION OF SUSPECTED TERRORISTS FROM ASYLUM: TRENDS IN INTERNATIONAL AND EUROPEAN REFUGEE LAW 8 (2004), available at <http://www.refugeelawreader.org/files/pdf/601.pdf> (last visited Nov. 29, 2005) (noting that exclusion based on complicity may be established by the alien’s (1) voluntary membership in a violent, criminal organization; (2) personal and knowing participation in its acts; and (3) failure to disassociate from the group at the earliest safe opportunity).

²⁵⁶ See *Ramirez*, 2 F.C. at 318.

²⁵⁷ See *Caballero v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C. 294–95 (affirming the decision of an immigration adjudicator that an asylum applicant’s actions constituted crimes against humanity and that the applicant could not avail himself of a duress defense unless the applicant demonstrated “that he was himself in danger of imminent harm, the evil threatened him was, on balance, greater than the evil inflicted on his victims and that he was not responsible for his own predicament”).

²⁵⁸ See *R. v. Ruzic* [2001], S.C.C. 24 (acquitting of criminal charges a Yugoslav citizen who arrived in Canada with two kilograms of heroin on the ground that a man in Belgrade had threatened to harm her mother if she did not comply).

²⁵⁹ See generally CONGRESSIONAL RESEARCH SERVICE, GERMANY’S ROLE IN FIGHTING TERRORISM: IMPLICATIONS FOR U.S. POLICY (2004), available at <http://www.fas.org/irp/crs/RL32710.pdf> (last visited Dec. 6, 2005) (“Although somewhat overshadowed in the public view by the strong and vocal disagreements over Iraq policy, U.S.-German cooperation in the global fight against international terrorism has been extensive”).

asylum claims from applicants who have committed serious international crimes.²⁶⁰ British courts have reached similar conclusions on analogous facts²⁶¹ despite the United Kingdom's anti-terrorism measures.²⁶² Australian courts have also recognized the defense of duress where noncitizens previously tied to human rights violations apply for protection visas, holding in at least one case that an individual's moral choice must be weighed.²⁶³ Australian courts have also considered mitigating circumstances that do not even rise to the level of true duress.²⁶⁴ These judge-made considerations have been instituted despite the Australian government's unequivocal anti-terrorism stance.²⁶⁵

International organizations have also addressed the duress defense in the asylum context. For example, while vigorously combating international terrorism,²⁶⁶ the Commission of the European Union has promoted considerations of duress in assessing

²⁶⁰ See Case No.72XII77, Antonin L. v. Federal Republic of Germany, 80 I.L.R. 673 (Bavarian Higher Administrative Court (BayVGH) (1979), in GEOFF GILBERT, CURRENT ISSUES IN THE APPLICATION OF THE EXCLUSION CLAUSES 440 n.60 (2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419dba514> (last visited Nov, 29, 2005) (accepting an asylum application from a person who had hijacked a plane to escape persecution on account of political opinion in Czechoslovakia).

²⁶¹ See Regina v. Abdul-Hussain, [1999] Crim. L.R. 570 (Ct. App.) (acquitting asylum applicants who had committed a hijacking to flee Iraq on the ground that they had acted under duress).

²⁶² See GLOBAL OPPORTUNITIES FUND ANNUAL REPORT 2004-05, COUNTER TERRORISM PROGRAMME (2005), available at http://www.fco.gov.uk/Files/KFile/06_GOFAR_counterterror.pdf (last visited Dec. 7, 2005).

²⁶³ See SHCB v. Minister for Immigration & Multicultural & Indigenous Affairs, (2003) F.C.A. 229. Here, the court found that the applicant, a former officer in an Afghan government agency involved in human rights crimes, could be denied a protection visa unless there were imminent real and inevitable threats to a the applicant's life. *Id.* at ¶¶ 8-9, 23, 31.

²⁶⁴ See, e.g., Applicant NADB of 2001 v. Minister for Immigration & Multicultural Affairs, [2002] F.C.A.F.C. 326 (balancing an Iranian asylum applicant's excludable act of heroin trafficking as a means of financial support against the applicant's other potential means of support in Iran).

