

NOTE

THUS CONSCIENCE DOES MAKE COWARDS OF US ALL: HOW A DURESS EXCEPTION TO THE PERSECUTOR BAR SHOULD FUNCTION IN MODERN ASYLUM LAW

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INTRODUCTION

This Note argues that U.S. asylum law should incorporate a duress exception to the persecutor bar, which currently denies asylum to individuals who committed persecutory acts, even if they did so under coercion, without sharing their leaders' persecutory motives. The landmark case *Negusie v. Holder*¹ has sparked fierce debates over Congress's intent when creating the modern persecutor bar through the Refugee Act of 1980, with some reading the text as imposing strict liability. However, this note argues that Congress envisioned a duress exception, given that its goal in enacting the Refugee Act was to domesticate international refugee-related agreements to which the United States is a party, and those agreements do not contemplate strict liability bars. The prevailing interpretation disregards modern neuroscientific and humanitarian perspectives, and unjustly excludes some of the most vulnerable individuals from relief, particularly child soldiers and people subject to mandatory universal conscription programs. Although the administrative agencies responsible for immigration, the Departments of Homeland Security and Justice (DHS and DOJ), have recently argued that the United States can meet its international obligations to protect refugees without extending asylum relief,² instead relying on deferral of removal under the Convention against Torture ("CAT relief") for individuals subject to the persecutor bar, this argument should be rejected. CAT provides scant protection against deportation

1. *Negusie v. Holder*, 555 U.S. 511, 521 (2009).

2. See *Securing the Border*, *infra* n.38; *Circumvention of Lawful Pathways regulations*, *infra* n.38.

in limited circumstances, with no other automatic benefits. Without asylum, the recipient is not guaranteed work authorization, cannot apply for family members to join him, and must live without any permanent status – not the circumstances best calculated to make a refugee feel safe.

Part I reviews the relevant historical context of the persecutor bar within U.S. immigration law, then gives an overview of some of the procedures and legal requirements of an asylum case. Part II analyzes the statutory language, drawing upon the international treaty underlying the persecutor bar to demonstrate that a duress exception aligns with both legislative intent and international legal norms. It also dives deep into the *Negusie* case. This part examines the parties' and adjudicators' arguments for and against a duress exception and assesses the future of the debate after *Loper Bright Enters. v. Raimondo*³ introduced a sea change to administrative law.

Part III turns to policy arguments, using neuroscientific discoveries to rebut outdated rationales that were used to justify a strict liability bar. It advances a humanitarian perspective to target a duress exception towards the most vulnerable and least dangerous applicants. Part IV proposes a legal test for courts to apply when evaluating duress claims in asylum cases. It advocates a narrow duress exception, applied to children *per se* and to youth and mandatory conscripts on a case-by-case basis, suggesting the fairest way to share the burden of proof between asylum seekers and the U.S. government. This test considers factors such as the severity of the harm and threats that purport to constitute duress, the applicant's age and cultural context, and the moral and practical choices available to the applicant. Congress, the executive departments, and asylum seekers' representatives can all play a part in bringing about needed changes. By adopting this framework, the United States can ensure a more just and humane asylum system that lives up to our values of promoting personal agency and welcoming those fleeing persecution, without sacrificing accountability or public safety.

On the Use of "alien"

Because asylum, like all of immigration, is a complex and arcane area of law, yet its words and issues can arouse great passion in Americans, I will define some terms as they appear in this note. An *alien* is simply "[a]ny person not a citizen or national of the United States."⁴ The term will never be used pejoratively in this note. To anyone who finds it offensive, I ask for your grace as you interact with the formal immigration system. Although much of the immigration legislative scheme has origins in white supremacist colonialist views,⁵ many judges, practitioners, and policymakers today value the best interests and humanity of these people and do not attach derogatory meaning

3. See *infra* n.10.

4. U.S. Citizenship & Immigr. Servs., *Glossary*, Dep't of Homeland Sec., <https://perma.cc/US57-JGRX> (last visited Jul. 28, 2024).

5. See generally Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford Univ. Press 2006).

to the word *alien*. In contexts where no legal terminology is needed, the word *noncitizen* may be used as a synonym.

Immigrant technically refers to a person not a national of the United States, who wishes to move here indefinitely. Many noncitizens come for temporary business, work, or pleasure with foreign residences they have no intention of abandoning and are referred to as *non-immigrants*. The immigrant/non-immigrant distinction is unhelpful to the asylum analysis, and I therefore try to avoid these words, though sources may refer to aliens in the United States generally as immigrants, and the socio-legal framework within which the U.S. relates to aliens is formally called *immigration law/policy*. The international community labels a person who undertakes long-term travel to a country not of their habitual residence, whatever their reason for doing so, as a *migrant*.

REFUGEES VS. ASYLUM SEEKERS

In the United States, lawmakers have dichotomized migrants and refugees with the connotation that the former come for economic opportunity, whereas the latter flee persecution. There is a subtle, and occasionally an overt, sense that the latter is superior to the former. Legally, a *refugee* has a specific definition that will be explored in parts I and II. I use the term refugee to mean someone who fits that legal definition, but to an adjudicator, all asylum seekers are generic aliens until proven refugees. Not all refugees, however, are asylum seekers; thousands come through United Nations refugee resettlement programs, with their applications processed at refugee camps and other facilities abroad.⁶ When this formal process is not feasible – usually because the individual is working quickly to evade direct threats and serious harm – a refugee can leave her homeland, choose a new country to settle in without the help of the UN, and personally request refugee status from that country. That subset of refugees is what we call asylum seekers.

An *asylum seeker* is any person who does not yet have asylee or refugee status but manifests an intention to apply for it. As a gross over-simplification, an affirmative asylum seeker before U.S. Citizenship and Immigration Services (USCIS) is called an *applicant*; a defensive one before immigration court, a *respondent*. I sometimes use the terms applicant and respondent interchangeably because the affirmative and defensive processes are fluid; from a technical standpoint, all respondents fall within the bucket of applicants; and the procedures and due process concerns of immigration court sometimes bleed over to affirmative contexts.

Finally, under wholly domesticated international law, it is fully legal at all times for anyone to come to the United States⁷ and apply for asylum. A lack of

6. USA for UNHCR, *Refugees in America*, <https://perma.cc/CAR3-ZWUD> (last visited Jul. 28, 2024).

7. Legal by statute, distinguished from permitted by regulation – the immigration agencies routinely promulgate new rules to restrict asylum, which are promptly challenged and can tie up appeals courts for years. The newest regulations and the executive/judicial dialogue process will be discussed further *infra*.

prior authorization or travel documents does not affect that legal right, nor does the place or manner of entry, so long as the alien declares himself to law enforcement and states an intention to seek asylum relief. As a result, an attorney could practice asylum law her entire career and never meet a client who is a so-called “illegal immigrant.” To differentiate between individuals who had prior entry authorization and those who did not, the terms *regular* and *irregular entrants* are proper. (This does not mean that an asylum seeker cannot be removed if he fails to prove his case; quite the contrary.)

Gendered Language Choices

In the spirit of inclusion that underpins our commitment to providing asylum relief, I had hoped to use the singular “they” throughout this note. Unfortunately, I discovered during the drafting process that this usage caused confusion about whom and how many people I was discussing in a given paragraph. I have therefore chosen to switch between “he” and “she” to refer to singular people. In no way should my usage of those pronouns be construed as a disregard for people who identify outside the gender binary. Indeed, gender nonconformism of all kinds can give rise to brutal persecution abroad and, too often, violence and dehumanization here. I look forward to the day when the English language widely recognizes a gender-neutral singular pronoun for sentient beings.

I. HISTORY AND CURRENT CONDITION OF THE UNITED STATES’ LEGAL RELATIONSHIP WITH REFUGEES⁸ – AND PERSECUTORS⁹

Any law governing migration may be seen as an attempt to codify society’s values with respect to others outside its borders. While ontological questions

For an exemplar of judicial review determining whether a regulation is inconsistent with the relevant statute and therefore *ultra vires*, see n.40 *infra*.

8. According to U.S. statute, a “refugee” is an individual “outside his or her country of nationality, or . . . last habitual residence, who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection, of that country 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.” 8 U.S.C. § 1101(a)(42)(A). To be eligible for asylum relief, the applicant must prove, *inter alia*, that he meets the definition of a refugee. Unless otherwise specified, the terms “asylum seeker” and “refugee” will be used interchangeably in this note focusing on asylum. This is one way I hope to bring simplicity to a highly complex area of law. For more clarity on terminology, see introductory notes *supra*.

9. To the chagrin of many a practitioner, no US statute, US immigration regulation, multilateral treaty, or other source of international law has defined the term “persecution” with any reliable legal specificity. Circuit case law has contoured the concept of persecution, primarily in terms of who can properly be called a *victim* of persecution. For example, isolated incidents of harm, even severe ones, cannot constitute persecution; rather, the acts must occur in a pattern. *See, e.g.,* Thapaliya v. Holder, 750 F.3d 56, 59 (1st Cir. 2014) (“isolated beatings have been commonly rejected as grounds for persecution”); Cabas v. Holder, 695 F.3d 169, 174 (1st Cir. 2012) (“one important factor is whether the mistreatment can be said to be systematic”) (internal citation omitted); Ritonga v. Holder, 633 F.3d 971, 976 (10th Cir. 2011) (“Ritonga suffered minor injuries only once . . . [W]e cannot say this constituted persecution”). Mental, emotional, and even economic harm, especially in the form of credible threats to the individual or her family’s lives, can qualify, though it is rare that persecution can be proven based on non-physical harm alone. *See, e.g.,* Sorto-Guzman v. Garland, 42 F.4th 443, 445 (4th Cir. 2022) (“[w]e have repeatedly said, the threat of death qualifies as persecution”) (internal citations omitted); Lukwago v. Ashcroft, 329 F.3d 157, 167 (3d Cir. 2003) (“[p]ersecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. Rather . . . [it includes] threats to life, confinement,

such as *Who makes up the groups of “us” and “other”* and *What is a nation-state and how do we define its borders* are integral to the study of immigration policy as a whole, asylum and refugee law deal with narrower questions. Who is dangerous, who is in danger, and how do we tell the difference between them? And what are our moral, legal, and geopolitical obligations with regard to each group? The United States, like most countries, first began to seriously wrestle with these questions after World War II.

A word of context for modern concerns about immigrant entry. For much of U.S. history, immigrants were essentially welcome without much formality

torture, and economic restrictions so severe that they constitute a real threat to life”) (internal citations omitted); *Lim v. I.N.S.*, 224 F.3d 929, 936 (9th Cir. 2000) (“threats standing alone” qualify as persecution “in only a small category of cases”). The persecutors must target the victim specifically, whether as an individual whose exact identity is known to the actors, or as a member of a group singled out for mistreatment – random criminal violence and even interstate or civil war may not constitute persecution. *See, e.g., Chicas-Machado v. Garland*, 73 F.4th 261, 270 n.7 (4th Cir. 2023) (“an applicant might demonstrate persecution on account of religion if she can show that she was *singled out* for some form of disparate treatment because of her religion”) (emphasis supplied); *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (the applicant must prove that her protected ground was “a central reason why she, and not some other person,” was persecuted) (internal citations omitted); *Cortez-Mendez v. Whitaker*, 912 F.3d 205, 210 (4th Cir. 2019) (“[f]light from gang recruitment is not a protected ground under the INA”). For this reason, adjudicators not only evaluate whether the acts in question rise to the requisite level of severity, but also whether they share a *nexus* with some characteristic of the victim. Current US law, closely mirroring the United Nations High Commission for Refugees (UNHCR), enumerates these characteristics as “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A). Generally, the characteristics must be immutable. *See, e.g., Larios v. Holder*, 608 F.3d 105, 108 (1st Cir. 2010) (a particular social group is considered to be, *inter alia*, “a group of persons sharing a common, immutable characteristic that makes the group socially visible”) (internal citations omitted). When an asylum applicant may be barred from relief because he persecuted others, adjudicators decide whether the bar applies using the same standards of harm and nexus that they use to evaluate the persecution suffered by the applicant himself. *See Lisa Yu, Differentiating the Material Support and Persecutor Bars in Asylum Claims*, EOIR Immigr. L. Advisor, Feb. 2009, at 5.

Because the current legal understanding of persecution is based on court precedent, it is subject to change, both across jurisdictions and over time. It also implicates separation-of-powers concerns. Modern U.S. asylum law derives from the Refugee Act of 1980, which amended the Immigration and Nationality Act (INA) and domestically executed the United States’ international obligations under the 1967 Protocol on the Status of Refugees (Protocol). I will argue that the Protocol is an excellent tool for discerning congressional intent in the relevant sections of the INA. Therefore, other branches of government whose role is to effectuate Congress’s intent should conform their actions to the Protocol’s letter and spirit wherever possible.

Separation-of-powers analysis is being overhauled since the Supreme Court overruled *Chevron, USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) in June 2024. The principle of deference established in the *Chevron* line of cases stood for the proposition that if Congress left an ambiguity in a statute that an executive agency was meant to administer, that agency’s interpretation of the statute controlled – even over a previous construction of that statute by an Article III court. Proponents of the doctrine believed that it left policymaking on complex technical issues to the people with the requisite expertise, kept government accountable for those interpretations because the bureaucrats making them worked for a political branch, and promoted uniformity in the administration of federal law because a single interpretation prevailed in every circuit. Opponents, who ultimately triumphed in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), argued that it violated separation of powers by taking the responsibility of statutory interpretation away from the judicial branch, and actually harmed legal uniformity because different administrations were likely to change regulatory policy every few years. *Chevron* played a large role in the Supreme Court’s resolution of *Negusie v. Holder*, the key twenty-first-century case about the duress exception to the persecutor bar. When I analyze *Negusie*, its developments over the last few decades, and its influence on asylum law, I have chosen to gloss the Court’s primary (*Chevron*-related) holdings and focus instead on the substantive arguments. Future adjudicators will be forced to use a much different decision calculus than was available in 2009. Whatever one’s overall position on *Chevron*, the *Loper Bright* decision creates an opportunity for asylum practitioners to advance theories outside the precedent of the Board of Immigration Appeals (BIA).

as long as they were white. It was not until 1929 that this country penalized individuals for their manner of entry, with Blease's Law, which criminalized crossing the border between official ports.¹⁰ Notably, no one seemed to think about restricting the manner of entry until it was likely to prevent Latinos from immigrating. History is relatively silent on the U.S. government's official position toward the manner of entry Europeans used, though many American families with European heritage have a story of one member, 100-plus years ago, simply stepping off a boat with a few dollars in her pocket to start a better life. No such data probably exist, but this author would not be surprised if, out of a sample of Americans who believe that "economic migrants" who do not "get in line" are lazy at best and criminal at worst, over ninety percent would have an ancestor who arrived on U.S. shores in exactly the manner they now decry – except it was not illegal at the time.

A quota-driven, restrictive system governed U.S. immigration law when the post-World-War-II "refugee problem," or collective action problem where millions of people could not or did not wish to return to their homes after a devastating conflict, confronted the major players on the international scene.¹¹ In 1946, the United Nations – then a newly minted organization – established the International Refugee Organization (IRO) to create solutions to the serious problems facing postwar refugees, and the countries taking them in.¹² The United States, one of fifty-five signatories to the IRO Constitution, footed roughly forty-five percent of the international agency's expenses.¹³ Every Director-General of the IRO, until its dissolution in 1952 when the UN High Commission on Refugees (UNHCR) was created, was a United States citizen.¹⁴ Pres. Truman vehemently urged Congress to enact domestic legislation executing the United States' responsibilities to refugees under the IRO Constitution, which it did with the Displaced Persons Act of 1948 (DPA).¹⁵ The Displaced Persons Act specifically excluded individuals who "assisted the enemy in persecuting civil populations" from refugee protection in the United States.¹⁶ The goal of this exclusion was primarily to keep former Nazis outside the country, so Jewish refugees would not be forced to live side by side with them.¹⁷ The purpose and values of the DPA continued to shape jurisprudence

10. Univ. Tex. at Austin Dep't of History, *Immigration History: Timeline*, (2019), <https://perma.cc/E36Y-ECGX>.

11. See *id.*; UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* 4 (1951), <https://perma.cc/US9Z-T5R7>.

12. United States Holocaust Memorial Museum, *United States Immigration and Refugee Law, 1921-1980*, <https://perma.cc/NN3C-M4NP> (last visited Jul. 25, 2024).

13. *Id.*

14. *Id.*

15. *Id.*

16. Melani Johns, *Adjusting the Asylum Bar: Negusie v. Holder and the Need to Incorporate a Defense of Duress into the "Persecutor Bar,"* 40 GOLDEN GATE U. L. REV. 235, 243 (2010).

17. *Id.*

on the exclusion of persecutors long after the INA, first passed in 1952, expanded and superseded most of its provisions.¹⁸

By the mid-twentieth century, it became clear that the “refugee problem” was not linked solely to World War II, and measures that were both more permanent and less specific to that conflict were needed.¹⁹ States responded, at first by enacting the 1951 United Nations Convention Relating to the Status of Refugees (Convention), whose objective was to indefinitely protect individuals who became refugees “as a result of events occurring before 1 January 1951” regarding the war in Europe.²⁰ Although the United States’ representative to the treaty committee played an integral role in drafting the Convention,²¹ the U.S. did not ultimately sign it.²² Instead, the U.S. mostly limited its response to the new paradigms of migration to passing the INA.²³ Congress also passed a Refugee Relief Act in 1953, allocating 214,000 visas to Europeans and East Asians fleeing communist controlled territory; recipients of such visas had to prove they had financial sponsors and secure offers of employment in the U.S., as well as “verify their political history.”²⁴

In the ‘60s, the international community recognized that even twenty years after World War II, there was a need for ongoing refugee support, so the United Nations enacted the 1967 Protocol Relating to the Status of Refugees (Protocol), which essentially amended the Convention to remove all time-bound

18. *Negusie v. Holder*, 555 U.S. 511, 521 (2009).

19. Tasha Wiesman, Comment: *Denying Relief to the Persecutor: An Argument in Favor of Adopting the Dissenting Opinion of Negusie v. Holder*, 44 J. MARSHALL L. REV. 559, 562 (2011).

The author of the instant note cites her fellow JMLS/UIC alum with gratitude but an abundance of caution. Wiesman’s paper presents a thorough historical breakdown of asylum law and the persecutor bar, *see* pp. 560, 562, 567. However, her policy conclusions are unreasonable and unsafe. Based on evidentiary difficulties and concerns about applicants manipulating the record, Wiesman rejects a duress exception in favor of reforming the entire asylum system, suggesting that applicants complete the process overseas like those who seek most other visas. *See* p. 577. This, she argues, will allow for more appropriate vetting by consular officials and obviate the need for credibility determinations. *See* p. 581. After four and a half years of direct representation work with immigrants under attorney supervision and an EOIR internship, I have already learned from experience that such a scheme would be terrifying and impractical for asylum seekers. U.S. consulate officials conducting an investigation, often over weeks or months, would tip off local law enforcement that the applicant in question was trying to leave the country, and probably staying close to the consulate’s location. The risk of further persecution, including disappearance and death, would be too high for the average applicant to engage in the process.

20. Convention Relating to the Status of Refugees art. 1(A)(2), Jul. 28, 1951, 189 U.N.T.S. 2545 (hereinafter “Convention”). An excellent clarification of the Convention, and the refugee definition generally, as they are situated within international human rights law developments, can be found in André de Lima Madureira, *International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention*, London School of Economics (Feb. 8, 2016), <https://perma.cc/KXC2-HKC8>.

21. *See generally The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, U.N. HIGH COMMISSION FOR REFUGEES (1995), <https://perma.cc/BBJ9-VKYN>.

22. Status of Chapter V 2. *Convention Relating to the Status of Refugees: Geneva, 28 July 1951*, U.N. TREATY COLLECTION, <https://perma.cc/BBJ9-VKYN> (last visited June 13, 2025).

23. Wiesman, *supra* note 19 at 561-64; National Network to End Domestic Violence, *Legal Information: Federal*, WomensLaw.org (Jan. 1, 2024), <https://perma.cc/ET9Z-F69S>.

24. Immigration and Ethnic History Society, University of Texas at Austin Department of History (2019), *Refugee Relief Act (1953)*, <https://perma.cc/2ZPC-F465>.

and geographic restrictions on who may qualify for refugee status.²⁵ The U.S. did become a signatory to the Protocol.²⁶ By signing, the U.S. agreed to Articles 2 through 34 of the 1951 Convention.²⁷ Because of the executing process in which Congress engaged when it passed the Refugee Act, the Protocol, an international instrument, enjoys parity with U.S. federal law under the Supremacy Clause.²⁸ The Refugee Act gives an authority to the provisions of the Protocol that most other treaties lack: regardless of a given court's level of respect for international law, the US' international commitment to refugees must be treated like an Act of Congress because it *is* an Act of Congress.

The United States has operated the largest U.N.-based refugee resettlement program in the world since 1970, accepting over 75,000 people in 2023.²⁹ The U.N. High Commissioner for Refugees notes that “[r]efugee resettlement to the U.S. is traditionally offered to the most vulnerable refugee cases including women and children at risk, women heads of households, the elderly, survivors of violence and torture and those with acute medical needs.”³⁰ For these people, the United States does go above and beyond in its financial and logistical support. But 75,000 refugees a year, while no small commitment, is the tip of the iceberg: today, the world is witnessing its greatest rates of displacement *ever*.³¹ One in sixty-nine of our global neighbors is displaced, meaning that the number of refugees is greater than the population of Japan.³² Globally, not quite sixty percent of the 1.4 million asylum claimants whose cases were resolved in 2023 received some protection, whether asylum or a lesser form of relief.³³ At the end of 2023, 6.9 million people were still waiting to have their claims adjudicated.³⁴ Approximately³⁵ 945,370 of those asylum seekers filed their claims in the US.³⁶ The need to substantively evaluate these claims in full before deciding their fate, whether a grant or denial, cannot be overstated.

It is beyond the scope of this note to significantly discuss the extensive rule-making since 2022 to limit asylum eligibility. The Departments of

25. Madureira, *supra* note 20; *Fact Sheet: International Refugee Protection System*, Immigration Forum (Apr. 1, 2019), <https://perma.cc/9HM8-683G>.

26. U.S. Holocaust Memorial Museum, *supra* note 12.

27. Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar*, 33 GEO. U. IMMIGR. L. J. 213, 220 n.48 (2019).

