Female Refugees: Re-Victimized by the Material Support to Terrorism Bar

Kara Beth Stein
University of the Pacific, McGeorge School of Law

Follow this and additional works at: https://scholarlycommons.pacific.edu/mlr
Part of the Human Rights Law Commons, and the Immigration Law Commons

Recommended Citation
Kara B. Stein, Female Refugees: Re-Victimized by the Material Support to Terrorism Bar, 38 McGeorge L. Rev. (2016).
Available at: https://scholarlycommons.pacific.edu/mlr/vol38/iss3/7
Comment

Female Refugees: Re-Victimized by the Material Support to Terrorism Bar

Kara Beth Stein*

TABLE OF CONTENTS

I. INTRODUCTION ............................................................................................................. 816

II. REFUGEE PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT ...... 818
   A. Defining Terms: Refugees and Asylum Seekers ....................................................... 818
   B. Historic Development of Refugee Law ................................................................. 819
   C. The Refugee Act of 1980 ....................................................................................... 820
   D. Terrorism Provisions of the Immigration and Nationality Act ......................... 821
      1. Congressional Intent: Excluding Those Who Seek to Harm the United States ................................................................. 821
      2. The Result: Excluding the Victims of Terrorists .............................................. 822

III. THE MATERIAL SUPPORT PROVISION UNJUSTIFIABLY DENIES FEMALE REFUGEES ADMISSION TO THE UNITED STATES .............................................. 823
   A. Application of the Material Support Provision Has a Grave Impact on Women ...................................................................................... 823
      1. Women Coerced to Provide Domestic Services Are Denied Admission ................................................................................ 823
      2. Women Coerced By Sexual Assault or Threat of Sexual Assault Are Denied Admission ......................................................... 824
         a. Rape: A Gender-Based Use of Force .............................................................. 824
         b. Rape: A Weapon of Intimidation ................................................................... 825

IV. APPLICATION OF THE MATERIAL SUPPORT PROVISION CONTRAVENES CONGRESSIONAL INTENT AND VIOLATES INTERNATIONAL LAW ................. 827

V. RECOGNITION OF A DURESS EXCEPTION TO THE MATERIAL SUPPORT PROVISION .................................................................................................................. 829
   A. Fraud Prevention in the Refugee Resettlement Context ........................................ 830

* J.D. candidate, University of the Pacific, McGeorge School of Law, to be conferred 2008; B.A. in Political Science with Spanish Minor, California Polytechnic State University, San Luis Obispo, 2003. I would like to extend my deepest thanks to my amazing parents, Jeff and Pam Stein; my sister, Julia Stein; my grandparents, Gladys Burton, Sol and Rosanna Stein, and Willard and Dee Burton; and my boyfriend, Jason Conaway. Each has not only encouraged me to pursue my academic goals, but has also given me continuous emotional support. Thanks also to my faculty advisors, Professors Omar Dajani and Ruth Jones, who provided me with invaluable feedback throughout the writing process.

815
I. INTRODUCTION

Post-September 11th anti-terrorism legislation may have strengthened our borders but at what cost? The Report on Women’s Human Rights in the United States Under the International Covenant on Civil and Political Rights, submitted to the United Nations Human Rights Committee, explained that while such legislation may have “imposed a major barrier to terrorists trying to enter through the U.S. refugee program, it has the perverse effect of denying protection to thousands of asylum seekers with meritorious claims who are the very victims of terrorism.” The report featured the story of a Liberian woman who was abducted, gang-raped, and held hostage by the rebel group Liberians United for Reconciliation and Democracy (LURD). LURD forced the woman to perform domestic services for them, including cooking and doing their laundry. While the woman qualifies in all other ways to be admitted to the United States as a refugee, the Department of Homeland Security (DHS) may deny her admission because it classifies her acts of forced domestic service as providing material support to a terrorist organization.

Like the Liberian woman, “there are currently thousands of refugees living in overseas camps and in urban slums that have been placed on hold by DHS and the United Nations High Commission for Refugees (UNHCR)” until the

1. WORKING GROUP, REPORT ON WOMEN’S HUMAN RIGHTS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2006) [hereinafter REPORT ON WOMEN’S HUMAN RIGHTS] (on file with the McGeorge Law Review). The report was produced by a coalition of non-governmental organizations that work on gender equality issues in the United States. Id.
2. Id. at 26.
3. Id. at 25.
4. Id.
5. Id.; see also HUMAN RIGHTS INST., GEORGETOWN UNIV. LAW CTR., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR ii (2006) [hereinafter UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR] (noting that DHS’s broad interpretation of the material support provision has had a detrimental effect on the UNHCR global resettlement program). UNHCR reports that those affected by the material support bar include: (1) “a Sri Lankan refugee who was forced to pay a ransom for his release after he was kept hostage by the Liberation Tigers of Tamil Eelam (LTTE),” (2) “anti-communist Alzados who challenged Castro’s rule in Cuba,” (3) “Vietnamese Montagnards who supported the United States military during the Vietnam War,” and (4) “more than seventy percent of all Colombian refugees.” Id.
6. REFUGEE COUNCIL USA, BACKGROUNDER: THE MATERIAL SUPPORT (AND RELATED BARS)
The material support problem is fixed. In addition to overseas refugees, DHS has put 598 asylum cases, over 550 family reunification petitions, and 4085 adjustment of status cases on hold because of the material support bar.