²⁶⁵ See Australian Government Department of Foreign Affairs and Trade, International Coalition Against Terrorism, available at <http://www.dfat.gov.au/icat/> (last visited Dec. 6, 2005) ("Australia is playing a leading role in both the Asia-Pacific region and more broadly in the global fight against terrorism.").

²⁶⁶ See generally THE COUNCIL OF THE EUROPEAN UNION, THE EUROPEAN UNION COUNTER-TERRORISM STRATEGY (2005), available at <http://www.statewatch.org/news/2005/nov/eu-counter-terr-strategy-nov-05.pdf> (last visited Dec. 6, 2005) (noting that the European Union's strategic commitment is "[t]o combat terrorism globally, and make Europe safer").

an asylum applicant's case.²⁶⁷ The United Nations has also advocated that duress is a defense to the criminal grounds of exclusion articulated in Article 1F of the Convention relating to the Status of Refugees 1951.²⁶⁸ Finally, Article 31 of the Rome Statute of the International Criminal Court states that

²⁶⁷ See COMMISSION OF THE EUROPEAN UNION, COMMISSION WORKING DOCUMENT: THE RELATIONSHIP BETWEEN SAFEGUARDING INTERNAL SECURITY AND COMPLYING WITH INTERNATIONAL PROTECTION OBLIGATIONS AND INSTRUMENTS, at 8, COM (2001) 743 final (Dec. 5, 2001) ("Mere, voluntary, membership of a terrorist group may, in some cases, amount to personal and knowing participation, or acquiescence amounting to complicity, in the crimes in question, and hence to exclusion from refugee status... [T]he status and level of the person involved, and factors such as duress [and] the availability of a moral choice should be taken into consideration."), available at <http://www.statewatch.org/news/2001/dec/immcom743.pdf> (last visited Nov. 20, 2005) [hereinafter COMMISSION WORKING DOCUMENT]. The European Court of Human Rights, the judicial enforcer of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, does not appear to have entertained asylum cases in which the duress defense has been raised. It should be noted, however, that on one occasion the court upheld the denial of asylum to a Sri Lankan citizen who claimed to have a well-founded fear of persecution by the Sri Lankan government on account of his support for the Tamil Tigers (LTTE). The applicant claimed that the support was given under duress. Without reaching the question whether the applicant could raise a duress defense, the court held that the fact that the applicant had given only low-level support to the LTTE and that his support was coerced actually made it less likely that the Sri Lankan government would persecute him. See *Case of Venkadajalasarma v. The Netherlands*, 59, 68 Eur. Ct. H.R. (2004); European Court of Human Rights, Historical background, available at <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (last visited Dec. 11, 2005). Also, Statewatch criticized the European Union's "Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism," which was drafted after the September 11 terrorist attacks. Statewatch contended that the document's provisions could be used to deny asylum to persons who gave "any form of support, active or passive," even to advance the humanitarian causes of so-called terrorist groups. See STATEWATCH, NEW EU MEASURE ON TERRORISM CRIMINALIZES ALL REFUGEES AND ASYLUM-SEEKERS 1-2 (2002), available at <http://www.statewatch.org/news/2002/jan/refugee.pdf> (last visited Dec. 10, 2005); THE COUNCIL OF THE EUROPEAN UNION, COUNCIL COMMON POSITION OF 27 DECEMBER 2001 ON THE APPLICATION OF SPECIFIC MEASURES TO COMBAT TERRORISM (2001), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00930096.pdf (last visited Dec. 10, 2005).