28. U.S. CONST. art. VI, cl. 2.

29. *Refugees in America*, *supra* note 6; *Global Trends: Forced Displacement in 2023* 42 (U.N. High Commissioner for Refugees 2024).

30. *Refugees in America*, *supra* note 6.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. The Office of Homeland Security Statistics rounds these numbers to the nearest ten in all its reports. They break down the data by country, region, sex, marital status, claim type, and other demographics, and exact numbers could compromise the privacy of the applicants. *See infra* note 37.

36. Noah Schofield & Amanda Yap, *Asylees: 2023*, Office of Homeland Security Statistics, <https://perma.cc/89LK-MXGM> (last visited Nov. 23, 2024). A little more than half of those claims were filed in removal proceedings (456,750 affirmative cases; 488,620 defensive ones).

Homeland Security and Justice, as well as the Presidents themselves, from both the Trump and Biden Administrations, have promulgated various policies that significantly impact asylum seekers' *de facto* rights.³⁷ The regulations attracted some indignation during notice-and-comment³⁸ and both the agency regulations and executive orders (EOs) were almost immediately challenged in court.³⁹

To briefly summarize the process, it is primarily Title 8, section 1158 of the U.S. Code that governs asylum law, along with rules found in 8 C.F.R. and administrative and Article III jurisprudence.⁴⁰ There are two postures in which an asylum seeker may begin his case: affirmative and defensive.⁴¹ In the affirmative posture, a refugee has entered the U.S. through regular means,

37. In reverse chronological order: Protecting American Communities from Criminal Aliens, 3 C.F.R. Exec. Order No. 14287 (Apr. 28, 2025); Securing Our Borders, 3 C.F.R. Exec. Order No. 14165 (Jan. 20, 2025); Securing the Border, 89 Fed. Reg. 48,710 (Jun. 7, 2024) (codified at 8 C.F.R. §§ 208, 235, and 1208); and Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023) (codified at 8 C.F.R. §§ 208, 1003, and 1208).

In Protecting American Communities, *supra*, President Trump characterized immigration writ large as an "invasion," 90 Fed. Reg. 18761, and sanctuary jurisdictions' sovereign prerogative against commandeering "a lawless insurrection." *Id.* The word choice is inflammatory to say the least, and the reader would not be faulted for finding it ironic.

38. See 89 Fed. Reg. and 88 Fed. Reg., *supra* note 37.

39. *City & Cty. of San Francisco v. Trump*, 2025 U.S. Dist. LEXIS 84524 (N.D.Cal. May 3, 2025), 3:25-cv-01350; Katharine Jackson, *Biden Administration Ready for Court Challenges to Border Policy*, *Mayorkas Says*, Reuters (Jun. 10, 2024), <https://perma.cc/MML4-68JP>; Lee Gelernt, *Immigrants' Rights Groups Sue Biden over Anti-Asylum Rule (Case: Las Americas Immigrant Advocacy Center v. U.S. Department of Homeland Security)*, Am. C.L. Union (Jun. 12, 2024), <https://perma.cc/UW54-AWVF>.

Las Americas continued in litigation into the new administration. On May 9, 2025, Judge Rudolph Contreras of the US District Court for the District of Columbia signed a memorandum opinion granting in part and denying in part plaintiffs' motion for summary judgment as well as granting in part and denying in part defendants' cross-motion for summary judgment. New named defendants were substituted for those who no longer held office. *Las Americas Immigrant Advocacy Center, et al. v. U.S. Dep't of Homeland Security, et al.*, 1:24-cv-01702-RC (D.D.C. May 9, 2025) (Mem) at 1, 8. Portions of the Securing the Border Rule were vacated, as well as individual decisions under those provisions, while a different section was upheld. Judge Contreras wrote, "Defendants emphasize that the INA provides that DHS and DOJ may establish 'limitations and conditions' on asylum beyond those laid out by Congress . . . True. But the INA requires that those additional limits and conditions be 'consistent with' the rest of section 1158. . . . the Rule is . . . unlawful. By conditioning asylum on a nonimmigrant's place of arrival, the Rule conflicts with the INA. . . ." *Id.* at 31-32 (internal citations omitted). While Trump has effectively ended asylum processing at the southern border by closing down CBP One, jurisprudence along *Las Americas'* lines may slowly reestablish asylum seekers' congressionally bestowed rights.

40. See, e.g., 8 C.F.R. §§ 1208.4, 1208.7, 1003.23(b)(4)(i); *INS v. Ventura*, 537 U.S. 12 (2002); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) for a variety of topics within asylum law. The most recent regulations are Securing the Border, 89 Fed. Reg., *supra*; Circumvention of Lawful Pathways, 88 Fed. Reg., *supra*. Those two rules considerably restrict asylum eligibility; exactly how the rules function(ed) is beyond the scope of this note, but they have spawned fierce litigation. See, e.g., the *East Bay* decisions, most recently remanding the case back to the Northern District of California after settlement negotiations between the plaintiffs and government failed on Feb. 5, 2025. *E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545 (9th Cir. 2025) (Mem). See also *Las Americas, supra* note 39. With respect to asylum specifically, the new Trump Administration has chosen not to promulgate any regulations through DHS and DOJ, thereby obviating the requirement for notice-and-comment and other procedures and safeguards. Instead, President Trump has pursued his goals primarily through EOs.

41. The author recognizes that this explanation is oversimplified and acknowledges the unique case trajectories some asylum seekers experience, but for purposes of this note, affirmative versus defensive is the most salient distinction.

such as on a valid visa, and files his application (Form I-589)⁴² with USCIS, which is a component agency of DHS. This begins an inquisitorial process with a USCIS Asylum Officer (AO).⁴³ If his application is approved, the asylee is entitled to work authorization⁴⁴ and can apply for any immediate relatives he left behind to join him.⁴⁵ An asylum grant also makes a person eligible to adjust status to lawful permanent residence in the future.⁴⁶

If the asylum officer cannot grant the application, in most cases, she refers it to immigration court, where the applicant must make his case again before an immigration judge.⁴⁷ A Notice to Appear (NTA), or charging document, is issued to the applicant⁴⁸ and he becomes a respondent in removal proceedings,

42. *Form I-589, Application for Asylum and for Withholding of Removal*, USCIS, <https://perma.cc/JT9F-KS7D> (last visited May 26, 2025). The I-589 application requests not only asylum, but also withholding of removal (“withholding”) and deferral of removal under the Convention against Torture (“CAT”). These are lesser-included, alternative forms of relief for people with a well-founded fear of persecution or torture in their home countries who do not qualify for asylum. Though withholding and CAT have fewer elements than asylum, and therefore fewer requirements to meet, the standard of proof is significantly higher – a roughly ten percent chance of being persecuted for asylum compared with a preponderance of the evidence (fifty-one percent chance) for the other forms of relief. Only asylum affords the recipient a path to lawful permanent residence and U.S. citizenship; only asylum provides the recipient an opportunity to bring his immediate family to the US as derivatives on his application. Withholding and CAT theoretically exist to fulfill our minimum non-refoulement obligations under the Protocol by not sending people back to countries where they would be persecuted or tortured, but they are not robust or permanent protections. (“Refouling” a refugee is to expel or return them to the frontier of any country where their life or freedom would be threatened, Convention art. 33.) If the U.S. government believes that circumstances have changed and the recipient of withholding or CAT no longer has a strong enough chance of being persecuted or tortured, it may withdraw relief and issue a removal order for him. CAT recipients may also be removed to a third country the U.S. government deems appropriate, if they have a chance of obtaining lawful status in that country and would not likely be tortured there. In practice, enforcement resources are not often devoted to revoking withholding and deferral of removal orders, but the mere possibility can create uncertainty and deep anxiety for a noncitizen. The persecutor bar applies to withholding as well as asylum, but not CAT: if the U.S. government believes an alien is dangerous, it will refole him and risk his life rather than risk the lives of its citizens; but even a risk of violence to U.S. citizens is not enough to overcome the universal international condemnation of torture. CAT recipients thought to be dangerous may be monitored and detained, and they are not entitled to employment authorization. Lauren Gearty, *Your Rights After a Grant of Convention Against Torture Protection or Withholding of Removal*, NOLO (Dec. 15, 2023), <https://perma.cc/VEF2-5D8L>. One argument against a duress exception to the persecutor bar, or for more harshly limiting asylum in other ways, is that the U.S. can meet its international obligations through withholding and CAT alone. Later in this note, I will show why, as a matter of law, policy, and ethics, this argument sidesteps the true issue, which is providing safety and security to those who have been deprived of it at home. I will demonstrate why asylum relief specifically is the best way to meet these obligations, both to other States parties to the Protocol and other humans with whom we share the world.

43. *The Affirmative Asylum Process*, USCIS, <https://perma.cc/DHB5-L4A3> (last visited June 10, 2025).

44. Once an asylum application is received by the pertinent agency, an “asylum EAD clock” [employment authorization document] begins to run. The applicant becomes eligible for work authorization after her case has been pending for 180 days, but she must separately file a Form I-765 application for the EAD. There are nuances to when the “clock” may start, pause, restart, or stop, but the basic upshot is that many asylum applications pend for years, and this interim work authorization is critical to the applicant’s medium-term survival. After asylum is granted, employment is authorized “incident to status” and the asylee no longer needs to independently renew her EAD. *The 180-Day Asylum EAD Clock Notice*, USCIS, <https://perma.cc/M4V5-V5YP> (last visited June 10, 2025).

45. *Asylum*, USCIS, <https://perma.cc/P2PY-6M69> (last visited June 10, 2025).

46. *Id.*

47. *Types of Affirmative Asylum Decisions*, USCIS, <https://perma.cc/4KQT-FVRW> (last visited Nov. 23, 2024).

48. *Id.*

i.e., a defensive posture. An attorney for D.H.S. prosecutes the respondent for the offense charged in the NTA;⁴⁹ the respondent presents his pleadings, including any defenses⁵⁰ such as his asylum application; and, after a merits hearing, the immigration judge (IJ) issues her decision and order of grant or denial/removal. Many arriving aliens go straight into removal proceedings and apply defensively in the first instance. In 2018, DHS and DOJ reported that more than 70,000 aliens cross the United States border between ports of entry and declare themselves as asylum seekers to immigration authorities each year.⁵¹ Such authorities, either U.S. Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE), ensure that arriving aliens⁵² who answer “yes” when asked if they are afraid to return to their countries, receive credible fear interviews (CFI) from an AO.⁵³

49. Section 212 of the INA enumerates inadmissibility offenses; § 237, deportability offenses. *See* 8 U.S.C. §§ 1182, 1227. The vast majority of defensive asylum seekers are charged under § 212 due to a lack of proper travel documents, crossing a border between ports of entry, misrepresenting information in order to obtain a document (which may be necessary to evade persecutors in their home countries), et cetera. An asylum application is considered a defense in removal proceedings because US asylum law, in accordance with the Protocol, offers an opportunity to apply for protection to any individual regardless of her immigration status. (Until recently, United States asylum law also offered this opportunity regardless of the individual’s place or manner of entry or manner of transit to the United States as well. Regulations under the Trump and Biden Administrations have limited asylum eligibility by these factors, but many of those rules have been enjoined or are in the process of being challenged, so their long-term effects are unclear.)

50. Defenses in immigration court are one instance where the “illegal immigrant”/irregular entrant distinction matters enormously. DHS has charged inadmissibility for unlawful entry or presence in the United States because the respondent has not yet proven that she is a refugee who definitionally cannot enter a country of refuge unlawfully (as long as she timely applies for asylum). Unlike other defenses, *e.g.*, § 212 waivers, once refugee status is proven in a successful asylum case, the NTA charges are not forgiven – they vanish. *See* 8 U.S.C. § 1182.

51. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55948 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

52. For simple and convenient reference, an “arriving alien” is “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.” 8 C.F.R. § 1001.1(q) (2024). “Admitted” or “admission” are defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A). Many asylum seekers are arriving aliens, and the Office of Homeland Security Statistics reported that in 2022, twenty-four percent of all asylum seekers self-reported as having entered without inspection (EWI). Irene Gibson, *Annual Flow Report – Refugees and Asylees: 2022*, OFF. OF HOMELAND SEC. STAT. (Feb. 15, 2024), <https://perma.cc/NS5Y-EZDV>. Admitted aliens can be construed as US persons even if they are not lawful permanent residents, and US persons receive greater Constitutional due process rights than arriving aliens. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders,” and an alien may be physically present in the United States without having “effected an entry”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society”).

53. *Questions and Answers: Credible Fear Screening*, USCIS (Sept. 12, 2023), <https://perma.cc/JV8D-B6XA>. Importantly, the newest regulations stratify credible-fear-type processes into multiple different procedures with different standards depending on the circumstances of the applicant’s entry, so labelling this “the CFI process” is reductive. Given the multiplicity of CFI-type procedures having little bearing on the persecutor bar, I have chosen not to use more specific language.

The credible fear interview, *i.e.*, a credible fear *of persecution in one's country of origin*, is a critical step to set up an asylum claim.⁵⁴ The CFI questions are designed to see whether there exists “a significant possibility . . . that the alien could establish eligibility for asylum.”⁵⁵ Despite the best intentions of many government employees, a myriad of issues plagues this process, not the least of which is that because the CFI takes place shortly after the asylum seeker’s entrance or apprehension in the United States, she is rarely represented by counsel.⁵⁶ Furthermore, despite DHS’ stated commitment to provide interpretation in each individual’s best language, mistakes in the choice of language often occur.⁵⁷ Because many refugees have suffered various forms of abuse at the hands of law enforcement in their countries,⁵⁸ the neuroscience of trauma indicates that being interviewed by a law enforcement officer can trigger symptoms and intense emotions that impede her effective responses to questioning.⁵⁹ These triggers may occur even if the individual understands intellectually that this AO is attempting to help her seek protection. The foregoing problems can create significant problems later in the case’s procedural posture. If the alien is shown to have positive credible fear, she is generally placed in formal proceedings where she submits her asylum application defensively.⁶⁰ Because of the

54. 8 C.F.R. §§ 1208.30(e) (2023), 208.30 (2025).

55. 8 U.S.C. § 1225(b)(1)(B)(v); *Grace v. Barr*, 965 F.3d 883, 888 (D.C. Cir. 2020).

56. *Asylum Processing Rule Cohort Report*, OFF. OF HOMELAND SEC. STAT. (Mar. 19, 2025), <https://perma.cc/GS7G-L394> (Credible Fear Claims, Final or Most Recent Credible Fear Outcome by Attorney Representation). Forty-two interviewees were represented by counsel, with four represented cases still pending; out of 3,741 total completed cases, that equates to roughly one percent. These cases were part of a pilot program implementing new rules for CFIs.

57. The Department of Homeland Security Office of Civil Rights and Civil Liberties received multiple complaints of “inadequate language access during [applicants’] credible fear” interviews, including “pressure to complete the interview in a non-preferred language; translation errors during the interview, and failure to follow the 2013 USCIS Asylum Division Memorandum, ‘Processing Credible Fear Cases When a Rare Language Interpreter is Unavailable.’” Dana Salvano-Dunn, Memorandum: Allegations Relating to Credible Fear and Reasonable Fear Interviews at the Houston Asylum Office, Dep’t of Homeland Sec. (Aug. 22, 2022), <https://perma.cc/HVM5-ANZV>.

President Trump laid off a significant portion of CRCL’s staff and eliminated many of its functions, citing “bureaucratic hurdles” that “undermin[ed] DHS’s mission.” Rebecca Beitsch, *Trump Topples Civil Rights Offices at DHS*, THE HILL (Mar. 21, 2025), <https://perma.cc/KB8F-4TA6>. Today, the CRCL immigration section’s official website describes one program: “Women, Peace, and Security.” *CRCL Immigration Section*, U.S. DEP’T OF HOMELAND SEC., <https://perma.cc/XUJ2-WMQC> (last visited May 10, 2025).

58. See, e.g., *Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 366 (4th Cir. 2021) (finding that Guatemalan police and judicial authorities are characterized by corruption and often beholden to gangs, participating in drug trafficking and extortion while neglecting to investigate harm against civilians); *Study on the human rights impact of law enforcement on asylum seekers, refugees and migrants in Africa*, AFRICAN COMM’N ON HUM. & PEOPLES’ RTS. (Sep. 2023), <https://perma.cc/H9RF-QFNN> (finding that xenophobia, lack of awareness, and corruption drive African law enforcement personnel to violate asylum seekers’ rights); Felipe Navarro, *Far From Safety: Dangers and Limits to Protection for Asylum Seekers Transiting Through Latin America*, CTR. FOR GENDER & REFUGEE STUD. AT U. CAL.-HASTINGS COLL. L. (April 2023), <https://perma.cc/P72S-5B38> (finding that Mexican authorities are responsible for serious violence against members of vulnerable groups like women, LGBTQ+ people, and children).

59. Brief for The Advoc. for Hum. Rts., Just. for Our Neighbors, Nat’l Immigrant Just. Ctr. & Am. Immigr. Law. Ass’n as Amici Curiae Supporting Respondent, *Matter of Negusie*, 27 I & N Dec. 347 (BIA 2018), at *24 n.11 (“Applicants – who are often escaping torture at the hands of government authorities – are often speaking with a government representative for the first time, and are naturally terrified of what might happen to them, leading to forgetfulness, incomplete answers, and inaccurate recollections.”).

60. 8 C.F.R. § 208.30(f) (2025).

unfeasibility of most international evidence discovery (and administrative law's relaxed rules of evidence), an asylum seeker's testimony may be the primary or even sole substantiation of her claim. As a result, credibility determinations are paramount, and consistency among statements is key to a finding of credibility. An asylum seeker and her counsel should, of course, avail themselves of every opportunity to amend the record if needed.

A reminder about the structure of the asylum argument may be helpful.⁶¹ The IJ or AO adjudicating the case will evaluate the following elements.⁶²

Past persecution is the first element to be considered, including the level of harm; the nexus to a statutorily protected ground (race, religion, nationality, membership in a particular social group, or political opinion); and government sponsorship of the persecution.⁶³ If "particular social group" is selected as a ground, the proposed group must be immutable, socially distinct, and particular (meaning the group's numerosity can be relatively well defined).⁶⁴ Persecution by a non-state actor may also meet this element if the government is unwilling or unable to protect its citizens from that actor, or especially if the actor works with government acquiescence or collusion.⁶⁵ If past persecution is proven, it creates a rebuttable presumption that the asylum seeker has a well-founded fear of future persecution.⁶⁶

Well-founded fear of future persecution may arise out of past persecution (unless DHS is able to rebut the presumption) or exist for independent reasons.⁶⁷ The asylum seeker must prove that she has at least a one-in-ten likelihood of being singled out for persecution by her home government.⁶⁸ If the persecution was committed by a non-state actor, the asylum seeker must prove that she could not avoid being persecuted by relocating within her own country.⁶⁹

The adjudicator must also find that the asylum seeker is not barred from relief. These bars, mandating denial regardless of the merits of the claim,

61. part II will thoroughly analyze several sections of the statute.

62. *Asylum, Withholding of Removal, and Protection Under the U.N. Convention Against Torture*, U.S. DEP'T OF JUST. (Oct. 2021), <https://perma.cc/L4XD-D4JD>.

63. 8 U.S.C. § 1158; Hillel R. Smith, *An Overview of the Statutory Bars to Asylum: Limitations on Applying for Asylum (part One)*, CONG. RSCH. SERV. (Sept. 7, 2022), <https://perma.cc/3QAM-GEJ5>.

64. A particular social group (PSG) has three elements: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *S.E.R.L. v. Att'y Gen. of U.S.*, 894 F.3d 535, 540 (3d Cir. 2018); *Matter of M-E-V-G-*, 26 I & N Dec. 227, 237 (BIA 2014). Extensive case law has contoured and developed the meanings of these terms and the standards an applicant must meet to prove membership in a particular social group; a thorough discussion thereof is outside the scope of this note.

65. *See, e.g., Grace v. Barr*, 965 F.3d 883, 889 (D.C. Cir. 2020).

66. 8 C.F.R. § 208.13(b)(1) (2024).

67. 8 U.S.C. § (1101)(a)(42)(A) *et seq.*

68. 8 C.F.R. § 208.31(a), (c); *see, e.g., Mendoza-Linares v. Garland*, 51 F.4th 1146, 1152 (9th Cir. 2022); *Alvarado-Herrera v. Garland*, 993 F.3d 1187, 1195 (9th Cir. 2021); *Bartolome v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018).

69. *See, e.g., Grace*, 965 F.3d at 889; *Asylum Procedures*, 65 Fed. Reg. 76121, 76126 (Dec. 6, 2000) (codified at (C.F.R. 208).

include timeliness (asylum must be requested within one year of the individual's entry into the United States, with limited exceptions); material support to terrorism; convictions for crimes involving moral turpitude or CIMTs and aggravated felonies; an offer of firm resettlement in a third country, with limited exceptions; and, most germane to this note, persecutor (discussed below).⁷⁰

After the statutory requirements above are met, the adjudicator may deny asylum in the exercise of discretion. The executive departments often argue that they can restrict asylum significantly and still comply with the INA and the Protocol because asylum is a discretionary form of relief, not mandatory.⁷¹ The I-589 contains applications for lesser-included alternative forms of relief, such as withholding of removal (“withholding”) and deferral of removal under the Convention against Torture (“CAT”). These alternative forms of relief are explained more fully in footnote 50; it is most important here to note that neither of them provides either a path to permanent residence and citizenship or an opportunity to bring family members to join the alien later. As a practical matter, based on the immense trauma, disruption to their lives, and lack of safety that meritorious claimants have faced, such limited forms of relief are inadequate protection because they do not create continuity and a sense of psychological safety.

The persecutor bar disqualifies from asylum any person “the Attorney General⁷² determines” has “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷³ Once an adjudicator finds facts that indicate an asylum seeker may be subject to the persecutor bar, the burden of proof is on the asylum seeker to demonstrate that he is *not* subject to it.⁷⁴ Proving a negative, which the asylum seeker must do by a preponderance standard, is a tremendous evidentiary challenge, especially for those not represented by counsel or represented by pro bono counsel whose usual area of practice is not immigration or asylum-related. Furthermore, courts have struggled to delineate what to consider “assist[ance]”

70. Smith, *supra* note 63.

71. See arguments made in support of Securing the Border, 89 Fed. Reg. 48710, 48711–48718 (Jun. 7, 2024) (codified at 8 C.F.R. §§ 208, 235, and 1208) and Circumvention of Lawful Pathways, 88 Fed. Reg. 31314, 31314–31319 (May 16, 2023) (codified at 8 C.F.R. §§ 208, 1003, and 1208).