Providing material support is one of various ways that individuals are charged with terrorist activity under the law. The Immigration and Nationality Act (INA) states that material support includes, but is not limited to, providing terrorists or terrorist organizations with shelter, transportation, communication, funds, false documents, identification, weapons, explosives, or training. The list of goods and services that invoke the material support bar is “non-exhaustive [and includes] no limiting principles.” DHS has interpreted material support to include domestic services, such as cooking and cleaning.

Various scholars and organizations in the refugee rights field are calling for a duress exception to the material support provision. Except for an inadequate governmental waiver, there are no available defenses for those forced to provide material support. The 109th Congress adjourned in December 2006 without

---


7. Id. ("The nationalities of those groups affected include Burmese Karen, Karenni, and Chin, Colombians, Montagnards, Hmong, Cubans, Liberians, Sierra Leons, Congolese, Eritrean, and Ethiopians.").


9. REFUGEE COUNCIL USA, supra note 6.

10. See Nezer Interview, supra note 8 (noting that the number of adjustment of status cases put on hold for material support reasons is rapidly increasing, having doubled between November 2006 and January 2007).

11. 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI) (West 2005); REPORT ON WOMEN’S HUMAN RIGHTS, supra note 1, at 25 (discussing the adverse effects the material support provision has on women).


14. See REPORT ON WOMEN’S HUMAN RIGHTS, supra note 1, at 25 (citing the Liberian woman’s case mentioned above). United States courts have generally agreed with DHS’s interpretation. See also UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, supra note 5, at 10 ("[P]roviding food and setting up tents for a religious congregation, which may have included members of the religion’s militant sect, constituted material support to a terrorist organization.") (citing Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004)).

15. See BLACK’S LAW DICTIONARY 542 (8th ed. 2004) (defining duress as “a threat of harm made to compel a person to do something against his or her will or judgment”).

16. See, e.g., ELEANOR ACER ET AL., HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM 11 (2006) ("Congress should clarify immigration law definitions to . . . explicitly recognize that duress is a defense to the material support bar."); Jennie Pasquarella, Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees, 13 HUM. RTS. BRIEF 28, 31 (2006) ("The lack of an explicit duress defense and DHS’s refusal to read one into the material support bar is inconsistent with U.S. and international law."); REPORT ON WOMEN’S HUMAN RIGHTS, supra note 1, at 29-30 ("The United States must provide for a duress and de minimus defense or exception to the ‘material support’ bar for refugees and asylum applicants who have involuntarily provided material support to alleged terrorist groups."); UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, supra note 5, at 45 ("[T]he lack of duress and de minimus exceptions . . . have had the effect of punishing particularly vulnerable refugees and validating the tactics of terrorist organizations.").

17. See infra Part VI (acknowledging that under existing law the material support bar can be waived but
passing House Resolution (HR) 5918, introduced by Representative Joe Pitts, which proposed amending the INA to create a duress exception to the material support provision. Representative Pitts plans to reintroduce the legislation during the 110th session, and this Comment advocates its passage.

Part II of this Comment sets out the refugee statutory framework, including the material support provision. Part III discusses how the material support provision unjustifiably denies female refugees admission to the United States. Part IV explores how the current application of the material support provision contravenes both congressional intent and international law. Part V examines the feasibility of a duress exception to the material support provision. Part VI proposes a number of ways that the government could implement the duress exception.

This Comment examines the need for a duress exception from a gendered perspective. It argues that precluding resettlement in the United States unjustly impacts women by characterizing incidents of forced domestic servitude or other actions taken due to sexual assault-based coercion as material support. This injustice merits enacting a duress exception to the material support provision.

II. REFUGEE PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT

A. Defining Terms: Refugees and Asylum Seekers

The INA defines a refugee as “any person [outside of his or her country of nationality] who is unable or unwilling to return . . . 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 Secretary of

20. See infra Part VI (discussing the Pitts legislation in further detail).
21. Although this Comment focuses specifically on how the material support provision impacts women, the provision’s broad interpretation clearly has the effect of barring both men and women from obtaining refugee status.
22. In addition to excluding those who have provided material support under duress, the material support provision also, in some instances, excludes those who have fought alongside the United States. Thomas G. Wenski, Editorial, Fix Glitches that Lock out Deserving Refugees; Bishop Wenski: Laws’ Unintended Effect Denies the Innocent a Home, ORLANDO SENTINEL, Jan. 22, 2007, at A11. “[The U.S. PATRIOT Act and REAL ID Act] also label as ‘terrorists’ those who may have been legitimate, if irregular, combatants in struggles supported at one time by U.S. policies. Id. “For example, 1960s-era anti-Castro Cuban freedom fighters are barred from United States citizenship by these new laws.” Id. “Likewise, Hmong, Montagnards and other ethnic minorities who fought alongside U.S. forces during the Vietnam War are now told that they have no place in our country.” Id. “Courageous individuals supporting pro-democracy groups resisting the military junta in Burma and other oppressive regimes also have been denied asylum here.” Id. While the impact of the material support provision on “freedom fighters” is an important topic, it goes beyond the scope of this Comment, which focuses specifically on the need for a duress exception to the material support provision.
23. Note that while the term “refugee” is defined in 8 U.S.C.A. § 1101(a)(42), the admission process for
Homeland Security or the Attorney General may grant asylum to a noncitizen who has applied for asylum, meets the statutory definition of a refugee, and who is physically present in the United States. Once the noncitizen is admitted to the United States as a refugee or has been granted asylum and has remained in the United States for one year, she generally may adjust her status to become a lawful permanent resident (LPR), commonly known as a green card holder.