²⁶⁸ Article 1F of the Refugee Convention, *supra* note 11, excludes an asylum applicant from refugee status on the ground that the applicant has committed serious transgressions before applying for asylum and is thus undeserving of the benefits and guarantees of refugee status. Article 1F states that the provisions of the Refugee Convention do not apply to any person to whom there are serious reasons for considering that: "(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations." See UNITED NATIONS HIGH COMMISSION FOR REFUGEES, CURRENT ISSUES IN THE APPLICATION OF THE EXCLUSION CLAUSES 2, 1 n.3, 33 (2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b389354b> (last visited Nov. 20, 2005) ("Where Article 1F crimes which have been committed knowingly and with a moral choice, it is hard to imagine that in practice the applicant could find a defence for her/his conduct. In this context, a defence is a reason for excusing conduct that would otherwise provide evidence of guilt - where the necessary mens rea is not present, then the crime has not been committed so it is inappropriate to talk of defences. Superior orders is

a person shall not be criminally responsible if . . . [t]he conduct which is alleged . . . 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.²⁶⁹

In addition, international immigration advocacy umbrella organizations have questioned whether a mere affiliation with a so-called terrorist organization may be grounds for excluding an asylum seeker.²⁷⁰ A report by the European Legal Network on Asylum (ELENA)²⁷¹ has argued that personal responsibility must be assessed in determining whether a refugee's affiliation with a terrorist organization is grounds for exclusion.²⁷² The ELENA report offers pro-duress defense arguments by scholars, the thrust of which is an emphasis on personal and knowing participation, a denunciation of absolute exclusionary bars, and the logic of allowing the duress defense.²⁷³ The report also outlines the positions of several European countries with regard to Article 1F exclusionary grounds.²⁷⁴ According to the report, Belgium, Denmark, the Netherlands, Switzerland, and the United Kingdom all focus on the individual's intent and actual role

not a defence to war crimes. It is equally impossible to conceive of how genocide or crimes against humanity could ever be, for example, a necessity. However, duress has on occasion been recognised as a legitimate defence to some Article 1F crimes.”). For more on the United States' obligations under the Refugee Convention, *see supra* notes 11, 234.

²⁶⁹ Rome Statute of the International Criminal Court, art. 31(1)(d), July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998), *available at* <http://www.un.org/law/icc/statute/rome.htm> (last visited Nov. 20, 2005). Article 31 provides that such a threat may be either made by other persons or constituted by other circumstances beyond that person's control. *Id.*

²⁷⁰ *See, e.g.*, ELENA, *supra* note 12, at 29.

²⁷¹ ELENA is a network of immigration and asylum lawyers in twenty-five central and western European countries and composed of approximately 2,000 legal staff. *See* European Council on Refugees and Exiles, European Legal Network on Asylum (ELENA), *available at* <http://www.ece.org/about/elena.shtml> (last visited Nov. 20, 2005).

²⁷² *See* ELENA, *supra*, note 12, at 31 (arguing that “membership per se of an organisation, which advocates or uses violence is not necessarily decisive or sufficient to exclude a person from refugee status. Individual liability must be proved, which entails evidence of a positive act and an intention by the claimant”).

²⁷³ *See id.* at 32–33 (summarizing the findings of Guy S. Goodwin-Gill, the Lawyers Committee for Human Rights, Michael Bliss, and James Hathaway).

²⁷⁴ *See id.* at 33–34 (“Generally, it is accepted by Member States [of the European Union] that the mere membership of armed opposition cannot lead automatically to exclusion.”).

in light of a terrorist organization's activities.²⁷⁵ ELENA contends that these principles should apply to cases involving noncitizens who live in terrorist-dominated war zones.²⁷⁶

Judges are as unlikely to advance reasoning based exclusively on foreign and international legal standards as reviewing courts are to sustain such reasoning. But courts can at least refer to the abovementioned trends in favor of a duress exception in foreign and international law to bolster their arguments. The U.S. Supreme Court has evinced growing support for this position.²⁷⁷

3. Contours and Consequences of a Duress Defense in Asylum Cases

The first step in allowing for a duress defense is to adopt the premise that safeguarding national security need not sacrifice our historical embrace of bona fide refugees. As discussed, the U.S. government is already oriented toward this objective.²⁷⁸ In the wake of the September 11 terrorist attacks, the Commission of the European Union voiced its commitment to this same principle.²⁷⁹ The Commission further endorsed the United Nations High Commissioner for Refugees' stance that the appropriate approach to filtering out excludable asylum seekers is the scrupulous application of existing

²⁷⁵ *Id.* (noting that in Belgium, for example, the "individual circumstances of the applicant should be taken into account, and the principle to invoke defences such as duress is therefore accepted").