72. And his or her delegates, *see* Kevin A. Gregg, *The State Of Asylum Law After Trump – And What’s Next*, LAW360 (Feb. 8, 2021), <https://perma.cc/9XHS-TCHU>. Gregg is a partner at Kurzban Kurzban Tetzeli and Pratt PA, where Ira Kurzban, who “literally wrote the book” on immigration law, practices. *See generally*, KURZBAN’S IMMIGR. L. SOURCEBOOK (19th ed., 2024).

73. Charles Shane Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 GEO. IMMIGR. L. J. 213, 215 (2019) (citing 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)).

74. “If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.” 8 C.F.R. § 1240.8(d). Note that a preponderance of the evidence is about five times the standard that the alien must meet to prove the basic merits of their claim.

or “participat[ion].”⁷⁵ Salient questions include to what degree the asylum seeker was involved in the persecutory acts (*e.g.*, did he beat prisoners, guard prisoners knowing they would be beaten, or merely cut the prisoners’ hair?); what degree of contemporaneous knowledge or scienter the asylum seeker possessed when acting the way he did; and, of course, whether the motive for the actions was “persecutory” in the sense that the actors targeted their victims on account of a protected ground. We now turn to part II, delving further into the statutory language and case law surrounding asylum, the persecutor bar, and any proposed exceptions for actions committed under duress.

II. ANALYZING THE STATUTES, REGULATIONS, AND JURISPRUDENCE AROUND THE PERSECUTOR BAR

The text of the persecutor bar can be found within Title 8 of the U.S. Code, primarily in § 1158, the asylum section.

The Secretary of Homeland Security or the Attorney General⁷⁶ may grant asylum⁷⁷ to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of § 1101(a)(42)(A) of this title.

8 U.S.C. § 1158(b)(1)(A).

Paragraph (1) shall not apply⁷⁸ to an alien if the Attorney General determines that – (i) the alien ordered, incited, assisted, or otherwise

75. *Matter of Negusie*, 28 I&N Dec. 120, 120-55 (A.G. 2020); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 915-33 (9th Cir. 2006); *Matter of M-B-C-*, 27 I&N Dec. 31, 31-39 (B.I.A. 2017).

76. 8 C.F.R. § 1208.2 corresponds to this portion of the statute, assigning jurisdiction over asylum applications and detailing relevant procedures.

77. Compare the domestic statute with: “The Conference, Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position, Recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement.” U.N. GOAR, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons at art. IV(D), U.N. Doc. A/CONF.2/108/Rev.1 (Nov. 26, 1952) (included with the Convention, *supra* note 20, before its Preamble) (giving recommendations regarding international co-operation in the field of asylum and resettlement).

The United States did not explicitly accede to these recommendations via the Protocol. However, the preamble of the Protocol nods at the goals of the Convention: “Considering that new refugee situations have arisen since the Convention was adopted and that refugees concerned may therefore not fall within the scope of the Convention, Considering that it is desirable that equal status should be enjoyed by all refugees . . . [the States parties] Have Agreed as follows” Protocol Relating to the Status of Refugees, Preamble, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Therefore, the stated recommendations at the beginning of the Convention are indicative of Congressional intent when executing the Protocol through the Refugee Act. 8 USC § 1158 was designed to work cooperatively within an international diplomatic framework, not solely operate in the interests of the United States government and subject to U.S. administrative and regulatory jurisprudence.

78. Compare the domestic statute with: “The provisions of this Convention shall not apply to any person with respect 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

participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1158(b)(2)(A)(i).

The term “refugee”⁷⁹ means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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 The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).

Before going further, I wish to acknowledge the very human reality behind these oft-reiterated legal terms. An abstract and detached consideration of the texts in their contexts is indeed crucial in the pursuit of a fair application of the law. However, even those who ultimately do not meet asylum’s narrow elements may have a history of oppression, poverty, and often violence. They are unfamiliar with the United States and our legal system; possibly our climate and language as well. Physical injuries and emotional traumas are the daily experiences of most applicants. Asylum seekers are members of the global community who may or may not be entitled to the U.S. government’s tangible assistance, but they are always entitled to our nation’s respect and compassion.

A. *Negusie v. Holder and Its Progeny: May Adjudicators Recognize a Duress Exception to the Persecutor Bar under Current Law?*

Daniel Girmai Negusie has been the face of the duress exception debate for twenty years. Persecutor barred because he had been forced to watch over

up to make provision in respect of such crimes . . . (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.” Convention, *supra* note 20, at art. I(F). The United States acceded to this provision via the Protocol: “For the purpose of the present Protocol, the term ‘refugee’ shall . . . mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘a result of such events,’ in article I A (2) were omitted.” Protocol Relating to the Status of Refugees, *supra* note 77, at art. I(2).

79. Compare the domestic statute with: “[T]he term ‘refugee’ shall apply to any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.” Convention, *supra* note 20, at art. I(A)(2). The United States has acceded to this definition via the Protocol. See United States Holocaust Memorial Museum, *supra* note 12; see also Protocol Relating to the Status of Refugees, *supra* note 77, at art. I.

political prisoners in harsh conditions that led to at least one prisoner's death, he appealed to the BIA and ultimately the Supreme Court under the theory that "persecution" necessarily includes an element of intent. The BIA applied a precedent favoring strict liability persecutor bars that stretched back before the Refugee Act; SCOTUS remanded, based on *Chevron* principles, and instructed the agency to construe the appropriate statute. Although Negusie received CAT relief, he was ultimately still found persecutor barred from asylum after many years of litigation. The Obama and Trump Administrations briefed and ruled on his potential duress exception differently; President Biden's Attorney General Garland recertified the case to address it again, but never issued an opinion during Biden's term. Negusie's facts and procedural posture vividly and comprehensively illustrate the legal and policy issues inherent in the duress exception debate; therefore, I will detail the case before engaging in further analysis.

Mr. Negusie, an Eritrean-Ethiopian dual national, was first conscripted into the Eritrean military in 1995 when he was nineteen years old.⁸⁰ He initially served for two years.⁸¹ "National service" is compulsory for all Eritrean citizens after secondary school.⁸² In 1998, Negusie was reconscripted; Eritrea was at war with Ethiopia, and Negusie indicated that he did not wish to fight against his other country of nationality, so he was assigned to a post away from the battlefield.⁸³ Later, he was imprisoned and subjected to forced labor, which he believes is the result of his request for reassignment.⁸⁴ It is undisputed in his case record that prisoners in the camp were being held on account of characteristics protected by the U.S. asylum statute and international law.⁸⁵ Among these characteristics were nationality and religion, including Protestant Christianity, most denominations of which are banned in Eritrea.⁸⁶ As one of his labor assignments, Negusie was forced to become a guard at the same camp where he was being held.⁸⁷ He was paid a nominal fee for performing duties such as

80. Matter of Negusie, 28 I&N Dec. 120, 122 (A.G. 2020).

81. *Id.*

82. According to the Associated Press, "Eritrean refugees and asylum-seekers report that during compulsory national service they experienced torture, inhumane or degrading treatment, sexual and gender-based violence, forced labor and abusive conditions." Once conscripted, national servicemembers are usually kept in their posts indefinitely. Eritrea does not honor conscientious objectors and routinely disappears and tortures those who evade or flee service, per credible human rights reports by the United Nations and non-governmental organizations (NGOs). Edith M. Lederer, *UN investigator says Eritreans experienced torture and sexual violence during national service*, ASSOCIATED PRESS, (August 7, 2023), <https://perma.cc/8SVN-J49M>.

83. Matter of Negusie, 28 I&N Dec. at 122.

84. *Id.*

85. *Id.*

86. Br. for Resp't at 4-5, *Negusie v. Mukasey*, 552 U.S. 1255 (2008), *decided sub nom.* *Negusie v. Holder*, 555 U.S. 511 (2009); Lara Haddad & Courtney Benningson, *LII Supreme Court Bulletin: Negusie v. Mukasey*, CORNELL L. SCH. LEGAL INFO. INST., <https://perma.cc/UD8Q-LQSW> (last visited Aug. 3, 2024); *Service for Life: State Repression and Indefinite Conscriptation in Eritrea*, HUM. RTS. WATCH 1, 2, 4 (Apr. 2009), <https://perma.cc/PTR4-T6KV>.

87. The petitioner and the government differently characterize Negusie's service as a prison guard, including the level of danger he faced and the degree to which he tried to contravene his leaders. However, "[a]ll sides acknowledge that Negusie was incarcerated He was released to serve as a prison guard In that role, Negusie was forced to carry a gun, watch prisoners bake to death in the sun, and prevent prisoner escapes. However, Negusie is credited with disobeying orders to inflict punishment

“preventing prisoners from escaping, taking showers, or obtaining fresh air” and keeping them in the hot sun.⁸⁸ He was aware that “his supervisor tortured prisoners with electricity,” though he did not participate in such activities; however, one of the prisoners under his supervision did pass away from sun exposure.⁸⁹ Negusie stated on the record that he “risked his life” to assist prisoners several times.⁹⁰ Negusie himself only received a “reprimand[,]”⁹¹ but he knew that “two other guards had been killed for attempting to escape.”⁹² After four years in his position as a prison guard, Negusie escaped by boarding a shipping container that was sent to the United States.⁹³ He arrived in Louisiana in December 2004⁹⁴ and applied for asylum and related forms of relief.⁹⁵

Because Negusie arrived in the United States without prior authorization,⁹⁶ his case began in a defensive posture. In 2005, an immigration judge found that he was persecutor barred from asylum and withholding of removal,⁹⁷ because even though “there’s no evidence . . . that [petitioner] is a malicious person,” “he helped [the government] in the prison compound where he had reason to know” that persecution based on protected grounds was taking place.⁹⁸ The IJ reasoned that Negusie was more likely than not to be tortured upon return to Eritrea and therefore granted him CAT deferral.⁹⁹ One of CAT’s disadvantages is that the U.S. government may not remove the alien *to the country where she has a credible fear of being tortured*, but prosecutorial discretion or deferred action is not guaranteed if another feasible country of removal can be identified. Furthermore, if the alien’s home country provides “diplomatic assurances” to the U.S. that the alien will not be tortured, protection may validly cease.¹⁰⁰

on prisoners, allowing prisoners to take showers, and sneaking them water. And he was punished for these acts” *Negusie v. Mukasey: Asylum Case in Supreme Court*, IMMIGRATIONPROF BLOG (Jun. 23, 2008), <https://perma.cc/D5HU-JFD2> (emphasis added). Furthermore, Immigration Judge Stogner found Negusie’s testimony generally credible. *Negusie*, 555 U.S. at 515.

88. *Matter of Negusie*, 28 I&N Dec. at 122.

89. *Id.*

90. *Negusie v. Gonzales*, 231 F. Appx. 325, 326 (5th Cir. 2007).

91. *Id.*

92. *Johns*, *supra* note 16, at 238 n.19 (citing Pet’r’s Reply Br. at 5, *Negusie v. Holder*, 555 U.S. 511 (2009)).

93. *Negusie v. Holder*, 555 U.S. 511, 515 (2009).

94. *Matter of Negusie*, 27 I&N Dec. 347, 348 (BIA 2018).

95. *Matter of Negusie*, 28 I&N Dec. 120, 122 (A.G. 2020).

96. *E.g.*, a visitor’s visa, a business visa, an acceptance to a United States school as an international student, etc. An asylum applicant may have already received a U.S. visa for other reasons, such as attending an international conference in the alien’s professional field, before the need to flee her country arises. If this visa is still valid, she may be able to travel directly to the United States without any immigration irregularities. Whether she possesses such prior authorization is the product of sheer happenstance, because formally applying for a visa while she is being actively persecuted would risk attracting the attention of officials in her home country who wish to harm her. In *Negusie*’s case, he would not even have been able to obtain an *exit* visa to leave Eritrea while he was of age to participate in national service, regardless of any authorization to *enter* the United States. *Service for Life*, *supra* note 86.

97. *Matter of Negusie*, 27 I&N Dec. at 349.

98. *Negusie v. Holder*, 555 U.S. 511, 515 (2009) (alterations in original).

99. *Id.* See *supra* text accompanying note 22 for a discussion of the immigration benefits that come with CAT versus asylum.

100. 8 C.F.R. § 208.17.

Seeking asylum's more comprehensive protection, Negusie appealed, but the Board of Immigration Appeals (BIA or "Board") affirmed: "The fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial."¹⁰¹ According to the BIA, under *Fedorenko v. United States*,¹⁰² the persecutor bar was a strict liability provision, and an adjudicator could not consider the alien's intent when he committed acts deemed to be persecutory.¹⁰³ Congress, the Board opined, could have used the word "voluntary" or similar if it wanted to carve out an exception for people acting under duress, as it had in other relevant statutory texts.¹⁰⁴ Negusie sought judicial review of this decision in the Fifth Circuit, where his petition was denied because "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions."¹⁰⁵

The Supreme Court granted Negusie's petition for writ of certiorari in March 2008¹⁰⁶ and issued its opinion in *Negusie v. Holder* almost one year later.¹⁰⁷ The Court primarily held that the Board and Fifth Circuit erred by applying *Fedorenko*, which the Supreme Court thought was inapposite, and remanded the case to the agency for reconsideration.¹⁰⁸ The question the

101. *Negusie v. Holder*, 555 U.S. 511, 515 (2009) (alteration in original).

102. *Fedorenko v. United States*, 449 U.S. 490 (1981). This case was decided under the Displaced Persons Act of 1948; the Court affirmed the petitioner's denaturalization because the government had discovered that he had worked as a prison guard for the Nazis at Treblinka.

103. "The BIA affirmed the denial of asylum and withholding. . . . The BIA held that . . . 'it is the objective effect of an alien's actions which is controlling.' The BIA also affirmed the grant of deferral of removal under CAT." *Negusie v. Holder*, 555 U.S. 511, 516 (2009). (omitting internal citations). The question of duress may resemble the Nuremberg defense, in which a war crimes defendant argued that he should be absolved of culpability because he committed the act in question pursuant to a superior's order. As will be discussed throughout this note, true duress does not arise in the context of mere expected obedience. It depends on the severity of the consequences for disobedience, and the likelihood – up to a sense of certainty on the noncitizen's part – that such consequences will result. These legal, ethical, and neuroscientific concepts will be discussed at length in parts II.B and III of this note.

104. The Displaced Persons Act incorporated the exclusion wording used in the IRO Constitution: people would be ineligible for refugee protection if they were found "(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war . . ." Annex I, part II, 62 Stat. 3051-3052, quoted in *Fedorenko*, 449 U.S. at 495. In *Fedorenko*, the Court found it significant that ground (a), the persecutor exclusion, omitted the word "voluntary" where ground (b) did explicitly require the individual to voluntarily assist enemy forces in order to be excluded.

105. *Negusie v. Gonzales*, 231 F. Appx. 325, 326 (5th Cir. 2007).

106. *Negusie v. Mukasey*, 555 U.S. 1695 (2008) (petition granted March 17).

107. *Negusie v. Holder*, 555 U.S. 511, 516 (2009).

108. The "trouble" with this holding is that the Court not only relied on *Chevron*, but doubled down on its deference to the executive branch because "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Id.* at 517 (quoting *INS v. Abudu*, 485 U.S. 94 (1988)). Post-*Chevron*, given two asylum seekers with near-identical fact patterns, one could be persecutor barred while the other could receive an exception, based on their geographic locations. Introducing forum shopping to the already convoluted asylum process could set in motion a spate of unintended consequences and new questions. For example, would a defensive respondent be allowed to move from the Fifth Circuit after crossing the border to a major city in the First or Seventh Circuit and escape the Fifth Circuit's notoriously harsh immigration precedent? Would the agencies begin issuing regulations to ossify choice of law at the respondent's point of entry, regardless of her ultimate venue? And if so, could circuits unevenly accept or reject those regulations?

Court specifically required the BIA to decide was “whether an alien who was compelled to assist in persecution can be eligible for asylum or withholding of removal.”¹⁰⁹ The Court acknowledged the arguments of the parties, “substan[tive]” on both sides, and used the fact that there was merit in both contentions to prove that § 1158 was ambiguous.¹¹⁰ Negusie had argued that the plain meaning of “persecution” includes “moral blameworthiness,” thus ruling out individuals who had acted without personal volition.¹¹¹ He advanced an interpretation of the statute that was consistent with criminal and international law, including ideas about fault and lenity.¹¹² The government supported its strict liability interpretation by essentially duplicating the *Fedorenko* argument: if Congress wanted to exclude solely voluntary persecutors, it could have said so.¹¹³ The Supreme Court pointed out that while the DPA used the word “voluntary” in one clause but not another, the Refugee Act never used that word at all, and silence is not a strong enough indicator of a definite choice.¹¹⁴ Because the BIA had built its rule of decision on the wrong foundation, the Court remanded to the agency with instructions to interpret the Refugee Act’s persecutor bar, rather than the DPA’s. Only then could an Article III court credit its wisdom about the existence of a duress exception.¹¹⁵

Justice Stevens, joined by Justice Breyer, penned a dissent opining that the Supreme Court should have reached the question of whether a duress exception exists to the persecutor bar and remanded to the BIA to apply (and contour) it.¹¹⁶ They answered that question in the affirmative because “[w]ithout an exception for involuntary action, the Refugee Act’s bar would . . . treat entire classes of victims as persecutors.”¹¹⁷ These dissenters examined the language of the Convention, which domestic law executed, and argued that because the Convention excluded people who “committed a crime against peace, a war crime, or a crime against humanity” from protection, the corresponding persecutor bar in § 1158 penalized “culpable” or morally blameworthy conduct only.¹¹⁸ Because the Convention’s exclusion pertains to criminals,

Overruling *Chevron* does not automatically overrule every case decided according to its principles. The clarion call to Congress to amend the INA with more specific instructions will only intensify in this jurisprudential climate, see, e.g., Johns, *supra* note 16 at 236-37; Christopher J. Walker & James R. Saywell, *Remand and Dialogue in Administrative Law*, 89 GEO. WASH. L. REV. 1198, 1221; Kevin A. Gregg, *The State of Asylum Law after Trump – and What’s Next*, LAW360 (Feb. 8, 2021) <https://perma.cc/S4EX-MYUJ>.

109. *Negusie v. Holder*, 555 U.S. 511, 516 (2009).

110. *Id.* at 517.

111. *Id.* at 518.

112. *Id.* Please see section B of this part of the note for a discussion on the duress defense’s characteristics in other areas of law, and how a consistent approach in the asylum system could better manifest American values and a workable, comprehensive legal structure.

113. *Id.*

114. *Id.* at 519.

115. *Id.* at 524.

116. *Id.* at 529.

117. *Id.* at 535.

118. *Id.* at 536-37 (citing Convention Art. I(F)(a), July 28, 1951, 19 U.S.T. at 6263, 189 U.N.T.S. 156).

they reasoned, it must allow for a duress defense: “We do not normally convict individuals of *crimes* when their actions are coerced,” and the United Nations Handbook interpreting the refugee agreements, “to which the Court has looked for guidance in the past, states that all relevant factors, including ‘mitigating circumstances,’ must be considered in determining whether an alien’s acts are of a ‘criminal nature’ as contemplated by Article I(F).”¹¹⁹ Because Congress was executing a treaty through the Refugee Act, they further reasoned that § 1158 delegates nothing to executive interpretation; rather, it is the purview of Article III courts to interpret the statutory language congruently with the international instrument.¹²⁰ The only question the Board may answer, which the dissenters would pose on remand, is how to apply the meaning of the statute so interpreted, such as defining *duress* and developing a test for identifying it.¹²¹

Justice Thomas, in his dissent, cited the dictionary definition of “persecution,” which contained the word “acts” but no language indicating *mens rea*; he therefore declared that the statute plainly foreclosed a duress exception.¹²² He also argued that it was correct to analyze the Refugee Act along the lines of the DPA, because when the judiciary construes language, and Congress enacts a new statute with the same language, it is reasonable to infer that Congress meant that statute to be identically construed.¹²³ Justice Scalia, joined by Justice Alito, concurred with the majority out of *stare decisis*

119. *Id.* at 537 (citing United Nations High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, paras. 157, 162, U.N. Doc. HCR/1P/4/Eng/REV.1 (Jan. 1992)). Justice Scalia’s concurrence in *Negusie*, discussed further *infra*, makes several arguments in favor of a strict liability persecutor bar. *See id.* at 525-26 (Scalia, J., concurring). One reason he provides for a bright-line rule admitting no exceptions is that American criminal law does not provide for a duress defense to intentional killings. *See id.* at 526 (citing 2 W. LaFare, Substantive Criminal Law § 9.7(b), pp 74-75 (2d ed. 2003)). It is arguable whether *Negusie* committed an intentional killing. The record does not reflect where exactly *Negusie*’s prison camp was located, but Eritrea has a semiarid inland area as well as two deserts – one is narrow arid region that follows the Red Sea coast (*see Eritrea*, CIA World Factbook (May 28, 2025)) <https://perma.cc/LH9R-43N6>; the other is the Danakil Depression, which has been called “the hottest region on earth” (*see Ray Jordan, Eritrea – Farming in a fragile land*, HUFFINGTON POST (Mar. 17, 2016, 2:18 PM), <https://perma.cc/T9SA-D6AX>). When *Negusie* kept his prisoners out in the sun, he may well have known that one was almost certain to die, thus becoming liable for murder under the Model Penal Code:

§ 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) It is committed purposely or knowingly

§ 2.02. General Requirements of Culpability

(b) Knowingly. A person acts knowingly with respect to a material element of an offense when:

(i) If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Model Penal Code §§ 210.2, 2.02 (AM. L. INST., Proposed Official Draft 1962).

The relationships between duress, intentional killing, and the global conditions that motivate people to seek asylum will be explored in part III *infra*.

120. *Negusie v. Holder*, 555 U.S. at 537 (Stevens, J., concurring in part).

121. *Id.* at 538.

122. *Id.* at 543 (Thomas, J., dissenting).