B. Historic Development of Refugee Law

In 1952, Congress passed the INA to establish the standards for immigrant admission into, and removal from, the United States. However, the original INA of 1952 did not mention refugees. Instead, the legal framework for the protection of persons fleeing persecution finds its roots in international law. On July 28, 1951, most members of the United Nations signed the Convention Relating to the Status of Refugees ("the Convention"). The United States, however, did not sign the Convention in 1951; instead, it became a party to the Convention indirectly in 1968 by acceding to the 1967 United Nations Protocol Relating to the Status of Refugees ("the Protocol"). Under the Protocol, the United States agreed to the principle of nonrefoulement—not to expel or return refugees to a country where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. Notably, while the Convention prohibits

24. 8 U.S.C.A. § 1101(a)(42); LEGOMSKY, supra note 23, at 2. Legomsky uses the term “noncitizen” instead of the word “alien” because it “conveys essentially the same technical meaning without the same baggage.” Id. This Comment follows Legomsky’s example and uses the term “noncitizen,” except when quoting statutory language referring to “aliens.”

25. See also LEGOMSKY, supra note 23, at 917-18. Legomsky refers to refugees who are outside of United States territory as “offshore” refugees and refers to those who have already managed to reach the United States shores on their own as “onshore” refugees. Id. He also notes that using the term “refugee” to refer both to “overseas refugees” and those who have already reached the United States as “asylum-seekers” can be a source of confusion since, under the statutory definition, every asylee is also a refugee. Id. The term refugee will be used in this Comment to refer both to refugees who were granted admission prior to their entry into the United States and to those who were granted asylum when already present in the United States.


refoulement, nothing in the Convention requires that member countries admit refugees who are outside their borders. Accordingly, a party country that initially refuses to admit overseas refugees does not violate the Convention.

C. The Refugee Act of 1980

Twelve years after the United States acceded to the Convention, Congress passed the Refugee Act of 1980 ("Refugee Act"), which brought United States statutory law into conformity with the Convention. The Refugee Act went beyond codifying the principle of nonrefoulement; it created a means "to deal comprehensively with both refugees applying from overseas and those applying for asylum within the United States." By passing the Refugee Act, Congress intended to bring the United States into compliance with its duties under the Convention Relating to the Status of Refugees. In addition to seeking to comply with the United States' obligations under international law, Congress also wanted to provide refugees with a safe haven based on the principle that individuals have the right to live free from persecution based on the enumerated categories. Title I, section 101(a) of the Act recognized that the United States has historically played an important role in responding to the urgent needs of those suffering persecution in their homelands and affirmed the United States' commitment to promoting opportunities for resettlement of refugees within its borders.

32. Id. at 926.
33. Id. at 939 (citing Refugee Act of 1980, Pub. L. No. 96-212, § 305(a), 94 Stat. 102 (codified at 8 U.S.C.A. § 1231(b)(3) (West 2005)); see also Foster v. Neilson, 27 U.S. 253, 314 (1829) (explaining that when the terms of a treaty require the parties to perform a particular act, the legislature must execute the contract before it can become enforceable as a rule of law for the court).
If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol relating to the Status of Refugees... Id. (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987)); Carolyn P. Blum, A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms, 15 BERKELEY J. INT'L L. 38, 38 (1997)); Joan Fitzpatrick, The International Dimension of U.S. Refugee Law, 15 BERKELEY J. INT'L L. 1, 6 (1997) ("[T]he legislative history of the Refugee Act is replete with general expressions of intent to bring U.S. law into conformity with international norms."). But see James C. Hathaway & Anne K. Cusick, Refugee Rights Are Not Negotiable, 14 GEO. IMMIGR. L.J. 481, 507 (2004) ("[T]he impetus to pass a new law was congressional preoccupation to constrain the practice of the executive branch to admit large numbers of refugees on the basis of its parole authority.").
A House Judiciary Committee report stated that, in addition to helping overseas refugees, Congress' intent was [T]o insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and [the committee] feels it is both necessary and desirable that United States domestic law include the asylum provision in the instant legislation.\textsuperscript{38}

D. Terrorism Provisions of the Immigration and Nationality Act

1. Congressional Intent: Excluding Those Who Seek to Harm the United States

In the past decade, Congress amended the INA to exclude noncitizens who intend to harm the United States. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act that expanded the class of inadmissible noncitizens to include "representatives" and "members" of terrorist organizations.\textsuperscript{39} By passing the USA PATRIOT Act of 2001\textsuperscript{40} and the REAL ID Act of 2005, Congress again expanded the class of individuals considered inadmissible to the United States for having engaged in terrorist activities.\textsuperscript{41} Under the INA, an individual "engaged in terrorist activity" if she committed various enumerated acts, "including providing material support to terrorists or terrorist organizations."\textsuperscript{42} By broadening the class of individuals that can be found to have

\textsuperscript{38} Heebner, supra note 27, at 553.

\textsuperscript{39} W. Aaron Vandiver, Comment, Checking Ideas at the Border: Evaluating the Possible Renewal of Ideological Exclusion, 55 EMORY L.J. 751, 761 (2006).

\textsuperscript{40} Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, § 411(a), 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].


\textsuperscript{42} REPORT ON WOMEN'S HUMAN RIGHTS, supra note 1, at 25.