²⁷⁶ See LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEES, REBELS AND THE QUEST FOR JUSTICE 143 (2002) (noting that as "in a criminal trial, in determining whether or not the asylum seeker is excludable, the adjudicator must permit the asylum seeker to present evidence concerning defenses and mitigating circumstances . . . e.g., duress"); see also HUMAN RIGHTS FIRST BRIEF, *supra* note 11, at 10 (listing Sri Lanka, Lebanon, the Philippines, Liberia, Peru, Sudan, Congo and Afghanistan as "war zones").

²⁷⁷ See *e.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."). In her dissenting opinion in the same case, Justice O'Connor wrote that "[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." *Id.* at 1215 (O'Connor, J., dissenting).

²⁷⁸ See *supra* note 65.

²⁷⁹ See COMMISSION WORKING DOCUMENT, *supra* note 267, at 6 (arguing that "bona fide refugees and asylum seekers should not become victims of [the September 11 terrorist attacks], and . . . there should be no avenue for those supporting or committing terrorist acts to secure access to the territory of the Member States of the European Union").

inadmissibility grounds in lieu of a wholesale overhaul of asylum law.²⁸⁰ Obviously, the United States took a different tack following the September 11 attacks²⁸¹ by crafting over-inclusive laws that have produced harsh results.²⁸² Of course, it is not too late to amend these laws. Indeed, the INA has been amended dozens of times since its enactment in 1952 to respond to changing world conditions.²⁸³ Until such amendments are adopted, asylum adjudicators should exercise their discretion to allow a duress defense.

The defense of duress has already been defined. The United Nations High Commissioner for Refugees has stated that duress results from a balancing equation.²⁸⁴ First, an individual is faced with a threat of imminent death or serious bodily harm against him or herself or someone else.²⁸⁵ Next, the individual must act necessarily and

²⁸⁰ *Id.* (“[T]he Commission fully endorses the line taken and expressed by UNHCR that, rather than through major changes to the refugee protection regime, a scrupulous application of the exceptions to refugee protection available under current law, is the appropriate approach.”).

²⁸¹ See FARNAM, *supra* note 57, at 53 (citing U.S. DEP’T OF JUSTICE, INS RESTRUCTURING PLAN (2001)) (noting that Attorney General John Ashcroft said, “The terrorism attacks of September the eleventh underscore in the most painful way for Americans that we need better control over individuals coming to our shore from other nations”).

²⁸² See *supra* note 58. The European Union has also remarked that exclusion from refugee status can have “life-threatening consequences.” See COMMISSION WORKING DOCUMENT, *supra* note 267, at 10.

²⁸³ See U.S. Citizenship and Immigration Services, Immigration and Nationality Act, *available at* <http://uscis.gov/graphics/lawsregs/ina.htm> (last visited Nov. 26, 2005).

²⁸⁴ UNITED NATIONS HIGH COMMISSION FOR REFUGEES, BACKGROUND NOTE ON THE APPLICATION OF THE EXCLUSION CLAUSES: ARTICLE 1F OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 26 (2003), *available at* [http://www.unhcr.ch/cgi-](http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=RSDLEGAL&id=3f5857d24)

[bin/texis/vtx/home/opedoc.pdf?tbl=RSDLEGAL&id=3f5857d24](http://www.unhcr.ch/cgi-bin/texis/vtx/home/opedoc.pdf?tbl=RSDLEGAL&id=3f5857d24) (last visited Jan. 19, 2006) [hereinafter BACKGROUND NOTE]. This definition normally applies to criminal exclusion clauses in the Refugee Convention, *supra* note 11. The Convention was succeeded by the Refugee Protocol, *supra* note 11. The Convention and the Protocol are the fundamental legal documents defining the rights of refugees and the attendant legal obligations of signatory states. The United States is bound by their provisions and has promulgated legislation to conform U.S. law to them. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C. (2000)).