123. *See id.* at 546-47.

respect for *Chevron*, but posited that the Board's strict liability approach was correct and he would like them to retain it.¹²⁴

To advocate for an asylum seeker charged with the persecutor bar after *Chevron*'s demise, while promoting fair and consistent adjudications and protecting national security, one must begin by interpreting the asylum statute's language. No one disputes that Congress intended to execute the 1967 Protocol when it passed the Refugee Act, resulting in the modern text of § 1158.¹²⁵ Therefore, the *travaux préparatoires*, or legislative history, of the 1951 Convention are instructive for construing the domestic text. As mentioned, the United States did send a representative to the proceedings where the Convention was drafted, even though it did not accede to it until it adopted Arts. 2 through 34 via the Protocol. The *travaux préparatoires* are also freely available in UNHCR files.¹²⁶ It is therefore reasonable to consider the members of Congress who wrote and enacted § 1158 to have constructive knowledge of the reasoning behind the definitions and exclusions in the Convention.

One of the issues that the drafters of the Convention¹²⁷ hotly debated was whether governments would be able to derogate, in times of national emergency, from any rights they had promised to afford refugees. Should the rights enumerated in the Convention be sacrosanct and inviolable, or contingent upon developments in each receiving country? For example, the UK recalled extreme measures it had taken during times of war to prevent "enemy aliens" from possessing cameras or radios, restrict where they lived, and even intern them,¹²⁸ in contravention of their rights to property, movement, liberty, privacy, and non-discrimination. To this argument, the United States representative replied that a government could deal with an alien who was truly an enemy spy by "hold[ing] that any individual was not a bona fide refugee."¹²⁹ In other words, the rights of refugees should be completely non-derogable. However, if a receiving government became concerned about national security in connection with a specific alien or population of aliens, it

124. See *id.* at 525 (Scalia, J. concurring). For further analysis of and challenges to Scalia's bright-line arguments, see generally Johns, *supra* note 17 at 249-54; Evan J. Criddle, *The Case against Prosecuting Refugees*, 115 NW. U. L. REV. 717, 746 (2020), (citing SCALIA & GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012) (pointing out that Scalia has "recognized, even [s]eemingly absolute criminal prohibitions' that use capacious terms like 'any' and 'every' can sustain limiting interpretations").

125. This Note does not address amendments arising out of IIRIRA and the REAL ID Act, as those amendments do not impact bars to relief. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, sec. 604(a), § 208(a), 110 Stat. 3009, 690; REAL ID Act of 2005, Pub. L. 109-13, div. B, title I, secs. 101(a), (b), §§ 208(b)(1), -(2)(a)(v), 119 Stat. 302, 303.

126. *The Refugee Convention, 1951: The Travaux préparatoires Analysed with a Commentary by Dr. Paul Weis*, UNHCR, <https://perma.cc/REU6-TS6J> (last visited May 31, 2025) [hereinafter *Travaux préparatoires*].

127. The Convention was drafted by an ad hoc Committee on Refugees and Stateless Persons, to which members of the UN sent representatives, and some international organizations sent observer representatives.

128. *Travaux préparatoires*, *supra* note 126, at 49.

129. *Id.* This is, in fact, exactly what the United States does. The bars to relief deprive the affected applicant of refugee status.

should undertake a case-by-case investigation of those aliens, and strip refugee status from any who were found to pose a danger. In agreement with this framework, the World Jewish Congress warned the committee that allowing derogation from the Convention in times of emergency would risk a catch-22 scenario of closing the doors to refugees exactly when they need protection most. Its representative pointed out that Article 27 provided for the “expulsion” of refugees premised on a national security risk.¹³⁰ The final language of Article 9 (Provisional Measures) authorized “a Contracting State, in time of war or other grave and exceptional circumstances,” to “tak[e] provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee,”¹³¹ thus enshrining a case-by-case evaluation of each applicant’s dangerousness in the text of the Convention. Debate over Article 31 (Refugees Unlawfully in the Country of Refuge) similarly eschews blanket or bright-line rules in favor of an individualized analysis: “each case must be judged on its merits and the establishment of a general single principle which might paralyze the enforcement of laws, essential for the defence of the State, public health or good morals, would not be acceptable.”¹³² Contrary to the BIA’s interpretation and Scalia’s suggestions in his dissent, the members of the committee believed that unbending universal rules (such as most strict liability bars) would actually “paralyze” a State party’s ability to protect its public and promote its values!

The debates over Article 32, Expulsion, are most parallel to the questions jurists must wrestle with regarding § 1158’s persecutor bar. The Canadian representative identified “three considerations” its authorities took into account in any alien’s deportation proceedings: whether his country of origin would receive him; whether his life would be in danger; and, interestingly in light of the balancing tests that have been proposed for adjudicating duressed persecutors,¹³³ whether the consequences awaiting the alien upon deportation were proportional to the negative equities that led to the decision.¹³⁴ The United States representative wished to narrow and specify the grounds on which a refugee might be expelled, making sure to prohibit grounds such as indigence, illness, or other flavors of undesirability.¹³⁵ Only the commission of crimes (or national security concerns) should justify such expulsion, he said; the committee Chairman, representing Denmark, clarified that only crimes threatening “public safety” should qualify, not misdemeanors and other lower-level offenses.¹³⁶ The

130. *Travaux préparatoires*, *supra* note 126, at 50.

131. *Convention*, *supra* note 20, art. 9.

132. *Travaux préparatoires*, *supra* note 126, at 212.

133. The ideal test for a potential duress exception is debated throughout the *Negusie* remand opinions and scholarly literature. These frameworks will be discussed in conjunction with the development of the case and as I develop my own proposition for a duress exception in part IV.

134. *Travaux préparatoires*, *supra* note 126, at 222.

135. *See id.* Sixty years later, Scalia blatantly proposed in his *Negusie* concurrence that asylum law should be predicated on the desirability of the applicant. Apparently, his originalism does not extend past the Constitution to treaties and statutes.

136. *Travaux préparatoires*, *supra* note 126, at 223.

Israeli representative recommended outlining specific procedural safeguards to ensure due process in removal proceedings.¹³⁷ (The text that made it into the Convention specified that proceedings must be carried out in accordance with the laws and procedures of each State party, *i.e.*, not in an arbitrary or cursory manner, but without delineating a base international process.¹³⁸) The comments to Article 32 reiterated the high standards required, stressing that “[t]he principle of proportionality must be observed” because “the seriousness of the measure has to be weighed against the interests of public order and national security.”¹³⁹ And the debate over Article 33, Prohibition of Expulsion or Return (“Refolement”), contained a discussion of the trauma refugees would face upon return, even absent any physical consequences. The French representative labeled such a return “absolutely inhuman” and declared that psychologically there would be “no worse catastrophe” for a bona fide refugee.¹⁴⁰ The committee referred to asylum as “one of the oldest of human rights”¹⁴¹ and indeed regarded the relief as sacrosanct, rather than a mere discretionary privilege, throughout their discussions.

Overwhelmingly, the drafters of the Convention advocated that the type of criminality they envisioned as an exclusion from refugee protection should be serious, dangerous conduct that required destructive intent and possibly a court conviction (which would have taken *mens rea* defenses like duress, and other factors into account).¹⁴² A strict liability persecutor bar imposes a different standard that denies protection to many more individuals than that small subset that would pose a danger¹⁴³ to the receiving society. While Congress was fully aware of these viewpoints when it amended § 1158 to execute the Protocol, unlike the asylum statute and refugee definition, the persecutor bar does not mirror the text of the Convention word-for-word. Rather than create an exclusion for individuals “whom there are serious reasons for considering that . . . he has committed a *crime* against peace, a war *crime*, or a *crime* against humanity . . . [or] he has been *guilty* of acts contrary to the purposes and principles of the United Nations,” Convention Art. I(F) (emphasis supplied), it barred those who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of” statutorily protected grounds, 8 U.S.C. § 1158(b)(2)(A)(i). The Convention’s exclusion

137. *Id.* at 223.

138. *Id.*

139. *Id.* at 232.

140. *Travaux préparatoires* to Convention Art. 33, Prohibition of Expulsion or Return (Refolement). (Art. 33 is the source of the “particularly serious crimes” bars to relief encoded in the INA.)

141. *Travaux préparatoires* to Convention Final Acts.

142. See Ellison, *supra* at 257.

143. Many early discussions of refugee exclusions, including those cited herein, focus on protecting Jews from having to live in community with former Nazis. Danger is not always physical; it may be psychological or even dignitary. To this author’s knowledge, no subsequent mass atrocity has resulted in large groups of victims and large groups of persecutors immigrating to the same locations, prompting serious concern about community retraumatization.

is extraordinarily narrow and evokes the large-scale horrors of World War II; Congress's persecutor bar sweeps in more conduct, to give the U.S. the option to protect itself from bad actors who may not quite be the worst of the worst. Still, the language Congress chose is indicative of and consistent with an intent- or *mens-rea*-based foundation for the persecutor bar. It not only admits but also encourages an individualized analysis of the alien's actions in context with her circumstances. A review of the key words that Congress used in § 1158 supports the conclusion that a refugee who committed bad acts as a result of duress should be able to receive asylum relief.

The first action that could trigger the persecutor bar is to "order" the persecution of others based on one of the protected grounds. The plain meaning generally given to *ordered* throughout § 1158 is that of "command" or "give an order for," with the noun form of order meaning "authoritative direction."¹⁴⁴ In case-law construing § 1158, the word appears in phrases like "the BIA . . . ordered Cheng removed to China,"¹⁴⁵ and "[t]he district court sentenced Vasquez-Orellana to five years' probation and ordered her to pay a special assessment of \$100 and restitution of \$13,000 to Enterprise."¹⁴⁶ The word, as used, does not imply a state of mind. However, each of the other words in the § 1158 list does imply a certain state of mind; therefore, the doctrine of *noscitur a sociis*, or the canon that associated words in a statute should be interpreted harmoniously, counsels that *ordered* be similarly construed.

Next, the statute bars those who have "incited" persecution. Unlike *ordered*, the plain meaning of *incited* is laden with intent. Merriam-Webster's defines it as a transitive verb meaning "to move to action; stir up; spur on; urge on," with synonyms such as "abet," "foment," and "provoke."¹⁴⁷ The Supreme Court's *Brandenburg* test for whether a state may proscribe speech as incitement requires that such speech be "directed to inciting or producing imminent lawless action,"¹⁴⁸ the subjective element of the test. In the asylum statute, the word *incited* appears only in the persecutor bar, so there is nothing to which it may be compared.

"Assisting" in persecution is also prohibited in § 1158. Merriam-Webster's ordinary meaning of *assist* is "to give usually supplementary support or aid."¹⁴⁹ The noun *support* is defined tautologically to the verb, which has a variety of plausible associated meanings: "to promote the interests or cause of"; "to uphold or defend as valid or right, advocate"; "to help"; "to keep something going."¹⁵⁰ *Aid* is defined as "to provide with what is useful or

144. *Order*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/7KZG-PSGW>.

145. *Zhen He Cheng v. United States AG*, 324 Fed. Appx. 768 (11th Cir. 2009).

146. *Vasquez-Orellana v. Holder*, 338 Fed. Appx. 536, 538 (7th Cir. 2009).

147. *Incited*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/5VGB-75PB>.

148. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

149. *Assisted*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/FLD5-79Z6>.

150. *Support*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/V93X-K964>.

necessary in achieving an end.”¹⁵¹ Most of the meanings attributed to *support* have purposive connotations that would be incompatible with duress. As the First Circuit emphasized in *Castañeda-Castillo v. Holder*, “we held that for the persecutor bar to apply to Castañeda, he must have had prior or contemporaneous knowledge that his actions during the Accomarca Massacre had the effect of assisting in the persecution of others.”¹⁵² In Negusie’s case specifically, the totality of his conduct would include his attempts to contravene orders and help prisoners, and possibly even the fact of his escape: would someone who agreed with his supervisors’ motives jump on a shipping container to get away from them, or would a true persecutor be more likely to seek asylum after a regime change when the tables had turned? Evaluating *assistance* using the totality of the circumstances could be dispositive for many claimants fleeing multifaceted conflicts. Some acts, while they could technically be considered “assistance” in a persecutory scheme, are too attenuated from the central harm to fall within the statute, such as providing ammunition to a military unit without knowing that the unit’s next mission involved massacring civilians, or sweeping floors in a detention facility to make room for new prisoners. Knowledge and intent, as well as the extent to which the applicant’s actions were important for accomplishing the persecution, help the adjudicator determine whether the assistance provided justifies barring the applicant from relief.

A review of recent case law shows that the proof of “assistance” in asylum cases requires at least some knowledge or intent, which makes a strict liability bar inappropriate. The First Circuit developed a standard for knowledge over several remand cycles of the case of *Castañeda-Castillo*, a Peruvian military officer.¹⁵³ According to the most recent (2011) published decision on his asylum claims, *Castañeda-Castillo* participated in a counter-insurgency operation against the ferocious Shining Path guerilla group; unbeknownst to him, over sixty civilians were massacred in the operation.¹⁵⁴ In a previous en banc consideration of the case, “*Castañeda II*” (2007), the First Circuit vacated the BIA’s denial of asylum because an alien should only be persecutor barred if he had “prior or contemporaneous knowledge that the effect of his or her actions is to assist in persecution.”¹⁵⁵ In another case, *Singh v. Gonzales*, the Seventh Circuit held that an Indian police officer assisted in persecution when he transported Sikhs to the police station, “where he knew that they would be subjected to unjustified physical abuse” on account of their religion.¹⁵⁶ The court found it significant that he refused to leave his employment because he claimed he needed the money and did not seek

151. *Aid*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/B4LL-XN92>.

152. *Castañeda-Castillo v. Holder*, 638 F.3d 354, 357 (1st Cir. 2011).

153. *Id.* (*Castañeda-Castillo*’s case went up and down the BIA and First Circuit for eighteen years.)

154. *Id.* at 357.

155. *Id.* at 358.

156. *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005).

another job.¹⁵⁷ These cases reinforce the idea that *assisting* persecution requires scienter, or at the very least, is not strict liability.

The final enumerated verb is “participated.” Merriam-Webster’s lists “to take part” and “to have a part or share in something” as definitions of *participate*.¹⁵⁸ Section 1158 uses the word only to establish the persecutor bar and to exempt persecutors from the definition of refugee. In *Shirvanyan v. Gonzales*, an Armenian police officer who knew that Jehovah’s Witnesses would be beaten when the authorities raided their homes, even though he never struck a blow himself, was correctly persecutor barred because “he chose to participate in those raiding parties and to continue in his job as a policeman, knowing he would be expected to participate in the persecution of Jehovah’s Witnesses.”¹⁵⁹ While no voluntariness appears inherent in the word *participate*, the court placed significance on the asylum seeker’s choice, calling Shirvanyan an “*active* participant” in persecution because he had advance knowledge that police would physically assault individuals based on their religion, yet “*chose* to participate in those raiding parties” anyway.¹⁶⁰ This suggests that the decision may well have been different if he had been conscripted and held in this police force under duress. The Second Circuit held in *Asfaw v. Gonzales* that the asylum seeker participated in persecution because she questioned political prisoners about their activities and reported their statements to the authorities, despite having personal knowledge of such prisoners being tortured.¹⁶¹ The court pointed out that her participation was “*active and direct*.”¹⁶² The plain meaning of *participate*, like *order*, does not inherently include a state of mind or motivation, but where the courts refer to this word, modifiers like “*chose*,” “*active*,” and “*direct*” are not far behind.

Overall, a construction of 8 U.S.C. § 1158(b)(2)(A)(i) that requires a culpable state of mind, and therefore allows a duress exception, is not only reasonable, but much more consistent with the ordinary usage of the statutory language than a strict liability persecutor bar. The logical conclusion is that Congress failed to copy the wording of the Convention, not because it rejected a culpability requirement, but because it wished to expand the bar beyond those who had committed crimes against humanity. This is reasonable; few would contest that the threshold for dangerousness, and even perhaps a judgment that someone is unworthy of U.S. government protection, is far below the perpetration of genocide and other large-scale atrocities. Persecutory acts fall along a continuum, from one beating of one political prisoner to the leaders at Nuremburg and Sarajevo. The statutory language offers protection to people who did the minimum wrong they could without experiencing heinous consequences for themselves and their families,

157. *Id.*

158. *participated*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/SL54-TAYS>.

159. *Shirvanyan v. Gonzales*, 130 F. Appx. 196, 197 (9th Cir. 2005).

160. *Id.* (emphasis supplied).

161. *Asfaw v. Gonzales*, 180 F. Appx. 243, 244 (2d Cir. 2006).

162. *Id.*

but not hardened human rights violators and those who voluntarily comply with them. So, a *limited* duress exception is warranted. I will share my recommendations in part IV, but in 2009, the Supreme Court posed the question to the BIA. The Department of Justice spent the next decade responding.

After *Negusie*'s remand, the change in Presidential Administrations caused DHS to submit one brief, then withdraw it and submit another, while *amici curiae* passionately weighed in.¹⁶³ Finally, nine years after the Supreme Court decision, Negusie received what he must have thought was a final administrative answer in *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018). The Board held that yes, “[a]n applicant who is subject to being barred from establishing eligibility for asylum or withholding of removal based on the persecuting of others may claim a duress defense which is limited in nature.”¹⁶⁴ It specifically names 8 U.S.C. §§ 1101(a)(42) (exception to the refugee definition), 1158(b)(2)(A)(i) (asylum statute) and 1231(b)(3)(B)(i) (withholding of removal), as well as 8 C.F.R. §§ 1208.16(c), (d)(2) (2018) (regulations implementing CAT).¹⁶⁵ The Board noted DHS’ argument that “the nation has a legitimate interest in not . . . importing ‘ethnic strife’ from other countries,”¹⁶⁶ but it steadfastly recognized that Congress used § 1158 to domesticate the Protocol, whose “purpose . . . is to protect the ‘integrity of the international refugee regime.’”¹⁶⁷ The BIA emphasized that liability for persecution was dependent on the actor’s “moral choice”¹⁶⁸ and invoked a definition of duress from the Nuremberg trials: “if the subordinate realizes that the act he is called upon to perform is a crime, [and] he may not refuse its execution without incurring serious consequences . . . this, therefore, constitutes duress.”¹⁶⁹ It urged that agencies and courts construe § 1158 consistently with international hard and soft law as well as the jurisprudence of other signatories to the Convention and Protocol, all of which recognized a duress exception, because Congress’s “Conference Report on the Refugee Act [directed] that the persecutor bar ‘be construed consistent with the Protocol.’”¹⁷⁰ The decision noted that “former child soldiers who have escaped captivity” have been held “a cognizable particular social group for purposes of asylum,” citing *Lukwago v. Ashcroft*,¹⁷¹ effectively exempting all of them from the persecutor bar. Declaring that a duress exception was consistent with not only international refugee, but U.S. criminal law, the Board advocated for a principle of

163. Ellison, *supra* note 27, at 216, 218, 223-24.

164. *Matter of Negusie*, 27 I&N Dec. 347, 347 (BIA 2018).

165. *Id.* at 348.

166. *Id.* at 351. A policy- and science-based challenge to this assertion will be presented in part III. So-called “ethnic strife from other countries” is contextual to the countries where it occurs, and unlikely to be reenacted on U.S. soil.

167. *Id.* at 357 (quoting James C. Hathaway, *The Michigan Guidelines on the Exclusion of International Criminals*, 35 MICH. J. INT’L. L. 3, 7 (2013)).

168. *Id.*

169. *Id.* at 358 (quoting IV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (Oct. 1946-Apr. 1949)).

170. *Id.* at 360 (quoting H.R. REP. NO. 96-781, at 20 (1980)).

171. *Id.* at 361; *Lukwago v. Ashcroft*, 329 F.3d 157, 183 (3d Cir. 2003).

proportionality, *i.e.*, that the harm caused by the applicant was not greater than the harm threatened if he did not comply.¹⁷² A dissent argued that the majority read the statute and its international ancestors too broadly, plus that a duress exception would be difficult to administer and ultimately allow unworthy individuals to receive asylum.¹⁷³

The majority posited a test to see if an applicant should receive the duress exception:

- (1) He acted under an imminent threat of death or serious bodily injury to himself or others;
- (2) He reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting;
- (3) He had no reasonable opportunity to escape or otherwise frustrate the threat;
- (4) He did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and
- (5) He knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.¹⁷⁴

Unpacking this language, the test has both an objective and subjective component (the threat *was* imminent and the applicant also *reasonably believed* so); the applicant is held responsible for placing himself in harm's way;¹⁷⁵ and not only is proportionality invoked, the applicant must have constructive knowledge of such proportionality. This test seems like a logical compromise between strict liability and the fear that the United States will accept unrepentant persecutors as refugees. The common law is familiar with imminence, reasonableness, and proportionality. One wrinkle is that immigration judges (and asylum officers) will apply this test to individuals from all over the world. The acts in question were committed in societies with disparate cultures, which may or may not map easily onto the American concept of the Reasonably Prudent Person. Part IV of this paper discusses adjustments to the BIA's test that would accommodate the breadth of asylum seekers' lived experience and further focus the adjudicator's attention on finding facts rather than mediating cultural meanings.

172. *Matter of Negusie*, 27 I&N Dec. 347, 363-64 (BIA 2018). I will challenge a black-letter understanding of proportionality in parts III and IV, but a proportional duress exception saves more lives than a strict liability bar.

173. *Id.* at 368-81. This is actually a concurrence in part and dissent in part.

174. *Id.* at 347.

175. This element appears calculated to avoid granting duress exceptions to police officers like Singh, *see Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005). Joining a police force, and not seeking other job opportunities when he realizes the police force engages in persecution, indicate that the applicant engaged in some level of moral choice. At a minimum, he failed to exercise due diligence to avoid participating in persecutory acts.

The test the BIA articulated, while groundbreaking in its deliberate approval of a duress exception, changed nothing for Daniel Negusie himself. The BIA affirmed the dismissal of his petition, opining that he did not pass its new test.¹⁷⁶ The Board established a burden-shifting framework in which an applicant proved his prima facie asylum case, DHS proved that he was persecutor barred, and then the applicant would prove by a preponderance of the evidence that a duress exception applied.¹⁷⁷ In this case, the majority found it significant that Negusie was given only verbal reprimands when he disobeyed orders, which could not constitute imminent threats, and that because he escaped at all, the camp where he was held clearly was not inescapable.¹⁷⁸ Whether someone who has observed conditions on the ground would agree with this characterization of the facts does not change the BIA's application of the law. Society got its duress exception; Negusie lost his appeal.