\textsuperscript{43} Id.; see also 8 U.S.C.A. § 1182(a)(3)(B)(vi) (West 2005). The statute defines a terrorist organization as an organization:

(1) designated under section 219 [9 U.S.C.A. § 1189]; (2) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in sub-clauses (I) through (VI) of clause (iv); or (3) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in sub-clauses (I) through (VI) of clause (iv).

\textit{Id.}

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B) [8 U.S.C.A. § 1182(a)(3)(B)]) or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C.A. 2656f(d)(2))), or retains the capability and intent to engage in terrorist activity or terrorism; and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United
engaged in terrorist activity, Congress sought “to bar from asylum or other relief those who truly mean to provide aid to actual terrorist organizations.” While it is appropriate for the government to exclude those who intentionally aid terrorists and threaten national security, the material support bar goes much further.

2. The Result: Excluding the Victims of Terrorists

At first glance, excluding those who provided material support to terrorist organizations seems like a sensible national security measure. However, DHS’s broad interpretation of the material support provision has resulted in the State Department’s failure to resettle thousands of refugees and asylum seekers who clearly pose no security threat because their so-called material support was rendered involuntarily. When a refugee is offered safe haven and removed from the coercive environment that caused participation, the impetus for providing support to terrorists is removed. Such refugees are no more likely to support terrorists prospectively than a person who has never provided such assistance.

At DHS’s urging, courts have essentially read out the word “material” from “material support” and found that any type of support can constitute material support for purposes of excluding a noncitizen from the United States. For example, in Singh-Kaur v. Ashcroft, the court held that a noncitizen who provided food and shelter to terrorists had provided material support. Although Circuit Judge Fisher dissented, arguing that characterizing providing food and tents as material support transmutes mere “support” into “material support,” the

---

States.

Id. § 1189(a).

44. ACER ET AL., supra note 16, at 3-4 (emphasis added).

45. See generally id. at 9.

Despite the President’s target of resettling 70,000 refugees in fiscal year 2006, only 31,912 refugees were brought to safety during this year. These low arrivals—and the even lower arrivals expected for next year—are primarily the result of the increased application of the material support bar. The Refugee Council USA has recently documented the impact of this bar on the U.S. resettlement program—noting that the delay in resolving the material support issue has “nearly shut down” the U.S. refugee admissions program for Colombian refugees.

Id.; see also Rachel L. Swarns, Terror Laws Cut Resettlement of Refugees, N.Y. TIMES, Sept. 28, 2006, at A1 (noting (1) that the refugee resettlement for fiscal year 2006 was “the lowest since refugee admissions plunged for nearly two years after the Sept. 11, 2001 terrorist attacks” and (2) quoting the State Department’s statement acknowledging that “the number of refugees admitted to the United States fell 23 percent this year” because of provisions in the USA PATRIOT Act and REAL ID Act); see also H.R. Res. 5918, 109th Cong. § 1(5) (2006) (“In fiscal year 2006, an estimated 10,000 to 15,000 vulnerable refugees who would otherwise be admitted will be denied entry because of the unintended consequences of overbroad bars on admission.”).

46. See infra Part V (explaining why a coerced actor does not pose a threat to society).

47. See, e.g., Singh-Kaur v. Ashcroft, 385 F.3d 293, 301 (3d Cir. 2004).

48. Id. (holding that providing food and setting up tents for a religious congregation, which may have included terrorist members, constituted material support to a terrorist organization).

49. Id. at 304-05 (Fisher, J., dissenting). Judge Fisher does not “disagree with the majority that the use of ‘including’ before the laundry list means that the enumerated listing is not exhaustive.” Id. Judge Fisher, however, argues that the “fact that the listing of types of ‘material support’ is not exhaustive does not transform
majority reasoned that since U.S.C.A. § 212(a)(3)(B)(iv)(VI) uses the term "including," Congress intended an expansive definition of the categories.\textsuperscript{50} Moreover, since there is currently no duress exception to the material support provision, even refugees who have been coerced to provide domestic services against their will are excluded.

III. THE MATERIAL SUPPORT PROVISION UNJUSTIFIABLY DENIES FEMALE REFUGEES ADMISSION TO THE UNITED STATES

A. Application of the Material Support Provision Has a Grave Impact on Women

Interpreting material support to include the provision of domestic services has a grave impact on women seeking resettlement in the United States.\textsuperscript{51} Women who meet the INA’s definition of refugee and pose no national security risk are unjustifiably being denied admission to the United States for having provided material support to terrorists.\textsuperscript{52}

1. Women Coerced to Provide Domestic Services Are Denied Admission

Opposing forces routinely kill men when taking over a community during times of war.\textsuperscript{53} Since many men are killed immediately upon invasion by opposing forces, fewer men than women are later vulnerable to being coerced to provide domestic services.\textsuperscript{54} Men who are not killed after invasion are still less likely to be coerced to provide domestic services for various reasons. In many developing countries, gender stereotypes continue to govern the roles of men and women in society.\textsuperscript{55} Entrenched cultural expectations result in girls and women performing domestic chores for the men in their households.\textsuperscript{56} Since domestic