²⁸⁵ *Id.*

reasonably to avoid this threat but must not intend to cause a greater harm than the one he or she is seeking to avoid.²⁸⁶

The definition would require additional proffers of evidence by asylum applicants and more subtle fact-finding by asylum adjudicators. Imagine, for example, the true story of a Colombian man, Mr. R, living in Bogotá with his wife and child.²⁸⁷ A guerrilla group on the State Department’s foreign terrorist organization list kidnapped Mr. R’s father and demanded ransom.²⁸⁸ Mr. R and his brother managed to pay the ransom with funds from the father’s savings.²⁸⁹ After the father’s release, the guerrillas threatened to kidnap Mr. R’s son unless Mr. R made additional payments.²⁹⁰ Mr. R was forced to uproot his family and flee to Costa Rica, later resettling in Sweden.²⁹¹ Under U.S. law, Mr. R’s ransom payment to the guerrillas was construed as affording material support to a terrorist organization.²⁹² Based on the UNHCR’s duress definition, Mr. R would have to establish before an asylum adjudicator that his payment to the guerrillas constituted a necessary and reasonable step in avoiding both his father’s death or continued captivity and his son’s potential kidnap.

A duress defense would not hurt the United States’ hunt for terrorists and their supporters. First, the above definition sets the bar high. Second, the U.S. asylum process has several other safeguards that make the current blanket rule of inadmissibility

²⁸⁶ *Id.* This formulation of duress is actually closer to that of the Modern Penal Code’s “choice-of-evils” defense. *See* MPC, *supra* note 94, § 3.02. Under this defense, “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.”

²⁸⁷ This fact pattern is based on a United Nations High Commissioner for Refugees example of the effects of the material support for terrorism provision. *See* UNHCR EXAMPLES, *supra* note 2, at 1.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* Mr. R’s father fled to Spain. *Id.*

²⁹² *Id.*

unnecessary. For instance, even if a duress defense were recognized, an asylum applicant would still have to undergo an interview with an asylum officer or a hearing before an immigration judge. These proceedings would still be based on credibility determinations.²⁹³ As discussed above, these determinations place a heavy burden of proof on the applicant.²⁹⁴ Asylum officers and immigration judges already frequently use country conditions as a factor in their adjudications of asylum cases; allowing an applicant to plead a duress defense would not significantly burden the decision-making process.

It is unlikely that an implied duress defense would inject undue subjectivity into the asylum process. Commentators have acknowledged that credibility determinations already depend on the adjudicator's subjective, personal judgment.²⁹⁵ In making such determinations, adjudicators rely on their personal judgment to balance countervailing factors.²⁹⁶ A duress defense would only add another ingredient to this balancing test. Furthermore, as noted above, the duress defense has long been available in criminal cases²⁹⁷ and has not caused unmanageable evidentiary problems because credibility

²⁹³ Credibility is not an explicit criterion for refugee protection in international law. However, in U.S. asylum cases, the asylum adjudicator must determine whether the applicant's evidence is credible. Credibility may be based on demeanor, inconsistencies, lack of detail or specificity, and speculation about the plausibility of the applicant's testimony. In the case of an adverse credibility determination, the asylum adjudicator must provide specific, cogent reasons. *See Kagan, supra* note 84, at 368; *Diallo v. INS*, 232 F.3d 279, 290 (2d Cir. 2000); *Gui v. INS*, 280 F.3d 1217, 1223, 1225 (9th Cir. 2002); GORDON ET AL., *supra* note 18, § 34.02[9]. Where the asylum adjudicator finds the alien's evidence credible, the adjudicator may nonetheless require additional corroboration from the alien. *See Diallo, supra*. For more on the difficulty that aliens face in obtaining additional corroboration, *see supra* note 31.

²⁹⁴ *See supra* note 30.

²⁹⁵ *See, e.g., Kagan, supra* note 84, at 367 (noting that "credibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings").