However, Negusie's yearslong asylum proceedings were not quite at an end. Then-Attorney-General Sessions certified *Matter of Negusie* to himself for reconsideration in October 2018.¹⁷⁹ He invited parties and *amici* to brief the duress exception issue anew.¹⁸⁰ On November 5, 2020, the Attorney General – now William Barr – released his opinion overruling and vacating that of the BIA.¹⁸¹ Attorney General Barr's primary reasoning for rejecting a duress exception was that it would harm "diplomatic considerations" unknown to immigration officials, create negative consequences for the rest of the immigration system, and improperly increase DHS' burden of proof to show that the persecutor bar applied.¹⁸² It was also his philosophy that the best interpretation of Congressional silence on an explicit duress exception was to unequivocally foreclose it.¹⁸³ He looked to the entire fabric of the INA, not just the asylum sections, and pointed out that Congress had made provisions for "excusable" conduct before.¹⁸⁴ Following the doctrine of *in pari materia*, thus inferring that Congress would have written a similar excuse provision into § 1158 if it wanted to, the fact that the persecutor bar to asylum derived from the Refugee Act – a different statute with unique provenance – was of no moment.¹⁸⁵ Turning his attention to the international instruments Congress was executing, and the Board's deference thereto, he conflated "an alien [who] has concededly committed or assisted in persecution" with someone who meets the Convention's standard of "serious reasons'

176. *Matter of Negusie*, 27 I&N Dec. at 348.

177. *Id.* at 366-67.

178. *Id.* at 368.

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

180. *Id.*

181. *Id.* at 155.

182. *Id.* at 120-21.

183. *Id.* at 126.

184. *Id.* at 127-132.

185. *Id.* at 131. The opinion mentions other bars to immigration relief and waivers thereof, which will be discussed briefly in part II sec. B of this note.

for believing that the alien has committed a disqualifying crime.”¹⁸⁶ Despite this conflation, those ideas might be distinct in the circumstance of duress.

It is interesting to compare the Attorney General’s advice about the role of the UNHCR Handbook with that of other authorities. He quotes the Supreme Court in *INS v. Aguirre-Aguirre*, calling it a “useful interpretive aid, but . . . not binding” and that “the Handbook itself disclaims . . . that ‘the determination of refugee status . . . is incumbent upon the Contracting State’”¹⁸⁷ “Not binding” does not, however, mean that even the Supreme Court believes the Handbook should be disregarded: the Court asserted the Handbook’s “significant” role in delimiting the U.S.’ obligations under the Protocol in *INS v. Cardoza-Fonseca* before it repeated that assertion in *Negusie v. Holder*.¹⁸⁸ It is also interesting to note what the Attorney General chose to quote from the Refugee Act’s legislative history. According to the committee report, the decision to exclude persecutors from the definition of *refugee* “would be ‘consistent with the U.N. Convention . . . and with the two [domestic] special statutory enactments . . . *the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953.*’” (emphasis in original)¹⁸⁹ Consistency among statutes over time cannot connote exact duplication of meaning between the DPA and the Refugee Act. Both laws aspire to open the US’ doors to refugees while keeping its population safe and adhering to a lofty system of morality. They do not effectuate that goal in identical ways.

The Attorney General also rejected any arguments of the parties that referenced criminal law, steadfastly holding to the semantic distinction that immigration law is civil, not criminal, in nature.¹⁹⁰ However, I will argue that the asylum context approximates the criminal too closely for comfort. The consequences of an adverse decision are equally, and often much more, prejudicial to a losing asylum litigant than a losing criminal defendant. The criminal convict submits to the shame of public censure for the breach of her duties in society, and suffers financial loss, incarceration, or possibly death as a result. The refouled refugee is vulnerable to the condemnation of her empowered persecutors for the immutable characteristics she cannot overcome, and suffers all manner of physical and psychological torment including death as a result. It is the weight of the consequence alone that begs a more thoughtful and serious comparison with criminal law principles. The Attorney General, however, feared that a far weightier consequence would attach to a duress exception to the persecutor bar: allowing exceptions to every other bar with similar language, including

186. *Id.* at 139.

187. *Id.* at 140 (first quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); then quoting United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* ¶ II (1979)).

188. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

189. 28 I&N Dec. 120, 142 (A.G. 2020), quoting H.R. Rep. No. 96-608 at 10.

190. *Id.* at 146.

those for torture, genocide, alien smuggling, and illicit substance trafficking.¹⁹¹ It is indeed startling to contemplate perpetrators of torture and genocide finding refuge in this country, but their plight would not be materially different from persecutor barred individuals: applicants who had truly done the least evil they could under unthinkably threatening circumstances would be protected; applicants who had committed such atrocities with moral choice would not be allowed to stay. Anti-climactically, the Attorney General finished his opinion by declaring that the evidentiary difficulties inherent in proving duress would be too burdensome for the government and too easy for the immigrant to manipulate.¹⁹²

After the Biden Administration took office, Attorney General Merrick Garland recertified Negusie's case to himself and directed the Board of Immigration Appeals to stay any further proceedings.¹⁹³ But Attorney General Garland never issued an opinion before the end of the Biden administration. Current Attorney General Bondi has not yet spoken on the issue, but the return of a Trump Administration indicates a likely retrenchment of Attorney General Barr's adamantly strict-liability opinion of 2020. With a totally new climate in administrative law post-*Chevron*, however, an Art. III court may choose to invalidate that opinion if it does not find the arguments persuasive. The duress exception to the persecutor bar is anything but settled law.

B. *The Defense of Duress Generally, and Guidance Therefrom for the Asylum Process*

1. *How Duress Works as a Defense to Criminal Prosecution*

To understand duress in the criminal context, it must be situated in its family of defenses, which include necessity and self-defense. These defenses¹⁹⁴ are predicated on a "choice of evils" philosophy: "a man has his choice of two evils before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two."¹⁹⁵ This choice-of-evils framework gives rise to a principle of proportionality that pervades duress cases, even outside the United States: the harm the defendant inflicted must not be greater than

191. *Id.* at 150.

192. *Id.* at 151.

193. Matter of Negusie, 28 I&N Dec. 399, 399 (A.G. 2021).

194. Excuse and justification are two distinct exculpatory concepts in criminal law, which are advanced as defenses in criminal trials. This author has no subject matter expertise in criminal law and cannot speak further to the finer points of these tenets. See generally Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989). Whether duress functions as a justification or excuse makes no difference to the persecutor bar because both excuse and justification cast the actor in a morally positive light. The debate over a duress exception to the persecutor bar is whether these individuals merit admission to the United States and/or whether it is in the best interest of this nation to have them live among us. A determination of moral positivity answers both questions, regardless of the philosophy on which that determination rests.

195. 4 WILLIAM BLACKSTONE, COMMENTARIES,*1, *30-31. This language technically serves as the definition of *necessity* only, but the lesser-of-two-evils trope or principle recurs whenever scholars and jurists spill ink on duress and self-defense as well.

the threatened harm he avoided by doing so.¹⁹⁶ And of course, what distinguishes duress from the rest of its “family” is the presence of compulsion or absence of moral choice.¹⁹⁷

For example, the choice-of-evils analysis is often exemplified in cases in which battered women assert the defense of duress to criminal prosecutions. Per a statute in Washington State:

The elements of duress are:

- (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or another would be liable to immediate death or immediate grievous bodily injury; and
- (b) That such apprehension was reasonable upon the part of the actor; and
- (c) That the actor would not have participated in the crime except for the duress involved.

RCW 9A.16.061(1). Note that this statute does not mention the proportionality rule, but that rule unavoidably pops up in case law and cannot be ignored. Parsing the language, *compulsion* is defined again using the word *irresistible*: “an irresistible persistent impulse to perform an act,” with an added legal definition “as by threat or intimidation.”¹⁹⁸ *Immediate* is exactly what one would expect: “occurring, acting, or accomplished without loss or interval of time; instant; near to or related to the present.”¹⁹⁹ *Grievous*, as it relates to the harmful consequences of failing to comply with the coercer, has the plain meaning of “causing or characterized by severe pain, suffering, or sorrow; oppressive; onerous.”²⁰⁰ One may assume that

196. In post-World-War-II war crimes jurisprudence, the “Krupp defendants” are instructive. Leaders of a German defense contractor that had worked closely with high-level SS officials, including Hitler himself, were charged with crimes against humanity because they benefited from slave labor to meet the Nazis’ onerous arms production requirements. The defendants pled a duress defense because they knew that the Nazis would mercilessly punish anyone who failed to support their cause. The U.S.-conducted tribunal found that the Nazis had not forced the defendants to use slaves; even if it was a fear-based idea, it was *the defendants’* idea. Furthermore, these contractors had been politically well-connected and the punishments meted out against them for noncompliance with the Nazis’ requirements would likely have been economic only. Therefore, the court held that keeping “civilian deportees, prisoners of war, and concentration camp inmates” in dangerous working conditions that resulted in many of their deaths was a culpable act not the product of duress. Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453, 529-33 (2016).

197. The Model Penal Code emphasizes the irresistibility of the act performed under duress, defining *duress* as “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 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.” MODEL PENAL CODE § 2:09(1) (1985).

198. *Compulsion*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/62XZ-47KE>.

199. *Immediate*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/3DK3-HW45>.

200. *Grievous*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://perma.cc/MC8K-6BCW>.

reasonableness and apprehension carry the same meanings they do elsewhere in the law.²⁰¹

This statute was put to the test in *State v. Riker*,²⁰² in which a previously abused woman committed illicit substance offenses at the behest of a man she perceived as threatening. This man was not her partner, and objectively, it would be difficult for the average person to perceive his conduct as a truly immediate threat.²⁰³ The substance of her appeal to the Washington Supreme Court was whether she could admit expert evidence about Battered Women's Syndrome and how it would alter Riker's perceptions of threat and personal agency so that duress would apply to her conduct where it might not to another's.²⁰⁴ Ultimately, the court held that this expert evidence was properly excluded from the trial, affirming Riker's conviction.²⁰⁵ A dissenter commented that "the jury . . . was denied the critical information made in the offer of proof: the *relevance* of that past history [of abuse] to her subsequent perceptions of danger and her susceptibility to threats of harm,"²⁰⁶ illustrating the important factors of duress to consider. "Fear," the dissenter darkly shared, "is cumulative."²⁰⁷

A case in the Seventh Circuit also wrestled with duress in the context of a battered woman whose boyfriend had instructed her to commit three robberies involving a firearm.²⁰⁸ The elements the circuit judges assessed were "reasonable fear of imminent death or serious injury, and the absence of reasonable, legal alternatives to committing the crime."²⁰⁹ (*Imminent* differs from *immediate* in the Washington statute: "ready to take place; happening soon; often used of something bad or dangerous; seen as menacingly near."²¹⁰) The panel faced difficulty in applying these elements to the defendant Dingwall's circumstances, where on at least one occasion her boyfriend was not even present when she committed the crime.²¹¹ They also thought it was significant that she possessed a firearm: wouldn't the person with the gun be the one in power, not the one duressed?²¹² The Seventh Circuit acknowledged that the Sixth and Ninth Circuits both took the psychological impact of abusive relationships into account in duress cases,²¹³ and analogized the

201. Stephanie M. Wildman & Dolores A. Donovan have attempted to expand and clarify a judicial expectation of reasonableness beyond its original common-law assumptions in their article *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1980-81).

202. *State v. Riker*, 123 Wash.2d 351, 351 (1994).

203. *Id.* at 356.

204. *Id.* at 357.

205. *Id.* at 370.

206. *Id.* at 374.

207. *Id.* at 373.

208. *United States v. Dingwall*, 6 F.4th 744, 745-46 (7th Cir. 2021).

209. *Id.* at 746 (citing *United States v. Sawyer*, 558 F. 3d 705, 711 (7th Cir. 2009)).

210. *Imminent*, MERRIAM-WEBSTER.COM DICTIONARY, <https://perma.cc/PB6Z-PBXC>.

211. *Dingwall*, 6 F.4th at 746.

212. *Id.* at 746, 750-51.

213. *Id.* at 751-52 (citing *Dando v. Yukins*, 461 F. 3d 791 (6th Cir. 2006); *United States v. Lopez*, 913 F. 3d 807, 807 (9th Cir. 2019)).

prosecution of human trafficking cases with “dynamics” where “traffickers systematically and intentionally coerce their victims by inflicting psychological control and fear.”²¹⁴ Reviewing the evidence, the court saw that the defendant’s boyfriend behaved violently and demandingly toward her on a regular basis throughout their relationship, and became angry when she did not comply with his requests, often to the point of physical or sexual attack. “A jury could conclude,” they wrote, “that this demonstrates an expectation of and level of control over Dingwall, even when physically separate.”²¹⁵ The jury might still agree with the government that she had plenty of opportunity to escape without committing criminal acts, but evidence about the abusive and controlling relationship was highly relevant to an analysis of her culpability.²¹⁶

Another criminal law concept should be highlighted here. An accidental homicide during lawful activity (distinct from felony murder, a homicide committed accidentally in the furtherance of a felony) is a separate legal concept, *misadventure*.²¹⁷ This may have implications for cases like Negusie’s, in which the actor was engaged in military or government service. How would U.S. criminal law characterize the sun exposure death of one prisoner under Negusie’s guard? As a first-degree murder, because in that climate, he should have known that such sun exposure would result in death? A misadventure, because he merely stood his guard post as required by his government, and in no way personally precipitated the death? Or something in between? And how would construing service like Negusie’s as lawful conduct impact the actor’s ability to claim duress, a defense to criminal charges that would certainly not be filed against one acting lawfully?

Earlier, I argued that asylum adjudications should import as many procedural and philosophical safeguards as possible from criminal law, because the consequences of ruling against the applicant or respondent are mechanically identical to the consequences of ruling against the criminal defendant. Not only are both state and federal conceptions of a criminal duress defense relevant to the asylum analysis, but the presumption of innocence²¹⁸ and the rule of lenity²¹⁹ have roles to play as well. Full discussion of these valuable principles is beyond the scope of this note because following them would

214. *Dingwall*, 6 F.4th at 753 (citing *United States v. Young*, 955 F. 3d 608, 615 (7th Cir. 2020)).

215. *Id.* at 758.

216. *Id.*

217. *Misadventure*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[h]omicide committed accidentally by a person doing a lawful act and having no intent to injure”).

218. “Once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless *they*, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt.” *People v. Goldberg*, 161 Cal. App. 3d 170, 189 (1984). A fundamental principle of the justice system, everyone must consider a criminal defendant innocent until a guilty verdict is returned (or plea is entered).

219. “When ‘reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute,’ the rule of lenity dictates that courts must decide the interpretive question in favor of a criminal defendant.” Criddle, *The Case against Prosecuting Refugees*, *supra* note 124, citing *Moskal v. United States*, 498 US 103, 108 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

require Congressional action to amend the INA.²²⁰ A responsible practitioner should construct arguments that spin off those principles where they can, though, because humanizing the immigrant and strengthening due process through innocence- and lenity-like lenses not only promote a client's best interests, but support compliance with our international commitments.

2. *How Duress Works as a Defense to Contractual Liability*

Duress also plays a crucial role in the adjudication of contract disputes. Contract principles are relevant to the asylum context for two reasons. First, it is important to harmonize rules across different areas of U.S. law; the public has a reliance interest in being able to predict the norms they must follow and knowing how words will be understood. Second, historically, much of the discussion on immigration matters has been cast in light of contracts (usually, between the intending immigrant and the U.S. government).²²¹ A contract, being an agreement to exchange goods or services of value between willing parties, may in this situation be analogized to the relationship between the persecutor barred asylum applicant and her genuinely persecutory superior. Courts have analyzed whether the applicant agreed with her superiors' motives and goals when applying the persecutor bar. For example, in *Hernandez v. Reno*, "the petitioner was forced under threat of death to join the Organization for People in Arms" in Guatemala and ordered to shoot into a crowd.²²² He considered trying to shoot his captors and escape instead, but "knew that he would have been overpowered by them," and tried to appear to comply with their demands by shooting in the general direction of the crowd but not at anyone.²²³ Afterward, the petitioner told his commanders that he disagreed with their violent methods and requested release. They refused, told him they would "send him 'to hell'" if he tried to escape, and assigned two guards to watch over him.²²⁴ The Eighth Circuit instructed the BIA to analyze whether the persecutor bar applied, even under a *Fedorenko* analysis, by examining the petitioner's "volition."²²⁵ Because "moral choice"²²⁶ is so central to the analysis, arguments about an individual's willingness to enter a contract are relevant and illustrative. Both moral choice and contract formation require affirmative, voluntary assent. Traditionally, laws throughout the United States recognize ways to avoid performing on a contract when the party's assent was less than truly volitional.

220. Executive departments that adjudicate matters promulgate their own procedural and substantive rules pursuant to their enabling acts. They do not follow principles generally applicable to the judicial system unless specified. For the immigration system, the INA controls. As discussed throughout this note, immigration law is considered civil rather than criminal, so unless Congress speaks, safeguards related to criminal law are unlikely to be adopted.

221. See generally Motomura, *supra* note 5.

222. *Hernandez v. Reno*, 258 F.3d 806, 809 (8th Cir. 2001).

223. *Id.* at 809.

224. *Id.* at 809-10.

225. *Id.* at 811, 815.

226. Evans, *supra* note 196, at 459.

“[A] signed release that is clear and unambiguous and knowingly and voluntarily entered into is binding on the parties unless cause exists to invalidate it on one of the recognized bases for setting aside written agreements, including illegality, fraud, mutual mistake, duress or coercion” is the comprehensive yet concise rule statement for contracts made under New York common law.²²⁷ Setting aside the thorny debate over the meaning of “voluntarily,”²²⁸ the fact that many if not most asylum seekers’ persecutory acts are legal in their countries but would not be here, and an intuitive sense that orders to persecute are not generally committed to writing, the following is pertinent to an application of the persecutor bar. A clear, unambiguous, and knowing agreement that person A will carry out person (or organization) B’s will in a persecutory scheme affiliates A with the persecutory scheme unless she can prove her “agreement” was under duress or coercion and not the result of a free choice. To escape contract liability under New York law, a duressed individual must “meet her burden of demonstrating ‘(1) threats of an unlawful act by one party which (2) compel[] performance by the other party of an act which it had a legal right to abstain from performing.’”²²⁹

But not so fast. “[C]ontracts executed under duress are, at most, voidable and not void,” and therefore if the duressed party “retain[s] the benefits” of the contract without “repudiating it,” he has therefore “ratified that agreement.”²³⁰ This assertion parallels the BIA’s reasoning for continuing to deny Negusie asylum after recognizing a duress exception to the persecutor bar: in their view, he did not make enough of an effort to oppose his persecuting superiors and escape, therefore, he should be considered one of them.²³¹ A great deal of cultural competence, a thorough case-by-case analysis, and perhaps a more detailed record than it is often possible to compile will be necessary to decide what constitutes retaining benefits; repudiating persecutory motives and acts; or its converse, ratifying them.

As another example, California’s statute provides that even “*economic duress*”²³² is enough to invalidate a contract. In such a case, “one party commits a (1) ‘wrongful act’ and (2) that act ‘is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative’ to agree,” plus “(3) causation: ‘[a] contract cannot be rescinded when it appears that consent

227. *Nelson v. Lattner Enter. of N.Y.*, 969 N.Y.S.2d 614, 616 (N.Y. App. Div. 2013).

228. Some jurists and scholars define “voluntarily” as bodily movement not governed by reflex, seizure, and the like. *See People v. Ramirez*, 520 P.3d 617, 630 (Cal. 2022) (“if Ramirez went to the hospital instead of court because he ‘was truly debilitated’, then he was not voluntarily absent”) (internal citations omitted). Others (like Congress in the Displaced Persons Act) use it interchangeably with “willingly.” *See In re Guardianship of Zornes*, No. 96CA35, 1997 Ohio App. LEXIS 3549, at *5 (Ohio Ct. App. Aug. 4, 1997) (“Freely. Of ones [sic] own accord. . . willingly or without compulsion.”).

229. *Nelson*, 969 N.Y.S.2d at 616 (citing *Chase Manhattan Bank v. N.Y.*, 787 N.Y.S.2d 155, 2 (N.Y. App. Div. 2004)).

230. *Nelson*, 969 N.Y.S.2d at 617.

231. *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018).

232. *Martinez-Gonzalez v. Elkhorn Packing Co.*, 25 F.4th 613, 620 (9th Cir. 2022) (emphasis added) (citing CAL. CIV. CODE § 1689(b)(1)).

would have been given . . . notwithstanding the duress[.]”²³³ After the Nuremberg tribunals, economic duress will not, and correctly should not, excuse persecutory conduct in the asylum context (unless it constitutes a complete loss of livelihood to the point of likely starvation). Nonetheless, the language of these elements demonstrates a theoretical consistency across areas of U.S. law in which individuals who were forced to act, with no alternative in sight, out of integrity with their own beliefs, may be disassociated from that conduct.

Furthermore, “[s]usceptibility,” or “a lessened capacity of a party to make a free contract,”²³⁴ impacts the evaluation of duress. Susceptibility may include “a lack of full vigor due to . . . physical condition, emotional anguish, or a combination.”²³⁵ The literature on susceptibility tends to be confined to specific topics such as children, people with certain types of disabilities, and techniques police use to obtain confessions, all of which are germane to the refugee experience.²³⁶ If agreeing to terms under duress, especially by those particularly susceptible to coercion, coupled with timely repudiating those terms, is enough to excuse an individual from performing a contract to exchange goods or services for value, an *a fortiori* argument emerges: why could similarly “agreeing” to objectionable conduct, then fleeing from the situation that caused the individual to so agree, not excuse him from being forced to give up his chance at safety?

3. *Other Bars to Immigration Relief*

Analyzing the six bars to asylum, specifically in 8 U.S.C. § 1158(b)(2)(A), and a seventh, untimeliness, encoded at § 1158(a)(2)(B), as a coherent whole is instructive for interpreting and applying the persecutor bar. The first bar listed in § 1158(b)(2)(A) is the persecutor bar. The remaining sections include the particularly serious crime bar; the serious nonpolitical crime bar; the national security bar; the terrorism or TRIG (terrorism-related inadmissibility ground), or material support bar; and the firm resettlement bar. The C.F.R. directs adjudicators to apply these bars in accordance with interpretive rules.²³⁷

233. *Id.* (citing *Perez v. Uline, Inc.*, 68 Cal. Rptr. 3d 872, 876 (Cal Ct. App. 2007) and *In re Cheryl E.*, 207 Cal. Rptr. 728, 736 (Cal. Ct. App. 1984)).