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} Id. at 298.
\textsuperscript{52} See infra Part III.
\textsuperscript{53} See \textit{e.g.}, Chris McGreal, \textit{Hundreds of Thousands Raped in Congo Wars}, GUARDIAN UNLIMITED, Nov. 14, 2006, http://www.guardian.co.uk/congo/story/0,1947147,00.html#article_continue (on file with the McGeorge Law Review) (noting that accounts given by survivors in the Congo stated that many women and girls were raped while men were killed).
\textsuperscript{54} This Comment does not suggest that men are unaffected by invading forces. Instead, it argues that since men are oftentimes killed quickly upon invasion, they are killed before they can be coerced into providing services, domestic or otherwise, to their attackers.
\textsuperscript{55} Meghana Shah, \textit{Notes, Rights Under Fire: The Inadequacy of Human Rights Instruments in Combating Dowry Murder in India}, 19 CONN. J. INT’L L. 209, 222 (2003) (“With the gross burden of providing basic needs to their citizens still unfulfilled, many developing nations hesitate to take on the additional responsibility of un-stereotyping women’s and men’s roles. . . .”).
chores such as cooking and cleaning are seen as women's work, invaders force women to cook and clean for them. Consequently, due to cultural practices, women seeking refugee status disproportionately face the issue of inadmissibility for providing material support by way of domestic services.57

Consider the Liberian woman mentioned above. Since she is a person outside of her country of nationality and is unable to return to Liberia because of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, she seemingly qualifies to receive immigration relief as a refugee.58 Yet due to predominant gender roles in her environment, her attackers forced her to provide domestic services, and this may deny her the opportunity for safe refuge.59 Thus, while the material support provision is facially gender-neutral, it is primarily women who are prevented from resettling in the United States because their forced domestic servitude is characterized as material support.

2. Women Coerced By Sexual Assault or Threat of Sexual Assault Are Denied Admission

Finding refugees inadmissible for rendering material support to terrorist organizations when coerced by sexual assault or threat of sexual assault denies women the protection ordinarily provided to those seeking refugee status or asylum.60 The material support provision, while not facially discriminatory against women, disproportionately impacts women because women are more likely than men to be coerced to act under threat of sexual assault.61

a. Rape: A Gender-Based Use of Force

Rape is a gender-based use of force that has historically been used against women and continues to be used against them.62 The conclusion that rape is

blogs/005067/ (on file with the McGeorge Law Review) (observing that in the Himba tribe, a semi-nomadic people who live in the Namibian desert, the girls undertake several household duties from cooking to cleaning to walking long distances for water).

57. This Comment does not advocate a standard that would exclude the claims of men or women who provided material support in forms other than domestic services. Instead, it seeks to highlight how characterizing domestic services as material support has a particularly grave impact on women.

58. See generally Kenneth L. Cain, The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant, 21 HUM. RTS. Q. 265, 269 (1999) (noting that the persecution suffered by many Liberian women was ethnically or politically motivated).

59. REPORT ON WOMEN'S HUMAN RIGHTS, supra note 1, at 25.

60. Id. at 25-26.

61. See infra Part III.2 (discussing rape as a gender-based use of force and weapon of intimidation).

predominantly a crime against women is supported by national statistics showing that the percentage of female rape victims is significantly higher than the percentage of male rape victims. "Females—adults and children—make up the overwhelming population of victims of sexual assault." Shifting focus to the international arena, the Report on Women's Human Rights in the United States Under the International Covenant on Civil and Political Rights notes that, in many parts of the world, women frequently become non-combatant rape victims when their communities experience military attack.

One author argues that "[w]omen are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender." Supporting that conclusion, another author states that women are raped because they are women: "[A]ll of the precautions in the world cannot eradicate the single biggest risk factor for rape—their femaleness."

b. Rape: A Weapon of Intimidation

Not only is rape disproportionately committed against women, but rape and threat of rape have been used to intimidate and coerce women. The 1998 International Criminal Tribunal for Rwanda (ICTR) indictment of Jean-Paul Akayesu was ground-breaking, not only because Akayesu was the first person convicted of rape as a crime against humanity, but also because the ICTR drew comparisons between sexual violence and torture. The ICTR stated that, like torture, rape is used to intimidate or obtain control over a person. In 2003, the

63. See Office for Victims of Crime, Nat'l Victim Assistance Academy, U.S. Dep't of Justice, Chapter 10: Sexual Assault (2002), http://www.ojp.usdoj.gov/ovc/assists/nvaa2002/chapter10.html (on file with the McGeorge Law Review) ("More than 52% of all rape/sexual assault victims were females younger than twenty-five."). A National Violence Against Women Survey found that, "[u]sing a definition of rape that includes forced vaginal, oral, and anal sex[…] one out of six U.S. women and one out of thirty-three U.S. men have experienced an attempted or completed rape as a child and/or adult."). Id.

64. MacKinnon, supra note 62, at 1302.


66. Id.; see also Katharine T. Bartlett & Deborah L. Rhode, Gender and Law: Theory, Doctrine, and Commentary 805 (4th ed. 2006) ("Estimates of the number of rapes that occurred during the Yugoslavian conflict range from 20,000 to 50,000. This magnitude of sexual violence is not unprecedented; Pakistani soldiers raped an estimated 200,000 women during the war over Bangladesh’s independence, and Japanese soldiers raped at least 20,000 Chinese women in the ‘rape of Nanking’ from 1937-1938.").


71. Id. ("Rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."); see also Report on Women's Human Rights, supra note 1, at 25 (noting that invading forces also use rape as a tool of oppression and exploitation). They rape women to ‘humilia[te]’ their men and their nation, for ‘ethnic cleansing,’ or for
United States Congress noted that the military regime in Burma used “rape as a weapon of intimidation and torture against women.” Since rape is committed predominantly against women and is used as a “weapon of intimidation,” it logically follows that some invading forces will rape women to ensure compliance with their demands.