²⁹⁶ *Id.* at 398.

²⁹⁷ *See supra* note 85.

determinations are usually left to juries.²⁹⁸ In asylum cases, single adjudicators with knowledge about worldwide human rights conditions are as competent as juries to make credibility determinations.²⁹⁹ Indeed, the sheer volume of cases allows such adjudicators to gain expertise³⁰⁰ and compare applicants' stories.³⁰¹ Unless the asylum adjudication process is thoroughly overhauled³⁰² or dispenses with single-adjudicator credibility determinations, allowing adjudicators to evaluate duress claims is currently the best solution.

CONCLUSION

The United States' asylum program suffers from deep-rooted defects that legislation following the September 11 terrorist attacks not only failed to cure but actually festered.³⁰³ While the government is analyzing the problem and hoping to secure a solution "[s]ooner rather than later,"³⁰⁴ scores of asylum applicants with legitimate claims are either languishing in limbo as their claims pile up or, worse still, are being

²⁹⁸ See *United States v. Bailey*, 444 U.S. 394, 416 (1980) (noting "the importance of the jury as a judge of credibility").

²⁹⁹ For more on asylum officer training, see U.S. Citizenship and Immigration Services, Core Occupations, available at <http://uscis.gov/graphics/workfor/careers/core.htm#asyoff> (last visited Nov. 29, 2005.)

³⁰⁰ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (reasoning that agencies rulings and interpretations "constitute a body of experience and informed judgment" and are "based upon more specialized experience and broader investigations").

³⁰¹ See Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 B.Y.U. L. REV. 541, 557 (2003) ("It is most understandable that trying to compare levels of harm between applicants calls for great amounts of wisdom."). It has also been suggested that hearing so many stories involving violence desensitizes adjudicators to persecution. See *id.* However, courts have held that claims of bias against administrative agencies must overcome a presumption of honesty and integrity. See, e.g., *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1376 (9th Cir. 1978). Furthermore, the Supreme Court has held that the experience and expertness that agency adjudicators acquire are an advantage, not a handicap. See *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

³⁰² See, e.g., Mousin, *supra* note 301, at 377–78 (advocating that refugee status should no longer hinge on adjudicators' subjective credibility determinations but rather on whether an asylum applicant is in danger of human rights violations in his or her home country).

³⁰³ See FARNAM, *supra* note 57, at 131.

³⁰⁴ See *supra* note 64.

shipped back to suffer the same persecution or even torture that propelled them to our doorstep in the first place.³⁰⁵

Bright-line rules may facilitate the task of asylum adjudicators. They may also, in sporadic cases, prevent bona fide supporters of terrorist organizations that pose a threat to national security from entering or remaining in our country. However, asylum seekers often need more protection than other groups of aliens coming to the United States;³⁰⁶ immigration law need not and should not fold at their expense in favor of national security.³⁰⁷ Indeed, our unequivocal legal and moral obligations require that we strike a happier medium in safeguarding our security in the face of international terrorism while accommodating those with compelling reasons for coming to the United States.³⁰⁸ This objective and the purpose of U.S. immigration law require that asylum adjudicators construe section 212 of the INA to include a duress defense.

³⁰⁵ *See id.*

³⁰⁶ FARNAM, *supra* note 57, at 131 (“Refugees and asylees are perhaps those most in need of protection from the United States more so than any other group of immigrants coming to this country’s shores.”).

³⁰⁷ *See Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 2-3 (2005) (statement of Ahilan T. Arulanantham, Staff Attorney, American Civil Liberties Union of Southern California), available at <http://judiciary.house.gov/media/pdfs/arulanantham051005.pdf> (last visited Nov. 20, 2005) (arguing that “[w]e do not have to choose between national security and our commitment to help those who are suffering around the globe”).

³⁰⁸ FARNAM, *supra* note 57, at 1 (“The challenge that the U.S. faces currently is how to balance the need to keep the country safe from international terrorists and how to welcome those who have legitimate reasons for coming to the country.”).