234. *Id.* at 626 (internal quotations omitted).

235. *Id.*

236. *See generally*, Kate Evans, *Practice Alert: Litigation Update in Negusie v. Holder: The Board of Immigration Appeals Nears Decision on the Persecutor Bar* (Oct. 2017), <https://perma.cc/P3WP-UQBH>; Substituted Amended Brief for Non-Profit Organizations and Law School Clinics as Amici Curiae, <https://perma.cc/Y8N5-CC7B>; Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (arguing that people with mental disabilities are more susceptible to coercion during the course of police interrogations); Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confession*, 81 VA. L. REV. 1471 (1995) (same); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985) (same). This author recognizes that the term “mentally retarded” is outdated and quite offensive in 2025 and asks the reader to overlook its usage by authors in the 1980s and 1990s.

237. *See generally* 8 C.F.R. §§ 208.13(c), (d).

FH-T v. Holder is a solid example of the debate over the terrorism bar.²³⁸ FH-T, another Eritrean military veteran, received a denial of asylum from the BIA because of his participation in the Eritrean People's Liberation Front ("EPLF"), "a 'Tier III' terrorist organization [under] 8 USC § 1182(a)(3)(B) (vi)(III)."²³⁹ "FH-T joined the EPLF when he was approximately fifteen years old in 1982, while Eritrea and Ethiopia were in the midst of a war" that resulted in Eritrea's independence in 1991.²⁴⁰ As a minor in the midst of a war zone, one wonders how clear-headed his decision to join the EPLF truly was, or if he was susceptible to control by adults as discussed in subsection 2 of this part of the note. Indeed, he stated on his asylum application that "he was motivated to join the EPLF by 'youthful emotions' as well as the 'prevailing war and politics[]'" and "quickly regretted this decision."²⁴¹ FH-T's superiors did not allow him to leave and, even after independence, they kept him in Eritrean National Service, incarcerating him in deplorable conditions when he attempted escape.²⁴² He testified that he did not know the EPLF engaged in operations other than the war for independence, but the immigration judge found him not credible because the EPLF's activities that qualified it for Tier III²⁴³ were "well-known," including assaulting United Nations workers and murdering civilians.²⁴⁴ FH-T had a "burden of showing by clear and convincing evidence that he did not know the group was a terrorist organization," which his testimony was deemed insufficient to meet.²⁴⁵ Petitioning for judicial review, FH-T argued that the violence in which he engaged during EPLF service was *lawful* – wars for self-determination are recognized and accepted under Eritrean, international, and U.S. law – and he was truly ignorant of the terrorist activity that was *unlawful* within the language of the statute.²⁴⁶ Unfortunately, the Seventh Circuit did not consider that argument, which is relevant to so many asylum seekers living under oppressive regimes, because FH-T had failed to raise it before the Board and therefore not preserved it.²⁴⁷ The panel denied review.²⁴⁸

238. Decided as *FH-T v. Holder*, 723 F.3d 833, 844 (7th Cir. 2013); *reh'g en banc denied*, *FH-T v. Holder*, 743 F.3d 1077 (7th Cir. 2014).

239. *Id.* at 833.

240. *Id.* at 836.

241. *Id.*

242. *Id.*

243. Tier III organizations do not need to be designated onto a list by a U.S. agency; they must simply engage in "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)," such as "assassination, violent attacks upon an internationally protected person, sabotage, and high-jacking." *FH-T v. Holder* at 839; 8 U.S.C. § 1182(a)(3)(B)(iii).

244. *FH-T v. Holder*, 723 F.3d 833, 837 (7th Cir. 2013).

245. *Id.*

246. *Id.* at 839.

247. *Id.* at 833.

248. *Id.* at 833.

Rehearing was summarily denied without opinion, but Judge Wood dissented from the denial, joined by Judges Posner, Rovner, and Hamilton.²⁴⁹ While they dissented on other grounds than the knowledge exception because they agreed that it had not been exhausted, they were concerned that “two agencies . . . have thwarted the congressional scheme through their regulatory apparatus.”²⁵⁰ FH-T had a statutory right to seek a waiver of the terrorism bar, because Tier III could be construed so broadly that too many applicants could be excluded under its aegis, yet he was caught between DHS and EOIR²⁵¹ procedures and regulations that prevented him from exercising that right.²⁵² While not completely parallel, comparing the two bars is illuminating: first, there exists a knowledge exception to the terrorism bar, found at 8 U.S.C § 1182(a)(3)(B)(i)(VI).²⁵³ The asylum statute, § 1158, defines the terrorism bar with explicit reference to the inadmissibility grounds in § 1182, again not copying the text of the Convention. However, the knowledge exception does seem to mirror the goals of the Convention: Articles 33.1 and 33.2 balance the refugee’s interest in *non-refoulement* against the state’s interest in national security. A refugee who supported a terrorist group wholly contextual to her country of origin, for the purpose of pursuing a political end there, such as independence, without supporting or committing disproportionate or indiscriminate violence, should not be considered a danger to her country of refuge.²⁵⁴ This tracks with the Convention’s interpretation of the persecutor exclusion as serious, usually criminal activity motivated by animus. Second, the dissenters from the denial of rehearing in *FH-T* emphasized that Congressional intent should be respected above the BIA and DHS’s regulatory schemes, especially when the effect in practice was a direct conflict. That is dissent, not good law in the Seventh Circuit, but without *Chevron*²⁵⁵, how many judges might have switched their votes? Should a similar case arise, modern advocates are free to argue that the BIA and DHS’s positions are not reasonable, nor are they consistent with the spirit of the INA, which may bring some of the judges in *FH-T*’s majority over to the dissent’s side and create new precedent.

249. *Id.* at 1077.

250. *Id.*

251. Executive Office for Immigration Review, the name of the component of the Department of Justice that handles immigration adjudications. It comprises all fact-finding Immigration Courts as well as the BIA.

252. *FH-T v. Holder*, 743 F.3d 1077, 1082 (7th Cir. 2014).

253. The section of the INA that deals with grounds of inadmissibility to the United States, applicable to all aliens.

254. Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, UNHCR Global Consultations on International Protection (2001), <https://perma.cc/G2L7-S9WF>. Arts. 33.1 and 33.2 are interpreted, not only with their original meaning and intent in the Convention, but in light of subsequent international terrorism agreements. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism, Annex to UNGA Res.54/109, 25 February 2000; Article III of the Organization of African States (OAU) 1969 Convention; U.N. General Assembly Declaration on Principles of Friendly Relations Principle 1, ¶¶ 8 and 9, 1970, GA Res.2625 (XXV).

255. *See* n. 11, *supra*, for a review of *Chevron* and administrative law principles.

As far as the criminal bars are concerned, the regulations extensively recount what types of convictions trigger bars to asylum and related relief.²⁵⁶ Statute and regulation can define certain convictions categorically as particularly serious crimes, whereas crimes not categorically listed may still be found particularly serious in the context of one individual's case adjudication.²⁵⁷ Aggravated felonies are *per se* particularly serious, with certain exceptions to comply with U.S. obligations under the Protocol.²⁵⁸ Factors to consider when determining whether a crime is particularly serious include "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community."²⁵⁹ This bar, as well, takes into account the applicant's intent, knowledge, and circumstances. Proof of the requisite *mens rea* inheres in a U.S. criminal conviction. In addition to the conviction itself, the adjudicator considers the circumstances surrounding the offending conduct, which may, of course, include duress (which may have been raised during criminal proceedings and mitigated sentencing, even if it was unsuccessful as a complete defense). The alien's dangerousness is salient, buttressing the proposition that activity contextual to the homeland – even violent activity – might not pose a risk high enough to countervail the merits of his claim not to be refouled. Finally, statute, regulations, and case law alike nod back to the goals of the Protocol.

To treat all bars to asylum relief in § 1158(b)(2)(A) consistently, a duress exception to the persecutor bar should be recognized. No matter how reprehensible or frightening the conduct, subjecting an applicant to a potential bar, none of them, except the persecutor bar, has been applied with strict liability. It is time to effectuate the American value of honoring personal agency, stated clearly and repeatedly across multiple areas of law, both in and out of the immigration context, by persecutor barring asylum applicants only if their objectionable conduct was committed with moral choice. All three branches of government have the opportunity to exercise their powers towards this goal. Part III will now turn to the extralegal arguments supporting a duress exception, based on modern science and sound policy.

256. See generally 8 C.F.R. § 208.13(c).

257. See, e.g., 8 C.F.R. §§ 208.13(c), (d); 8 U.S.C. §§ 1158(b)(2)(B)(ii), (d); *In re Frentescu*, 18 I&N Dec. 244, 244 (BIA 1982); *Delgado v. Holder*, 648 F. 3d 1095, 1104-5 (9th Cir. 2011).

258. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (amending 8 U.S.C. § 1253(h)(2)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C., § 305(a)(3), 110 Stat. 3009-546, 3009-602 (amending 8 U.S.C. § 1231(b)(3)(B)).

259. *In re Frentescu*, *supra* note 252, at 244; *Anaya-Ortiz v. Holder*, 594 F. 3d 673, 679 (9th Cir. 2010); *Delgado v. Holder*, 648 F. 3d 1095, 1107 (9th Cir. 2011).

III. DURESS, THE BRAIN, AND THE INDIVIDUAL IN SOCIETY

*Who would fardels²⁶⁰ bear,
 To grunt and sweat under a weary life,
 But that the dread of something after death,
 The undiscover'd country, from whose bourn
 No traveller returns, puzzles the will. . . .
 Thus conscience does make cowards of us all,
 And thus the native hue of resolution
 Is sicklied o'er with the pale cast of thought. . . .*
 -William Shakespeare, *Hamlet*, Act 3, sc. 1, ll. 77-86

The famous “To be or not to be” speech quoted above vividly illustrates a key aspect of human nature: that people are likely to stay in an unfavorable position rather than change their circumstances when such a change involves facing a terrifying unknown. This concept is even acknowledged in the Declaration of Independence: “[A]ll experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”²⁶¹ Hamlet chose death as the terrifying unknown to muse about. An asylum seeker may well be in a situation where the alternative to compliance with a persecutory system is death, for herself or a family member. She may face an indefinite prison term, or corporal punishment amounting to torture, or at least “cruel treatment” under international law.²⁶² With such a menacing state of affairs, it is unrealistic to expect much rebellion. Indeed, the very fact of her escape to pursue asylum in another country represents a brave act approaching a potentially dangerous unknown. Examining the real-world circumstances giving rise to these cases, the pertinent question becomes not *what exactly did the noncitizen do?* but *can we truly blame her for doing it?*

260. *Fardel* is a derogatory early modern term for *burden*. Hamlet, being a Prince, is conjuring the image of a peasant or day-laborer with truly back-breaking loads to carry. While living this way was a reality in his time period, and still is in many parts of the world, the image also functions as a metaphor for the emotional weight we all bring with us from our life experience.

The author of this note is a classical actor, who began professional training in 2003; earned a BSc in communication, theatre major, at Northwestern University in 2009; taught Shakespeare to adolescent women with the nonprofit Viola Project; taught in residence at the Quincy (Illinois) Community Theatre; and has founded or co-founded three classical theatre business ventures. After more than twenty years of experience steeped in that industry, it can be next to impossible to parse out the provenance of one’s knowledge; often, the meaning of an antiquated word is casually imparted by a director while the cast are moving through a playing space with nothing to write it down. I ask for your trust when a purely literary *fact* lacks a citation. Any *interpretations* of Shakespearean text are my own. I bear full responsibility for both.

261. U.S. Declaration of Indep., ¶ 2.

262. “[T]he decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the *purpose of the conduct and the powerlessness of the victim*, rather than the intensity of the pain or suffering inflicted.” *Manual on the Definition of Torture*, UN Off. High Comm’r for Hum. Rts. 7 (Dec. 16, 1981), <https://perma.cc/SV45-AML4>, quoting Rep. of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2006/6, ¶ 39 (emphasis in original).

Most of the asylum system, and indeed the entire INA, is rooted in the prevailing beliefs of 1951 and 1952, whereas the law of duress in criminal and contract spheres grows out of the English common law. In times that far past, decision-makers did not have access to many developments in the study of trauma, coercion, and the impacts of both on the human mind. Certain experiences can adversely impact an individual's sense of personal agency and threat perception during the period when the individual is stressed by the event. Trauma, especially post-traumatic stress disorder (PTSD),²⁶³ has been shown to reduce a person's sense of empowerment and ability to make decisions.²⁶⁴ For example, *amici curiae* to the *Negusie* BIA remand, including the Center for Gender & Refugee Studies at University of California at Hastings College of the Law (CGRS), extrapolated the battered-women-syndrome-related concept of "learned helplessness" to the persecutor bar context. They proposed the example of "a mother suffering from long-term, severe domestic violence [who] may reasonably believe without a direct threat that attempting to prevent her daughter's female genital cutting would be both futile and perilous."²⁶⁵

International law generally exempts conduct committed under duress from the exclusion clause for persecutors because "there was no intention to cause greater harm than that threatened."²⁶⁶ Shoring up this proposition, a 2013 study at the National University of Singapore examined students' sense of agency ("SoA"), or belief that they are responsible for their actions and the

263. Dr. Bruce Olson, a clinical psychologist, offered the following definition of post-traumatic stress disorder in *State v. Janes*, 121 Wn.2d 220, 233 (WN 1993): PTSD is an anxiety condition based on the experience of extreme adverse events.

Refugees experience PTSD at high levels compared to the general population. Over thirty percent of refugees may be PTSD-diagnosable, see Kate Evans, *Practice Alert – Litigation Update in Negusie v. Holder: The Board of Immigration Appeals Nears Decision on the Persecutor Bar*, U. IDAHO COLL. L. (Oct. 2017), <https://perma.cc/EG3G-PLNG>. Even if the trauma an individual suffered does not ultimately result in DSM-V-diagnosable PTSD, the individual's frame of mind and decision-making abilities will still be altered while the traumatic events are happening. For example, a child separated from his parents experiences "high levels of anxiety and distress . . . which impair the developmental trajectories in otherwise healthy children," and when healthy attachment relationships are "ruptured, this ability [to develop and survive independently] is severed, and it is likely to lead to adverse long-term personality, interpersonal, cognitive, and emotional sequelae." *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy: Hearing Before the H. Comm. on Energy & Com.*, 116th Cong. 3, 7 (statement of Cristina Muñiz de la Peña, Terra Firma Mental Health Director, Center for Child Health and Resiliency). Note that the negative impacts of PTSD are not limited to children.

264. Shauna Carmichael, *Persecutor Bar, Former Child Soldiers, & Lessons from Research on Child Development*, 18 SCHOLAR 381, 463 (2016).

265. Substituted Amended Brief for Non-Profit Organizations and Law School Clinics as *Amici Curiae* at 17, *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018), citing Brandon R. White, Comment, *Using Learned Helplessness to Understand the Effects of Posttraumatic Stress Disorder and Major Depressive Disorder on Refugees and Explain Why These Disorders Should Qualify as Extraordinary Circumstances Excusing Untimely Asylum Applications*, 64 BUFFALO L. REV. 413, 546, 548 (2016).

266. James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 585 (2d ed. 2014). See also Brief of International Refugee Law Scholars as *Amici Curiae*, *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018); Brief of Non-Profit Organizations and Law School Clinics as *Amici Curiae*, *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018); *MT v. Sec'y of State for the Home Dep't* [2012] UKUT 00015 [106]; *Diaz v. Canada* (Minister of Citizenship and Immigration) [2013] F.C. 88, para. 51 (Can.); *VWYJ v. Minister for Immigr. & Multicultural & Indigenous Affairs*, [2005] FCA 658 at [9]; Refugee Appeal No. 75634 [2006] NZSRAA [79] [N.Z.].

results those actions cause.²⁶⁷ The study suggested that a person's sense of agency was "the result of conscious mental processing," competing with other tasks that require conscious processing for the person's attention.²⁶⁸ The authors stated that the next step in their research was "the tantalizing hypothesis" that a person's perception of her level of control over her actions could be distorted and manipulated by "limiting the amount of conscious cognitive resources available" to that person.²⁶⁹ In other words, the simple existence of high stress and task overload, such as that imposed by cruel armed superiors or prison wardens, could prime an individual to be duressed and controlled. The researchers explicitly acknowledged that sense of agency "forms the cornerstone for . . . our legal and social systems" because "[w]e ascribe blame or credit largely on the basis that an individual knows that he is the author of his actions."²⁷⁰ If that individual's sense of agency is shaky, a structure of legal and moral responsibility cannot reliably be built on top of it. People also develop morally over time; this is especially apparent as children grow through adolescence into adulthood and undergo profound changes in their brains and hormones,²⁷¹ but it also happens as the product of experience.²⁷² These contemporary understandings should not only raise a new humanitarian argument in favor of a duress exception, but put to rest two previously compelling arguments against it.

A. *Is Past Conduct Predictive of Future Behavior?*

The first outdated argument against a duress exception is that past conduct is necessarily predictive of future behavior, so it was believed that anyone who

267. Nicholas Hon, Jia-Hou Poh, & Chun-Siong Soon, *Preoccupied minds feel less control: sense of agency is modulated by cognitive load*, 22(2) CONSCIOUSNESS AND COGNITION 556 (2013).

268. *Id.* at 557.

269. *Id.*

270. *Id.* at 556.

271. Carmichael, *supra* note 264, at 386-87, 422, 424; Roberta Bosisio, *Children and Young People as Moral and Legal Actors: Findings from Studies Conducted in Northern Italy*, in *Law and Childhood Studies: Current Legal Issues*, Vol. 1 4 (Michael Freeman, ed., 2012); Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* 4 (2009); J.M. Hurtado, *From Goals to Habits – A View from the Network*, in *From Attention to Goal-Directed Behavior: Neurodynamical, Methodological and Clinical Trends* 166 (Francisco Aboitiz and Diego Cosmelli, eds., 2009); Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008).

272. Bosisio, *supra* note 266, at 5, 9, 13; Elvina Chow, Theses and Dissertations, *The Intergenerational Transmission of Culture Through Attachment-Based Parenting Practices and Their Effects on Child Neurology: A Systematic Review* 2 (2024) (on file with Pepperdine University) ("[S]ociocultural dynamics intricately intertwine with the neurobiological processes shaping human development"); Catherine S. Kramer, Legacy Theses & Dissertations, *"I Felt from That Place": A Qualitative Case Study of Emerging Practices to Build Youth Peer Supports in Residential Care* 20 (2024) (on file with the University at Albany's Scholars Archive) ("[P]eer relationships . . . allow for: (1) the development of necessary social skills to navigate mutual relationships . . . (2) an opportunity to experience self-confidence and efficacy by offering support to peers in need . . . (4) an opportunity to secure a relational base to draw continued strength from"); World Health Organization, *Mental health of adolescents* (Oct. 10, 2024) ("A adolescence is a crucial period in which individuals develop social and emotional habits . . . [including] building peer relations, and developing coping and problem-solving skills"), <https://perma.cc/X65J-SS2V>.

had engaged in persecutory conduct posed a danger to the US. By this logic, whatever the individual's motive and intent for his conduct, only a strict liability persecutor bar was appropriate.²⁷³ Modern science points to a more nuanced view of human behavior; past conduct is not always predictive of the future, depending on the context and varying exigencies of the actor's environment.

For most asylum seekers today, the potentially persecutory acts they committed in their homelands were contextual to the societies in which they lived and the influence of powerful leaders. As a result, a noncitizen is not likely to repeat such conduct outside the grip of whoever put her under duress. When the adjudicator determines whether the noncitizen was under duress, that decision reveals the noncitizen's degree of dangerousness to the receiving society. Someone with moral choice who still opted to persecute others may be presumed to do so again, and it is correct to persecute her. But for an individual who lacked such moral choice *in the specific situation where she persecuted*, that concern disappears. Such an individual should have the opportunity to demonstrate the real predictors of her future conduct throughout the adjudication context, such as her performance in jobs she willfully takes, the way she treats her family, and her level of prosocial behavior in other countries.

Domestic violence is an example of this contextual behavior to which the law returns again and again. For example, battered women syndrome, or BWS, has been much debated regarding duress in criminal cases, such as in the *Riker* case, discussed above. Suppose the mother in CGRS's hypothetical²⁷⁴ managed to escape to the US with her daughter. Without her abuser and the cultural community that may enable that abuse, the mother has no reason not to protect her daughter from violence and may, when made aware of its availability, seek medical care to ameliorate the violence already done. It is more reasonable for the US to help such individuals than fear them.

B. *Is a Former Persecutor Undesirable*²⁷⁵ *in American Society?*

The second argument that has been made against a duress exception is that anyone who has engaged in such conduct would be an undesirable potential

273. See, e.g., Matter of Negusie, 28 I&N Dec. 120 (A.G. 2020) (“[I]n light of longstanding Board precedent and policies of the Department of Justice . . . seeking to avoid collateral consequences that would be detrimental to the administration of immigration law, and weighing the diplomatic implications of this decision, I conclude that the best reading of the persecutor bar does not include an exception for coercion or duress”); Vukmirovic v. Ashcroft, 362 F.3d 1247, 1250 (9th Cir. 2004) (“[T]here is no provision under the law that exempts acts of self-defense from qualifying as persecution The objective effect of the Respondent’s actions was to hurt and sometimes kill the Croats”) (internal citation omitted); Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003) (“Bah . . . argu[es] that, given the fact of his forced recruitment, he did not engage in political persecution because he did not share the RUF’s intent of political persecution. We reject this contention. The syntax of the statute suggests that the alien’s personal motivation is not relevant”).

274. Substituted Amended Brief for Non-Profit Organizations and Law School Clinics as *Amici Curiae*, *supra* note 260.

275. Negusie v. Holder, 555 U.S. 511, 527 (2009) (Scalia, J., concurring) (“[T]here may well be reasons to think that those who persecuted others, even under duress, would be relatively undesirable as immigrants The Nation has a legitimate interest in preventing the importation of ethnic strife”).

member of American society. Proponents claimed he should not be rewarded with a haven, nor should anyone belonging to the groups he previously antagonized be forced to live side by side with him. This ethos underpinned much of the *Fedorenko* decision.²⁷⁶ Nonetheless, modern thinking about rehabilitative justice joins with cutting-edge findings around neuroplasticity to challenge such an unforgiving judgment.