One Liberian woman described the horror she experienced when sixteen armed men burst into her apartment. After taking everything of monetary value, the true nightmare began. The woman’s son, daughter, and two nephews were with her at the time of the attack. A boy with a hammer came towards her and said, “This woman is for me.” First, he hit her in the head with the hammer. When he pulled down her jeans in order to rape her, her young daughter started screaming. “[T]he man grabbed [her] screaming child from [her] side and knocked her down and started raping her. He just grabbed her... raped her to death, and laid her to the side.”

DHS has failed to “recognize the gender-specific vulnerability of rape or threat of rape as a duress defense” to the material support bar. This position renders these women, already the victims of the most horrendous persecution, prisoners in the country that persecuted them. At minimum, this policy prevents protecting victims from further sexual assault. When the facially gender-neutral material support provision of the INA encounters the reality of women’s vulnerability to sexual assault, the law has the effect of discriminatory exclusion of the women who are most deserving of immigration relief.

Ultimately, precluding resettlement in the United States unjustly impacts women by characterizing incidents of forced domestic servitude, or other actions

---


74. Id.

75. Id.

76. Id.

77. Id.

78. Id.

79. Id.; see also Int'l Rescue Comm., Issue in Focus: “Material Support” and Refugees, July 7, 2006, http://www.theirc.org/news/latest/material-support-and.html (on file with the McGeorge Law Review) (noting that “West African women who have been raped by rebels and forced to provide them with housing” are being denied refugee status and asylum because they have provided material support to terrorists); see also U.S. Conference of Catholic Bishops, Action Alert: Material Support—Legal Restrictions on Protecting the Persecuted, http://www.nccbuscc.org/mrs/materialsupport0406.shtml (last visited Aug. 11, 2007) (on file with the McGeorge Law Review) (noting that the material support provision “prohibits women and children victimized through rape and torture from seeking necessary protections from the United States government”).

80. REPORT ON WOMEN’S HUMAN RIGHTS, supra note 1, at 25.
taken due to sexual assault-based coercion, as material support. This injustice merits the enactment of a duress exception to the material support provision.

IV. APPLICATION OF THE MATERIAL SUPPORT PROVISION CONTRAVENES CONGRESSIONAL INTENT AND VIOLATES INTERNATIONAL LAW

Refugee rights advocates persuasively argue that Congress intended the terrorism-related amendments to the INA to “bar from asylum or other relief those who truly mean to provide aid to actual terrorist organizations.” Representative Sesenbrenner (5th District of Wisconsin) states that “the law aimed to keep out those who intended to cause harm to the United States while continuing to ‘giv[e] hope and shelter to people who can legitimately claim and receive asylum.’” Although congressional intent was not to penalize the victims of terrorists, the current application of the material support provision has had that effect.

DHS’s interpretation and application of the material support provision contradicts Congress’ intent to provide shelter and refuge to those “who can legitimately claim and receive asylum.” First, since the women who provide domestic services under duress do not voluntarily provide aid to terrorist organizations, nothing in their actions suggest that they intend to harm to the United States. Accordingly, these women likely pose no national security threat. Second, women who otherwise meet the statutory definition of a refugee, and thus can legitimately claim immigration relief, are being denied admission under the material support provision. The persecutors deprive these women of both their bodily integrity, through violent sexual assault, and their individual autonomy by forcing them to provide domestic services. Given DHS’s current interpretation of material support, the United States government incidentally ensures that the women cannot secure safe haven from the terror forced upon them.

In addition to contravening congressional intent, DHS’s interpretation of the material support provisionrenders the United States non-compliant with its obligations under the Convention. Under Article 33 of the Convention, the

81. See supra Part III.
82. ACER ET AL., supra note 16, at 3-4 (emphasis added).
84. Id. at 3-4; see also Philip Peters, Editorial, Why We Need To Fix Real ID Act, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 4, 2006, at 23A (noting how recent statutory changes effectively “slam a door in the face of many legitimate refugees and asylum seekers”).
87. REPORT ON WOMEN’S HUMAN RIGHTS, supra note 1, at 25-26.
88. Id.
United States cannot expel a refugee to a country where she will face persecution unless there are reasonable grounds for regarding the refugee as a danger to the security of the United States.\textsuperscript{90} No rational grounds exist to regard a refugee as a national security threat for providing material support under duress.\textsuperscript{91} If an asylum seeker who poses no threat to national security is denied asylum for having provided material support and is subsequently expelled to a country where she will face persecution, that act violates the Convention’s principle of nonrefoulement.\textsuperscript{92}

The \textit{Charming Betsy} canon, a well-established principle of interpretation, states that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”\textsuperscript{93} This canon is applied regularly by the Supreme Court\textsuperscript{94} and is highlighted in the influential \textit{Restatement (Third) of the Foreign Relations Law of the United States}.\textsuperscript{95} Since DHS’s interpretation of the material support provision violates international law in the asylum context, application of the \textit{Charming Betsy} canon requires the use of another possible interpretation of the material support provision to avoid violating international law.