Proponents of a strict liability persecutor bar argue that former persecutors do not merit inclusion in the receiving society; it would be offensive to the individuals who had escaped that exact persecution to be forced to live with them. This argument has become outdated. In the World War II era, an individual's rights were tied to her geographic homeland; outside her country of citizenship, extra efforts needed to be made to affirm those rights.²⁷⁷ While countries differ in the degree to which they honor and protect human rights, today it is axiomatic that a human has certain rights wherever she goes, regardless of whether she makes formal ties to that community. Imagining rights as a gift the state bestows upon its own in exchange for allegiance, but to which someone unconnected with the state cannot aspire, entrenches colonialism and privilege. Furthermore, today the nation-state and its official organs often take a backseat to organized criminal enterprises, armed militias, and even multinational corporations in importance to ordinary people's lives.²⁷⁸ Members of formerly persecuted groups may not necessarily be able to recognize the people who harmed them on sight.²⁷⁹

276. *Fedorenko v. United States*, 449 U.S. 490, 497-98 (1981) (“The complaint alleged that petitioner should have been deemed ineligible for a DPA visa because he had served as an armed guard at Treblinka and had committed crimes or atrocities against inmates of the camp because they were Jewish”) (“The Government’s witnesses at trial included six survivors of Treblinka who claimed that they had seen petitioner commit specific acts of violence against inmates of the camp. Each witness made a pretrial identification of petitioner from a photo array that included his 1949 visa photograph, and three of the witnesses made courtroom identifications”) (“If . . . [an] applicant [for a DPA visa] had been an armed guard at [a concentration] camp, he would have been found ineligible for a visa as a matter of law”). The fact that survivors of Treblinka specifically recognized *this petitioner* after all seven of them had lived in the United States for decades is relevant to the pervading sense that a duress exception, or any other balancing of equities that would permit him to retain citizenship, would unacceptably disrupt the community. As will be discussed in part III, such reunion showdowns between prisoners and guards are far less likely in today’s conditions, affecting the desirability and feasibility of a duress exception.

277. Edwin O. Abuya, Ulrike Krause, & Lucy Mayblin, *The neglected colonial legacy of the 1951 refugee convention*, 59 INT’L MIGRATION 265, 265 (2021).

278. Asylum Access, *What is the 1951 Refugee Convention – and How Does It Support Human Rights?* (July 24, 2021) (“[T]he Convention’s definition of the term ‘refugee’ does not accommodate a growing population of people who have experienced displacement, including those displaced due to climate change, food insecurity or non-state terrorism”), <https://perma.cc/DA52-DY9L>; see also *Paye v. Garland*, 109 F.4th 1, 11 (1st Cir. 2024) (“If Paye suffered past persecution . . . due to the Liberian government’s . . . unwillingness or inability to restrain private actors, he is entitled to a presumption of future persecution”); *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014) (“The complaint alleged that during Argentina’s 1975-1983 ‘Dirty War,’ Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers . . .”). *Daimler* is a landmark personal jurisdiction case, grappling with the issue of where such large and powerful companies might be held legally accountable for any crimes and misconduct.

279. The classic example is Rwanda’s Hutus and Tutsis, who have been alternately called ethnic groups, races, classes and language groups according to political whim. See The Sociological Mail, *How Is The Relationship Between Hutus And Tutsis Today?* (Sept. 19, 2018), <https://perma.cc/F9R2-ZEWN>.

Further complicating the quest to draw bright lines in communities is the bedrock of a duress exception itself: the thorny relationship between victim and persecutor in modern conflict and oppression, where both roles can be played by the same person. Empirical literature about the effect of culture on an individual's behavior and development,²⁸⁰ the actual relationship between groups even in post-genocidal societies,²⁸¹ and neurology's role in "goal-directed behavior"²⁸² indicates that rehabilitative social integration is possible. Even if the Refugee Act and Protocol were not clear that adjudicators are not meant to consider desirability as a factor when deciding asylum applications,²⁸³ modern science and sociology dispel the myth that asylum applicants who engaged in persecutory acts under duress are undesirable at all.

C. *A Word about Minors and Their Unique Experiences*

Child soldiers, and their equivalents in cartels and other armed groups (hereinafter "soldiers" for brevity, though many literal child soldiers are protected by *Lukwago*),²⁸⁴ are a quite easy example of contextualized dangerousness. Children have an underdeveloped sense of cause and effect,²⁸⁵ may be less able to appreciate the difference between right and wrong,²⁸⁶ and often lack a meaningful ability to live self-sufficiently, which makes them more dependent on the adults forcing them to persecute.²⁸⁷ As a result, they are sometimes considered ideal targets for persecutory groups' recruitment efforts.²⁸⁸ Child soldiers have "participate[d] in the beating and killing of other children – some even forced to engage in cannibalistic practices,"²⁸⁹ yet under the supervision of a

280. See Kendra Cherry, *Overview of Child Psychology and Development: Factors That Influence Children's Emotional, Social, and Cognitive Growth*, Verywell Mind (Nov. 8, 2024), <https://perma.cc/348H-XLKJ>.

281. See, e.g., *How Is The Relationship Between Hutus And Tutsis Today?*, *supra* note 274.

282. See Hurtado, *supra* note 266.

283. Statutory construction discussed in part II.

284. *Lukwago v. Ashcroft*, 329 F.3d 157, 183 (3d Cir. 2003).

285. Robert Kinscherff, forensic psychology professional at William James College, highlights "the lack of prefrontal cortex development in young brains. The prefrontal cortex controls humans' ability to: delay and reflect . . .; take all options into account (juveniles are extremely impulsive); contemplate risks and consequences (sensation seeking is at an all-time high at mid-adolescence); have social intelligence (juveniles have difficulty being empathetic and are susceptible to peer pressure)." Morgan Tyler, *Understanding the Adolescent Brain and Legal Culpability*, Am. Bar Ass'n (Aug. 1, 2015), <https://perma.cc/N9C9-7PHF>.

286. *Id.* (citing *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding that children are immature, amenable to influence, and not fully morally developed, therefore the harms they cause as juveniles are not indicative of their inherent character)).

287. See Cecilia Wainryb, '*And So They Ordered Me to Kill a Person*': *Conceptualizing the Impacts of Child Soldiering on the Development of Moral Agency*, 54 *HUM. DEV.* 273, 276 (2011).

288. See United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Working Paper Number 3: The Children and Justice During and in the Aftermath of Armed Conflict*, 10 (Sept. 2011) ("Children are often desired as recruits because they can be easily intimidated and indoctrinated. They lack the mental maturity and judgment to express consent or to fully understand the implications of their actions."), <https://perma.cc/KGP7-UWXT>.

289. Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 *FLA. J. INT'L L.* 285, 292 (2009).

kind and responsible adult, one wonders how likely they would even be to obtain the requisite tools for such behavior.

Furthermore, a child's personality and psychological state are in flux throughout his development.²⁹⁰ In the U.S., aggressive children contend with the juvenile justice system, where they face more temporary and lenient consequences than adults, and are referred to as "delinquents."²⁹¹ With rare exceptions, defendant minors do not face the social censure and legal disability attaching to a "criminal."²⁹² That means that, even if a child soldier is not able to flee and apply for asylum until he grows up, one may still infer that he is not dangerous in the receiving country: his conduct will now be governed by his settled adult personality, and an understanding of the consequences of his actions. He is no longer dependent on his commanding officers for food and shelter, nor is he living in fear that he or his family will suffer severe reprisals for his disobedience. UNHCR directs adjudicators to consider

the age of the [child] at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defense of oneself or others?); the consequences of refusal to join . . . [the] possibility of not participating in such acts or of escape; the forced use of drugs . . . the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as the result of his or her involvement.²⁹³

None of these factors, other than the point that "trauma, abuse or ill-treatment" leaves lasting symptoms that must be healed, will be present in the receiving society.

One focus group study in Italy shows minors' process of moral development and independent decision-making in action. Adolescents were given a story to read, in which a sixteenth-century traveler appealed to the justice

290. Cherry, *supra* note 275 ("The culture a child lives in contributes a set of values, customs, shared assumptions, and ways of living that influence development throughout the lifespan.").

291. See, e.g., Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLIN. PSYCHOL. REV. 448, 456 (2013) (showing that Multidimensional Treatment Fostercare (MTFC) correlates to "less violent offending, fewer criminal referrals and fewer number of days in locked settings, lower antisocial behavior scores, more positive family management scores, and lower deviant peer association scores") (internal citations omitted); *In the Interest of T.A.T.-P.*, 2020 Pa. Super. Unpub. LEXIS 1826 (PA Sup. Ct. Jun. 2, 2020) (finding minor guilty of "simple assault and harassment" was "adjudicat[ed] delinquent" and ordered "to perform 20 hours of community service or pay a \$145 fine"); *State v. Charbonneau*, 154 Vt. 373 (Vt. 1990) (holding that adult courts have very limited jurisdiction over juveniles, and consequences like drug treatment programs and probation are more appropriate for minors than incarceration).

292. *In re J.M.*, 2024 Cal. App. LEXIS 447 at *3-*4 (Cal. App. Jul. 12, 2024) (noting that juveniles could only be tried in criminal court "after a juvenile court judge conducts a 'transfer hearing' to consider such factors as the minor's degree of criminal sophistication and previous delinquent history"); *B.K. v. State*, 235 N.E.3d 142, 143 (Ind. 2024) (vacating disposition of joint and several liability because the juvenile restitution statute had strict parameters and must be respected); *In re E.P.*, 89 Cal. App. 5th 409, 416 (Cal. App. 2023) (affirming that a juvenile may only be transferred to criminal court if juvenile court finds "that the minor is not amenable to rehabilitation while under the jurisdiction of the juvenile court").

293. UNHCR, Background Note on the Application of the Exclusion Clauses at 34.

system when a local squire mistreated his horses. Upon losing his case, he became a vigilante, trying to obtain his justice through acts of violence and revenge. Ultimately, the court did order the person who wronged the traveler to make him whole, and then condemned the traveler to death for his criminal behavior.²⁹⁴ The focus group leader asked the teenagers what they thought of the story, how the traveler should have responded to his circumstances, and how they might respond in his place. Participants tended to agree that the traveler's reaction to the injustice he suffered was wrong and only caused more suffering for all involved – but they recognized that they would have been likely to behave similarly, due to feelings of rage and powerlessness.²⁹⁵ They articulated two spectra along which they analyzed the story: one of past to present, considering that a feudal plebeian's choices were restricted compared to those of a modern person; and one of abstract to concrete, noting that what they believed they *should* do in principle was probably divergent from what they *would* do in a high-pressure reality.²⁹⁶ It is important for adjudicators to understand that an individual undergoes life experience as well as moral and personal development along her journey from childhood to maturity. A child may not withstand the same pressure as an adult, and an adult should take accountability for any misdeeds where she might not be held accountable in childhood.

D. *A Reliable, Humanitarian Framework That Supports National Security*

The two spectra the Italian focus group applied to the traveler's story nicely encapsulate the need for a duress exception to the persecutor bar and, thus, for a case-by-case analysis of individual narratives and contexts. The past-to-present spectrum reflects different countries' levels of newness and development, whereas the abstract-to-concrete spectrum invites the decision-maker to empathize with the asylum seeker's physical and mental journey from his persecuted homeland to the seat of American justice. Organizing the applicant's circumstances and context along these spectra and considering the logical corollaries of her actions on American soil will lead to a sound framework for analysis. It is time for the U.S. immigration system to unpuzzle its own will and give asylum seekers the opportunity to prove any cruel and abusive acts were committed under duress, therefore exempting them from the persecutor bar. A proposed test, which seeks to maximize protection for those who need it while keeping the exception narrow enough not to drown the spirit or letter of the rule, is the subject of part IV.

IV. DECISION-MAKING, DURESS, AND THE RESILIENCE OF THE RECORD

As demonstrated throughout part II, a duress exception to the persecutor bar effectuates congressional intent, fulfills the United States' international

294. Bosisio, *supra* note 266, at 5-6.

295. *Id.* at 8.

296. *Id.*

commitments, harmonizes American values across the legal landscape, and serves justice to refugees. Part III has shown that a duress exception is both appropriate in light of ongoing scientific discoveries and respectful of asylum seekers' lived experience. Adding duress to the list of determinations the adjudicator must make on what can amount to an unclear and difficult-to-develop record will require tests, guidance, and procedures. This part of the note offers recommendations for that purpose.

The BIA articulated a five-part test for duress in its 2018 *Negusie* opinion. To sculpt a new framework, it is reasonable to begin where the Board left off. The five elements it laid out were:

- (1) [The alien] acted under an imminent threat of death or serious bodily injury to himself or others;
- (2) He reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting;
- (3) He had no reasonable opportunity to escape or otherwise frustrate the threat;
- (4) He did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and
- (5) He knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others.²⁹⁷

The second, third, and fourth elements should be retained. However, the ideas of imminence in the first element and proportionality in the fifth element are not well supported, either by studies of the human brain and behavior or the conditions in other countries that drive asylum seekers to leave.

Imminence is a narrow and rigid legal concept that excludes all but the most truly pressing consequences,²⁹⁸ and restricting the duress exception in this manner is inconsistent with international guidelines that counsel great caution when applying the exclusion clauses.²⁹⁹ Threats of death or serious bodily injury to oneself or family members may be equally frightening, harmful, and inescapable whether the threatened action will take place imminently or two hours from now, tomorrow, or in six months' time – depending on the particulars of the society, geography, and relationships in question.³⁰⁰ Requiring true imminence

297. *Matter of Negusie*, 27 I&N Dec. 347, 347 (BIA 2018).

298. *See, e.g.*, *Cormier v. State*, 540 S.W.3d 185 (Tex. App. 2017); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Pittman v. Boiven*, 249 Cal. App. 2d 207 (Cal. App. 1967).

299. UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention Relating to the Status of Refugees* (Sep. 4, 2003).

300. *See, e.g.*, *Sorto-Guzman v. Garland*, 42 F.4th 443, 446 (4th Cir. 2022) (El Salvador); *Blanco v. AG United States*, 967 F.3d 304, 311 (3d Cir. 2020) (Honduras); Karen DeYoung, *Escobar Judge Seeks Asylum after Threat*, *Pittsburgh Post-Gazette*, Nov. 29, 2000, at E-12 (Colombia).

before a threat is considered meaningful enough to influence action is a common law theory bearing the mark of Western male privilege; even American women have been hard pressed to convince triers of fact that a temporally delayed violent act against a physically stronger male abuser could count as self-defense.³⁰¹ How much more will an asylum seeker, from a distant place and diverse culture, differ in perspective from the Reasonable Prudent Person – who was, until about fifty years ago, the Reasonable Man?³⁰² To treat asylum seekers of various genders and classes from every corner of the globe with equal justice, only the credibility and seriousness of the threats they face should be considered. In some countries, where enforced disappearance is common, a simple “. . . or else” without a date or even a certain consequence, may be the source of genuine duress.

Likewise, the proportionality requirement in the fifth element is an unrealistic burden to impose on asylum seekers. Looking at a record of events after the fact, an official is readily able to weigh the harm threatened against the harm committed. Even the most attentive and least casual reviewer still has the benefit of hindsight, which the individual did not at the time he committed the acts in question. Decisions are always a probability game, as one can never be certain of the results in advance. Imagine the following hypothetical: a young conscript is assigned to a team tasked with shooting anyone who attempts to leave the camp where the conscripts are staying, along with their superiors and some prisoners. The conscripts know that the prisoners are victims of a campaign of ethnic cleansing, and while they morally abhor this campaign, they have no voice in the chain of command or public sphere to oppose it. When they see a prisoner trying to escape, they shoot in the air to appear that they are complying with orders while trying not to cause any harm. The superiors discover this ploy and summarily execute one conscript, thought to be the ringleader of the rebellious group, in front of her fellow soldiers. Our young conscript now believes that if he is caught disobeying orders again, he will be executed too, and the chance that he will be caught is relatively high considering the repressive and tight-knit unit to which he belongs. The following week, five prisoners try to escape. This conscript shoots in their general direction, but does not aim at them. They are running fast through vegetation in the dark of night. The conscript believes that he has a low chance of hitting any of the prisoners, and if he does, he will probably wound them without killing them. Under the stern watch of his commander, the conscript continues shooting for several minutes. In the morning, he sees five bodies left out in the open air as a warning to other prisoners. He realizes that despite his best efforts, he killed all five of the prisoners.³⁰³

301. See, e.g., Deepa Shivaram, *Rittenhouse's defense renews focus on the case of a 17-year-old who killed her abuser*, NPR (Nov. 25, 2021), <https://perma.cc/J7V2-KTL9>; *People v. Humphrey*, 13 Cal. 4th 1073 (1996); *State v. Koss*, 49 Ohio St. 3d 213 (Sup. Ct. 1990).

302. See Wildman & Donovan, *supra* note 201.

303. Story aggregated from multiple cases arising out of several different countries and persecutory armed groups.

The harm inflicted – five deaths – is much greater than the harm threatened – the conscript’s own death. Should the protagonist of this hypothetical escape and apply for asylum in the United States, he would not be eligible for a duress exception and would be removed to his country to face the execution he had tried to avoid. From a human behavior and humanitarian perspective, this is an absurd result. The BIA’s fifth element does include a constructive knowledge component, which takes into account the individual’s decision calculus and lack of hindsight. However, the only time it used this test, the panel misapplied it to Daniel Negusie’s facts. He guarded political prisoners out in the hot sun without water, though he sometimes snuck them water when he could.³⁰⁴ He was given a verbal reprimand when caught helping a prisoner once, which the BIA found significant in holding that Negusie did not meet its proportionality test.³⁰⁵ No serious consequences befell him when he helped a prisoner, yet his helping behavior was inconsistent; one of the inmates under his supervision died in the sun.³⁰⁶ In Eritrea, authorities regularly mete out torture, disappearance, and long periods of incarceration in squalid conditions to anyone who opposes or even questions their orders.³⁰⁷ One warning would be all a reasonable person in that political climate needed to know that her conduct had been discovered and would not be tolerated in the future.

Rather than test for proportionality, even with a constructive knowledge requirement, adjudicators should inquire whether the alien had done all she could, under the circumstances, to minimize the harm inflicted. This approach considers the impact of coercion on the alien’s sense of agency and situates the alien’s actions within her cultural and political context. It necessitates a sincere attempt, by all American participants in the process, to familiarize themselves with conditions on the ground in each asylum seeker’s home country, which admittedly takes time. That being said, because migration tends to occur in “flows,” with large proportions of refugees coming from the same five to ten countries in any given year,³⁰⁸ and only a small proportion of asylum cases are likely to require a duress exception analysis,³⁰⁹

304. ImmigrationProf Blog, *supra* note 87 (summarizing filings from throughout *Negusie*’s procedural history).

305. *Matter of Negusie*, 27 I&N Dec. 347, 368 (BIA 2018).

306. *Id.* at 348.

307. Rep. of the Comm’n of Inquiry on Hum. Rts. in Eritrea, U.N. Doc. A/HRC/29/CRP.1, at 119 (2015). Of course, adjudicators may only decide cases on the record before them. It is not known exactly how much detail about conditions in Eritrean national service *Negusie* and his counsel had entered into evidence, or amici had referenced in their briefs.

308. Of the approximately 945,000 people who applied for asylum in 2023, the highest numbers by far came from Venezuela and Cuba. *How Many Asylum Applications Does the US Receive Each Year?*, USA Facts (Jan. 2, 2025), <https://perma.cc/HY2R-CTFX>. See also Xavier Devictor, Quy-Toan Do & Andrei A. Levchenko, *The Globalization of Refugee Flows*, WORLD BANK GROUP (April 2020), <https://perma.cc/MSJC-2FDH>.

309. Of all cases in which an Article III court reversed the BIA shortly after the Supreme Court declared the persecutor bar ambiguous – the time one would imagine the circuits would be most interested in trying to resolve this question – only one involved “a persecutor bar issue.” John Guendelsberger, *Circuit Court Decisions for April 2009*, EOIR IMMIGR. LAW ADVISOR (May 2009), <https://perma.cc/NQ5X-GTLZ?type=image>; also Martine Forneret, Note, *Pulling the Trigger: An Analysis of Circuit Court Review of the “Persecutor Bar”*, 113 COLUM. L. R. 1007, 1044 (2013).

investing some time and resources to elevate institutional knowledge about conditions in certain countries will pay large dividends in each life saved.

The most reasonable and compassionate way to formulate a duress exception would acknowledge the vulnerabilities of certain specific groups. Asylum seekers who committed the persecutory acts in question while minors – under the age of eighteen, which demarcates majority in international as well as domestic law,³¹⁰ therefore dovetailing nicely with the United States' obligations under the Protocol – should receive a *per se* duress exception. As discussed in part III, the juvenile mind is often too impressionable to be relied on to make such difficult, time-sensitive moral choices. One could never suggest that minors, especially teens, lack moral agency writ large, but it is important to appreciate the unique circumstances in duress exception cases. The lack of procedural safeguards in immigration compared with criminal proceedings, coupled with the relative unavailability of evidence to support or refute allegations about what took place overseas, counsels even greater safeguards on the substantive side to protect children from being thrust back into the dangerous conditions they escaped. It is also unreasonable to expect adjudicators to familiarize themselves with cultural standards of maturity and social behavior in every country from which asylum seekers hail. A sixteen-year-old who was heretofore sheltered in a small, socially conservative community that demands deference to elders may be less developed as a moral agent than a twelve-year-old who operates his own well-frequented fruit stand. Or maybe not. In any case, refoulement is too high a penalty to justify gambling with the judge's cultural competence.

Another reason to adopt a *per se* duress exception for minors is that children cannot live independently as easily as adults, and below a certain age, they cannot live independently at all. This circumstance limits the menu of choice for even the most responsible adult, as the scholarship discussed in part II on abused and isolated spouses indicates. United States asylum law already recognizes that age plays a major role in whether it is reasonable to expect an individual to relocate.³¹¹ A child forced into an armed group is likely to be dependent on his superior officers for basic needs like food and shelter, and possess inferior physical strength and speed to escape, simply by virtue of his childhood. This vastly restricts his options *vis-à-vis* an adult, and all he should be required to prove in order to demonstrate duress is his age.