The interpretation suggested by this Comment, requiring material support be provided voluntarily to bar admission or serve as a ground for exclusion, is consistent with Article 33 of the Convention. Expelling a noncitizen who voluntarily provided material support to a terrorist organization is justified under Article 33 because such a noncitizen can fairly be characterized as a danger to the security of the United States.\textsuperscript{96} The logical argument is that since the noncitizen intended to aid a terrorist organization in the past, she may currently or in the future intend to aid terrorists.\textsuperscript{97} In contrast, a refugee who has involuntarily provided material support under threat of sexual assault or other force intended to avoid the threatened bodily harm.\textsuperscript{98} Since such a noncitizen never intended to aid

\textsuperscript{90} \textit{Id.} at art. 33.
\textsuperscript{91} \textit{See supra} Part II.D.2; \textit{infra} Part V.
\textsuperscript{92} Convention Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19, U.T.S. 6223, T.I.A.S. No. 6577. It is not the act of denying asylum but rather the act of sending the refugee back to a country where she will face persecution that violates art. 33 of the Convention.
\textsuperscript{93} \textit{See} Curtis A. Bradley, \textit{The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law}, 86 \textit{GEO. L.J.} 479, 482 (1998) (quoting Murray v. Schooner Charming Betsy, 6 U.S. 118 (1804)).
\textsuperscript{94} \textit{See} Ralph G. Steinhardt, \textit{The Role of International Law as a Canon of Domestic Statutory Construction}, 43 \textit{VAND. L. REV.} 1103 n. 266 (1990) (citing several Supreme Court cases in which noncitizens’ treaty rights were interpreted not to be affected by subsequent United States legislation to avoid conflict between treaty obligations and domestic law).
\textsuperscript{95} Bradley, \textit{supra} note 93, at 482.
\textsuperscript{96} \textit{See} Hathaway & Cusick, \textit{supra} note 35, at 536 (“Because refugee status is uniformly defined in international law, it is simply not open to the United States to establish an additional ground of disqualification defined in purely domestic terms.”).
\textsuperscript{97} \textit{See infra} Part V (comparing individuals coerced to provide material support under duress and individuals coerced to commit criminal acts under duress).
\textsuperscript{98} Regardless of whether the refugee is actually able to avoid the threatened severe bodily harm, her
a terrorist organization in the past, she is unlikely to aid terrorists once resettled in the United States because the coercive circumstances are removed.

V. RECOGNITION OF A DURESS EXCEPTION TO THE MATERIAL SUPPORT PROVISION

Duress is defined broadly as “a threat of harm made to compel a person to do something against his or her will or judgment[.]” The law recognizes duress in many contexts. To demonstrate why justice requires recognition of a duress exception to the material support provision, it is necessary to consider why duress is typically recognized as a legal defense.

While the elements of the duress defense differ by jurisdiction, a criminal defendant generally will be acquitted of any charge, other than murder, if the criminal act was committed under the following circumstances:

1. another person threatened to kill or grievously injure the actor or a third party, particularly a near relative, unless she committed the offense;
2. the actor reasonably believed that the threat was genuine; (3) the threat was “present, imminent and impending” at the time of the criminal act; (4) there was no reasonable escape from the threat except through compliance with the demands of the coercer; and (5) the actor was not at fault in exposing herself to the threat.

Both utilitarian and retributivist theories explain why defendants who commit crimes under the above circumstances are generally acquitted. Utilitarian theorists argue that since a coerced party does not possess a criminal disposition, the coerced party does not require incapacitation or rehabilitation. Instead, utilitarians maintain that since a coercing party possesses the criminal disposition, it is the coercing party and not the coerced party who should be incapacitated or rehabilitated. Just as a criminal defendant acting under duress lacks a criminal disposition, a refugee who is coerced to provide material support to terrorists lacks the intent either to assist terrorists or to harm the United States. Because a coerced refugee lacks any intent to cause harm to the United States, the material support she provided should not serve as a reason to exclude her from the United States.

---

100. This Comment specifically addresses duress in the contexts of criminal and immigration law.
102. Id. at 297-98.
103. Id. at 300.
104. Id.
105. See generally id. (noting that it is the coercing party, not the coerced party, that has the criminal disposition).
Retributivists argue that criminal defendants who act under duress do not deserve punishment.\textsuperscript{106} By recognizing a duress defense in the criminal context, society excuses a coerced actor’s unlawful conduct if the actor “accedes to a threat that, upon honest self-reflection, most of us doubt we would have the moral fortitude to resist either.”\textsuperscript{107} Refugees who have provided material support to prevent severe bodily injury to themselves or to their loved ones similarly should not be blamed or held responsible for their acts. Because “[a]ny one of us would hand over money if someone held a gun to our child’s head,” it is inappropriate to penalize refugees who make comparable decisions.\textsuperscript{108} The United States government argues that a duress exception should not be recognized because government officials “can’t be sure that refugees’ tales of coercion are true.”\textsuperscript{109}

A. Fraud Prevention in the Refugee Resettlement Context

There is undoubtedly a problem with noncitizens committing fraud within the refugee resettlement program.\textsuperscript{110} Resettlement officials believe that some seeking resettlement fabricate claims to secure resettlement and others claim non-family members as relatives to assist non-family members in securing resettlement.\textsuperscript{111} In this context, noncitizens may be tempted to claim that they committed acts of material support under duress when in fact the acts were committed voluntarily. While fraud prevention remains a legitimate concern for

\textsuperscript{106} Id. at 301.

\textsuperscript{107} Id. at 302 (“[Judges] are often compelled to set up standards that we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy” (citing Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884))).

\textsuperscript{108} Gaouette, supra note 19, at A1 (quoting Michael Horowitz, a Hudson Institute fellow).

\textsuperscript{109} Id.