Brain science also reveals that, while society can expect enough maturity and rational decision-making from an eighteen-year-old to confer legal rights and duties upon her, the prefrontal cortex responsible for executive

310. See, e.g., *UN Welcomes Afghan Government's Endorsement of Road Map to End Recruitment and Use of Children in National Security Forces*, Off. of the Special Representative of the Sec'y-Gen. for Child. & Armed Conflict (Aug. 1, 2014), <https://perma.cc/C86G-HR3Y> (reporting that Afghanistan has agreed to the international committee's recommendation to discipline any military officer who attempts to recruit people under age 18 and "release all underage recruits").

311. 8 C.F.R. § 208.13(b)(3).

functioning is not fully developed until a person's twenties.³¹² Therefore, individuals in their late teens and early twenties may still have the self-regulation of an adolescent.³¹³ It would be cruel to allow a *per se* duress exception for a person of seventeen years and 364 days, then completely remove it after one more day on this planet, forcing an individual with a developing brain and little benefit from life experience to prove his case as robustly as someone of his parents' age would – even without factoring in trauma, cultural differences, and exigencies of life such as poverty and extreme climate disruption. Therefore, it is recommended that adjudicators apply some kind of lenity rule to young adults in that period of development, to ease the transition between an age when protection is prioritized over accountability and an age when accountability reigns supreme.

Another reason for lenity with young adults – say, under twenty-six – is the fact that military service generally requires recruits to be over eighteen. If a person were to go straight from life in the family home while finishing secondary school, to life in an armed group, she would lack a frame of reference for truly independent decision-making and struggle to conceptualize how to defy her superiors enough to escape, then provide for her own basic needs. However, society can expect greater agency and a better-developed moral mind from these young adults than from their minor peers. Therefore, it would be appropriate to apply the same elements when assessing a young adult's duress claim as that of an older adult, while honoring the exigencies of their life stage. A practice of resolving any questions about whether the young-adult asylum seeker meets the elements of duress in the asylum seeker's favor will provide justice to young people who are in danger of persecution, yet were forced to harm others in the past.

One must consider some countries' compulsory conscription programs, in which *every* national over a certain age must participate in military service for a certain period of time.³¹⁴ There may be criminal punishments, social stigmas, and restrictions on participation in civic life for those who dare defy this universal requirement.³¹⁵ Mandatory universal conscription programs are

312. Tyler, *supra* note 280.

313. "Today, [senior research scholar in psychology] Jeffrey Arnett argues that we should recognize a new, post-adolescent stage, called 'emerging adulthood,' reflecting a range of characteristics that describe those between the ages of eighteen and twenty-five: 'identity exploration, instability, self-focus, feeling in-between and a rather poetic characteristic he calls 'a sense of possibilities.'"" David Pimentel, *When Are (Should) Juveniles (Be) Tried as Juveniles and When as Adults? The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 83 (2013); Jeffrey Jensen Arnett, Ph.D.: *About*, <https://perma.cc/7LTQ-H2KD> (last visited Jul. 27, 2024).

314. Angola, Austria, Colombia, Cuba, Eritrea, Israel, Laos, North Korea, South Sudan, South Korea, Switzerland, Taiwan & Vietnam. Katharina Buchholz, *The State Of Military Conscription Around The World*, STATISTA.COM (Jan. 9, 2023), <https://perma.cc/A4V3-GCAF>.

315. See, e.g., *Ukraine's draft dodgers are living in fear*, THE ECONOMIST (Apr. 28, 2024), <https://perma.cc/B429-68P7>; Charlotte Lawson, *Israel's Ultra-Orthodox Military Draft Crisis, Explained*, THE DISPATCH (Apr. 4, 2024), <https://perma.cc/S52F-CBXR>; U.S. Dep't of State, Bureau of Democracy, Hum. Rts., & Lab., *2023 Country Reports on Human Rights Practices: Eritrea* (2023), <https://perma.cc/L3TD-YG6X>.

perfectly legal under international law, as long as certain criteria are met to administer the programs humanely.³¹⁶ When the regime becomes persecutory and uses conscript man-power to accomplish its ends, the question of personal responsibility becomes complicated. While simply following an order is not a justification for committing persecutory acts,³¹⁷ if an asylum seeker comes from a country where mandatory conscription is practiced, and it is established that the regime in power persecutes certain people or groups, the fact that he had to participate in such a program should create a presumption of duress.

Naturally, presumptions are rebuttable, and the appropriate standard for the government to rebut the duress exception should not be particularly high. Many militaries do not punish disobedience with death or serious bodily injury to the servicemember or her family. Dishonorable discharge, loss of money or employment opportunities, and even incarceration – if relatively brief and in humane conditions – do not constitute duress such that persecutory acts should be excused. Extreme corporal punishments, including cruel and degrading treatment under CAT; summary executions, or even lawful executions carried out in a cruel and unusual manner; long, harsh, or indefinite prison terms; and severe familial reprisals would be examples of qualifying duress. An appropriate standard for the government to rebut a presumption of duress for a mandatory conscript could be around thirty percent: nowhere near as onerous as a preponderance, but still a meaningful showing.

Much ink has been spilled on the decision-making significance of evidentiary challenges inherent in immigration adjudications.³¹⁸ In merits hearings, it is natural that applicant testimony may stand alone if credible,³¹⁹ and the Federal Rules of Evidence are significantly relaxed,³²⁰ when so many witnesses and documents exist in other countries outside U.S. jurisdiction. Immigration judges and asylum officers move within these constraints daily as they adjudicate underlying eligibility claims. They also evaluate whether bars to relief apply within this evidentiary configuration. But some worry that a duress exception might be a bridge too far in a world dominated by applicant testimony – once it is shown that she is subject to the persecutor bar,

316. *Forced Conscription under International Law*, SYRIA JUST. & ACCOUNTABILITY CTR. (2022), <https://perma.cc/S6GS-3WMW> (synthesizing UNHCR Handbook, Additional Protocols of the Geneva Conventions, Rome Statute, Convention on the Rights of the Child, and opinions of U.N. Human Rights Council).

317. Ellison, *supra* note 27, at 224.

318. *Is it legal to cross the U.S. border to seek asylum?*, INTERNATIONAL RESCUE COMMITTEE (Apr. 11, 2024), perma.cc/BZS7-KT4F (describing challenges applicants face trying to obtain documents while they wait for CBP appointments in Mexico); Walker & Saywell, *supra* note 108, at 1244 (citing *Gui Cun Liu v. Ashcroft*, 372 F.3d 529 (3d. Cir 2004)); Wiesman, *supra* note 19, at 565-66; *Fedorenko*, 449 U.S., *supra* note 102, at 510 n.32.

319. 8 U.S.C. § 1158(b)(2)(B)(ii); Emily Puhl, *Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol*, 25 BERKELEY LA RAZA L.J. 87, 103 (2015); UNHCR, *Handbook*, *supra* note 119, at ¶ 197; *In re Wadud*, 19 I&N Dec. 182, 188 (BIA 1984).

320. 20 C.F.R. § 498.217(b); *Elsenety v. Health Care Fin. Admin.*, 85 F. App'x 405, 408 (6th Cir. 2003) (“the DAB [Department of Health and Human Services Departmental Appeals Board] correctly found that [Fed.] R. [Evid.] 408 is not binding on ALJs”) (citing 42 C.F.R. § 498.61).

presenting duress claims would be an effective way to manipulate the record to excuse her conduct without needing to provide convincing evidence of such duress.³²¹ Because an asylum claim may be proven by credibility *or* corroboration,³²² in duress exception cases, extra notice and other procedural safeguards can accomplish the twin goals of offering justice to people who truly suffered duress and preventing noncitizens from abusing that opportunity. At any point in a defensive process if DHS believes that a given asylum seeker is or may be subject to the persecutor bar, government counsel should inform the judge and the respondent or her counsel that the bar will be raised and that the respondent must either rebut/disprove its applicability or prove duress. This notice allows the respondent to properly prepare a defense, including obtaining as much documentary evidence as possible to overcome any suspicions of self-serving testimony. If the bar's applicability only becomes apparent during a merits hearing, the respondent should be offered a continuance to prepare a defense, and pro se respondents should be reminded that they have the right to be represented by counsel going forward. An asylum officer can provide the same advisories, though the defense will likely still need to be presented in court after a referral.³²³

Respondents found not credible for any reason are supposed to receive a chance to corroborate their claims with documentary evidence after an adverse credibility finding;³²⁴ unfortunately, continuances and opportunities to submit supplemental filings are not regularly given.³²⁵ The backlogs in the asylum system are extreme, and procedures that may increase them should be implemented with caution. However, honoring asylum seekers' right to a full and fair process and ensuring that courts decide persecutor bar cases correctly – excluding dangerous and violent individuals undeserving of refugee protection while admitting vulnerable people who need such protection – are both higher priorities than resolving cases quickly. Administrative convenience has been expressly rejected as a potential *Mathews* factor in favor of the government for procedural due process purposes,³²⁶ and while arriving aliens lack a cognizable due process interest in any United States immigration status,³²⁷ the Convention underlying 8 U.S.C. § 1158 guarantees refugees the right to present their cases

321. See Wiesman, *supra* note 19, at 576.

322. 8 U.S.C. § 1158(b)(1)(B)(ii).

323. *Types of Affirmative Asylum Decisions*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 31, 2022), <https://perma.cc/69AP-6PVY>.

324. 8 U.S.C. § 1158(b)(1)(B)(ii).

325. David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1208–09 (2016) (“the evidence presented in this Article should lead the BIA to question its ability to judge whether a denial of a continuance materially affected the outcome of a case . . . this would not only lead to more generous granting of continuances in the first place, but would also make decisions more consistent across judges”).

326. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021).

327. See, e.g., *Gisbert v. U.S. Att’y Gen.*, 988 F.2d 1437, 1443 (5th Cir. 1993).

before a fair and competent tribunal in the receiving country.³²⁸ There are many ways the United States can streamline its immigration processes, all beyond the scope of this note, but depriving asylum seekers of the opportunity to defend themselves against arguments that would completely shut down their cases is not an appropriate one. If sufficient time is allowed for respondents to prove duress and corroborate their testimony with strong documentation, immigration adjudicators should have no more trouble ruling on duress than they have with any other element of an asylum case.

The Board of Immigration Appeals imposed a preponderance of the evidence standard for each element of its test in 2018.³²⁹ In the case of most adult asylum seekers, there is no apparent reason to adjust this standard. Because the whole international community takes persecution so seriously, and flight from persecution is the bedrock of an asylum claim in the first place, any applicant with a history of persecutory acts should have to fully convince the U.S. that such acts were not committed with moral choice. That is the proper way to safeguard United States citizens and uphold the integrity of the refugee protection scheme. Meritorious applicants should be able to meet the preponderance standard – with requisite time and counsel. To sum up previous recommendations, most asylum seekers claiming a duress exception to the persecutor bar should be held to a preponderance standard, but some vulnerable groups will enjoy a lower burden. Children – those who committed the acts in question while underage, even if they apply for asylum after turning eighteen – should receive a *per se* duress exception. Members of universal conscription services, who successfully prove such conscription within the facts of their original asylum claims, should receive rebuttable presumptions of duress, which the government can overcome by somewhat less than a preponderance standard, say thirty percent. And young adults who were between eighteen and twenty-six at the time of the persecutory acts, while technically also subject to the preponderance standard, should be evaluated with a rule of lenity that resolves ambiguities in the applicant’s favor.

The adequacy of the record in asylum cases has emerged as a recurring theme in debate over both substance and procedure.³³⁰ The obvious port of call for immigration system reform is Congress, then the regulatory agencies, as well as individual adjudicators, and all of these players must contribute to a fully

328. See, e.g., Gemma Manning, *Female Genital Mutilation and the Assessment of Risk by Immigration and Asylum Tribunals* (2023) (Ph.D. thesis, University of Manchester).

329. *Matter of Negusie*, 27 I&N Dec. 347, 363 (BIA 2018).

330. See *Herrera-Elias v. Garland*, 96 F.4th 1040, 1044 (8th Cir. 2024) (“Herrera-Elias argues the IJ failed to compile an adequate record to address whether his criminal conduct should be considered serious despite his young age, the limited nature of his involvement in the gang’s operations, his fear of being killed if he failed or refused to cooperate, and the trauma he suffered”); *Chen v. Gonzales*, 434 F.3d 212, 219 (3d Cir. 2005) (“The United States cannot, as a practical matter, send investigators to interview doctors, neighbors, or family members, inspect medical records, or use any other discovery techniques which would be routine in domestic litigation. In this context the need for corroboration is particularly important.”); Amy Grenier & Greg Chen, *Policy Brief: The Asylum Credible Fear Standard*, AM. IMMIGR. LAW. ASS’N (Nov. 27, 2023), <https://perma.cc/M3U3-3DRU> (“The [credible fear] interviews occur in a few days, giving people who have survived trauma inadequate time to recover and prepare evidence.”).

functioning and wholly just system, but first, a word to the advocates is in order. Under the unique constellation of circumstances in an asylum case, the need to create a robust, detailed, and unassailable written record becomes clear. Advocates are encouraged to get as much detail as they can from their clients about the events in question, then creatively seek substantiation for as many of those details as possible. A brief that gives the facts and law comprehensive treatment, while still making efficient use of the adjudicator's reading time, can obviate the need for continuances and eliminate doubts about the respondent's credibility. A record that accurately and exhaustively reflects the asylum seeker's reality can mean the difference between life and death, as adjudicators can only grant relief for which the alien has *proven* she qualifies.

For the many respondents who appear *pro se*, compiling a complete and thorough record that sufficiently addresses each legal question is a Herculean task. It is unwise and unjust to expect any layperson, let alone one who hails from a foreign jurisdiction, to compile everything needful for a successful duress exception claim. Adjudicators are already permitted to take administrative notice of certain documents not entered into evidence by the parties, usually the relevant State Department country condition report.³³¹ For duress cases involving *pro se* respondents, the range of administrative notice should widen considerably to facilitate fair adjudication. United Nations committees, such as the Committee against Torture and the Human Rights Council, report on country conditions and practices relevant to persecution and duress.³³² Although one should not expect immigration judges to spend *copious* time doing factual research like this, once the web repositories for such reports were found and catalogued, they would be no less time-consuming to consult than the State Department country condition reports. Perhaps, if an overwhelming number of asylum seekers hail from one particular country or region, the DOJ could assign subject-matter expertise in that country or region to one of its officers. That person's duties would include submitting a brief statement about whether and how people living there might be forced to

331. See *Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (“[T]he BIA’s ability to take administrative notice is well supported in case law”); *Castillo-Villagra v. INS*, 972 F.2d 1017, 1020 (9th Cir. 1992) (“We grant a petition for review of a decision of the Board of Immigration Appeals and reverse, because the Board improperly took notice of the effect of the change of government in Nicaragua . . . without giving [petitioners] notice of its intent to do so and an opportunity to show cause why . . . the record [should be] supplemented by further evidence”); *Kaczmarczyk v. INS*, 933 F.2d 588, 593 (7th Cir. 1991) (“The petitioners argue that such use of official notice robs asylum adjudications of their individualized nature and in fact caused the Board in their cases to ignore evidence they presented”). While I advocate for an expansion of the doctrine of administrative notice, I agree with the petitioners and judges in these cases that such evidence should be subject to confrontation, examination, and rebuttal by the alien just as any other adversarial evidence would be.

332. See, e.g., *Dari Dapur: Reframing narratives on migration in Malaysia*, OHCHR (Jul. 15, 2024), <https://perma.cc/CMY7-NXX3> (providing an example of a Human Rights Council article on its regional work); Andreas von Staden, *The Conditional Effectiveness of Soft Law: Compliance with the Decisions of the Committee against Torture*, 23 HUM. RTS. REV. 451 (2022) (discussing the committee’s individual complaints procedure and its effectiveness, with some links to reports).

commit persecutory acts, or appearing as a neutral expert witness to opine on a respondent's assertions.

The best and most enduring way to enshrine a duress exception to the persecutor bar in asylum law is for Congress to amend the INA. It can legislate as specifically as it prefers about who is barred from asylum and how those determinations are made. At a minimum, it should either amend 8 U.S.C. § 1158(b)(2)(A)(i) to modify the list of verbs with *mens rea* language; or add another subsection after the list of bars, enumerating which are strict liability and which should encompass exceptions and waivers for duress (and any other factor Congress sees fit to consider). But ideally, it should go further, specifically exempting minors, making provisions for other vulnerable groups, and mandating that executive agencies provide a certain level of notice and fairness in the evaluation. It should require the availability of judicial review for negative duress findings. Congressional action puts to rest the contention over whether the lack of the word “voluntary” necessarily equals strict liability, which has raged since *Fedorenko*. It also helps prevent executive agencies from making rules that aggressively restrict asylum, because the plainer and more humanitarian-focused the law, the more difficult it will be for the executive to argue that harsh regulations are “consistent with the statute.”³³³

After Congress acts, DHS and DOJ will need to create implementing regulations to make certain that the augmented statute is practicable and administered similarly across various situations. In the absence of Congressional action, the agencies can still engage in rulemaking to incorporate a duress exception to the persecutor bar. As analyzed above, both the statutory language and much of the relevant Article III caselaw promote an interpretation of the bar that affords such an exception. Recent rulemakings have served to limit asylum rather than expand it,³³⁴ and the agencies should reverse course and restore full protections, substantive and procedural, to those who wish to apply.³³⁵ Reality on the ground impedes much empirical research about what happens to failed asylum seekers. Individuals who fail their credible fear interviews and are immediately returned without further proceedings will not be meaningfully monitored, because they do not have pending cases. Off US soil and outside US jurisdiction, they may be all but unreachable to their former attorneys, if indeed they were ever represented – almost ninety-nine percent of credible fear interviews occur without the presence of counsel.³³⁶ Because of

333. For example, using “the generic-relief regulation” instead of the asylum-specific parts of the C.F.R. has been considered an insufficient procedural safeguard for asylum cases. See Ellison, *supra* note 27, at 231.

334. See Securing the Border, 89 Fed. Reg. 48,710 (Jun. 7, 2024) (codified at 8 C.F.R. §§ 208, 235, and 1208); Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023) (codified at 8 C.F.R. §§ 208, 1003, and 1208); see also Securing Our Borders, Exec. Order No. 14,165, 90 Fed. Reg. 8467, §§ 6-7 (resuming the Migrant Protection Protocols and ending the use of CBP One).

335. With the understanding that this is unlikely to occur for the next few years, I provide an aspirational prescription, nonetheless.

336. See *Asylum Processing Rule Cohort Reports – June 2024*, *supra* note 56, at tbl. “Credible Fear Claims.”

these facts, the government will never know what the devastating and cruel impacts of its current policy could be. Should the agencies take note of these ill effects, though, promulgating a rule still accomplishes three goals. It forces the government to research, formulate, and defend its position, as well as consider public opinion; it establishes a policy over a several-year period that, if successful, might inspire a future administration to retain it; and it creates more uniformity and notice in the system by removing duress interpretations from the preference of individual adjudicators – even if that happens to be the Attorney General. An Administrative Procedure Act rulemaking can codify the existence, elements, burdens, and standards of a duress exception to the persecutor bar and require that the government adhere to them.

Without legislation or rulemaking, adjudicatory precedent remains an available course. Because former Attorney General Garland never issued an opinion in *Negusie* after he recertified it, the BIA will continue to follow former Attorney General Barr's, sharply foreclosing a duress exception.³³⁷ Fortunately, the post-*Chevron* landscape offers an opportunity for respondents and their counsel to challenge the Barr opinion, petitioning for judicial review when they believe they have been persecutor barred unfairly. The Article III tribunal will now be expected to engage in full, independent statutory construction, and respondents can spell out every reason a duress exception may properly be read into § 1158(b)(2)(A)(i). *Skidmore* deference³³⁸ may still rule the day, if Barr's lengthy opinion is found persuasive by the court, or if government counsel buttresses it with other arguments in favor of strict liability. Article III judges being generalists, one may fear that they will defer to the executive more expansively than they need to under *Skidmore*, especially given the traditional view of immigration as an executive sovereign prerogative.³³⁹ Fortunately, respondents' counsel have many tools in their arsenal, factual and legal, to render the government's arguments unpersuasive. In order to assuage a judge's fear that an exception might swallow the admittedly safety-promoting rule, advocates should lay out a concrete and narrow enough test to apply to an individual applicant's duress claim. The elements might appear as follows.

- (A) To establish that the alien should be exempted from the persecutor bar because he acted under duress, he must establish by a preponderance of the evidence that:

337. See *Negusie*, 28 I&N Dec. 120 (A.G. 2020).

338. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Before *Chevron*, Article III courts applied this case in admin law related decisions by deferring to the government if its interpretation was persuasive. One imagines that courts will revert to this standard now that *Chevron* has been overruled. Under this framework, the BIA and AG's opinions will probably be respected and thoroughly considered, but not followed to the exclusion of excellent arguments by respondents' counsel.

339. See, e.g., *Landon v. Plasencia*, 429 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has *no constitutional rights* regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." (emphasis added)) (citing authorities, including *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

- (1) He acted under threat of death or serious bodily injury to himself or others;
 - (2) He reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting;
 - (3) He had no reasonable opportunity to escape or otherwise frustrate the threat;
 - (4) He did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and
 - (5) He took all reasonable steps, in the totality of the circumstances, to minimize the harm he inflicted, OR
 - (6) The alien was a minor at the time he committed the acts in question.
- (B) If the alien establishes, through the facts of his underlying asylum claim, that he was conscripted into a mandatory universal military service program, he shall be presumed to have acted under duress. The government may rebut this presumption by a substantial probability.
- (C) If the alien was between eighteen and twenty-six at the time he committed the acts in question, all ambiguities shall be resolved in the alien's favor.

With an ongoing refugee crisis of such magnitude, both in terms of the degree of suffering and the number of people affected, every stakeholder in a receiving country like the United States has a role to play in ameliorating it. Congress; the President; the principal officers of DHS and DOJ; individual asylum officers and immigration judges; individual counsel, both for respondents and the government; and American voters must all face the metaphorical “undiscover'd country”³⁴⁰ of revising the asylum system to be more in line with its original goals of refugee protection while maintaining public safety, as well as congruent with modern exigencies and understandings. When that is accomplished, the real country that asylum seekers have endured so much to reach will be opened to those who prove their merit, and American society will begin to benefit from their bravery and persistence.

340. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.