\textsuperscript{111} MARTIN, supra note 110, at 153 (“[A]pplicants for resettlement may tailor their stories to fit what they understand to be the requirements of the [resettlement] program...”); see also Cianciarulo, supra note 110, at 497 (“Our efforts to verify the claimed family relationships of all refugee applicants... are continuing and have resulted in the identification of numerous cases involving identity fraud and relationship misrepresentation.” (citing Oversight of U.S. Refugee Program: Hearing Before the S. Subcomm. on Immigr., 109th Cong. (2004), http://judiciary.senate.gov/testimony.cfm?id=1310&wit_id=2960 [hereinafter Oversight of U.S. Refugee Program Hearing] (on file with the McGeorge Law Review) (statement of Eduardo Aguirre, Jr., Director, U.S. Citizenship and Immigr. Servs.).)
the refugee resettlement program, safeguards are in place to lower the likelihood that noncitizens will obtain refugee status fraudulently.\textsuperscript{112}

Jana Mason of the International Rescue Committee discussed the fraud detection measures in place in the United States: "Refugees already go through so many security checks. They are fingerprinted, run through FBI databases... they're a very tightly screened group."\textsuperscript{113} In addition to screening refugees before they are admitted to the United States, a number of DHS agencies work within the United States to detect fraud.

The Homeland Security Act of 2002 (HSA) brought almost all the immigration agencies under the umbrella of DHS.\textsuperscript{114} The agencies charged with enforcement of immigration laws include the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE).\textsuperscript{115} HSA also created the United States Citizenship and Immigration Services (USCIS).\textsuperscript{116}

CBP inspections are conducted at all "ports of entry" into the United States, while ICE enforces immigration law within the interior of the United States.\textsuperscript{117} Since these agencies enforce the immigration laws, they are charged with investigating fraud.\textsuperscript{118} In addition to the fraud investigations carried out by CBP and ICE, USCIS recently created the Office of Fraud Detection and National Security that works closely with ICE to address the issue of immigration fraud.\textsuperscript{119}

United States Code section 1182(a)(6)(C) states that any alien who procures admission into the United States by fraud is inadmissible.\textsuperscript{120} Section 1227(a)(1)(A) provides that "[a]ny alien who at the time of entry... was... inadmissible by the law existing at such time is deportable."\textsuperscript{121} Accordingly, any alien who obtained admission into the United States by fraudulent means may be rendered deportable. When a noncitizen has violated a provision of the INA by committing fraud, the appropriate enforcement agency, upon discovering the fraud, may commence removal proceedings.\textsuperscript{122}

\begin{flushleft}
\textsuperscript{112} See infra Part V.B.
\textsuperscript{113} Gaouette, supra note 19, at A1.
\textsuperscript{116} Id.
\textsuperscript{117} LEGOMSKY, supra note 23, at 3.
\textsuperscript{118} See, e.g., Oversight of U.S. Refugee Program Hearing, supra note 111.
\textsuperscript{119} Id.
\textsuperscript{120} 8 U.S.C.A. § 1182(a)(6)(C) (West 2005).
\textsuperscript{121} Id. § 1227(a)(1)(A).
\textsuperscript{122} Id. §§ 1182(a)(6)(c), 1227(a)(1)(A).
\end{flushleft}
B. Balancing Fraud Prevention and Recognition of a Duress Defense

In many areas of the law, duress exceptions create a temptation to commit fraud. Existing criminal and immigration law provide a few examples.

1. Criminal Law

The defense of duress is well recognized in criminal law throughout the United States. For example, People v. Lovercamp held that an inmate who escaped from prison was entitled to a duress instruction at trial for unlawful escape because prison authorities failed to take action to protect her from physical and sexual assault by other inmates after she notified authorities. The court held that the prisoner would be entitled to the duress instruction if escaping from prison was the only viable choice available to the defendant when faced with the alternative of suffering imminent physical and sexual assault.

A criminal defendant who faces great deprivation of liberty has an incentive to fraudulently claim that she committed a crime under duress, even though her act was completely voluntary. Would it then be appropriate to eliminate the duress defense from criminal law? As mentioned in the beginning of Part V, recognition of a duress defense in the criminal law context derives from two theoretical bases: retributivism and utilitarianism. Eliminating a duress defense in criminal law squarely conflicts with the retributivist principle that a coerced actor does not deserve to be punished. If the duress defense were eliminated, many people lacking moral culpability would be wrongfully held responsible for their coerced actions. Eliminating the duress defense from criminal law would also conflict with the utilitarian principle that punishing a coerced actor will not deter her from committing future criminal acts.

Quite appropriately, the court in Lovercamp held that the trial court erred in denying the defendant a duress instruction when she escaped prison to avoid imminent physical and sexual assault. Similarly, women who provide material support under threat of sexual assault seek to avoid further traumatic harm and
are thus not deserving of punishment from the retributivist perspective. Additionally, since these women provided acts of material support only under duress, declaring them inadmissible to the United States will not deter them from committing future acts of material support. On the contrary, refusing their admission may leave women in a situation where they will again be forced to submit to the demands of terrorists.

2. Immigration Law Relating to Communism

The INA makes past or present membership in, or affiliation with, the Communist Party, or any other totalitarian party, a specific ground for inadmissibility. Despite making Communist members generally inadmissible, U.S.C.A. § 1182(a)(3)(D)(i) provides an exception for those who became members involuntarily "for purposes of obtaining employment, food rations, or other essentials of living." Someone who joined the Communist Party because she was politically aligned with its ideals might fraudulently claim that she joined involuntarily to prevent a bar to her admission to the United States. Apparently, despite this risk, Congress found that the opportunity to provide a safe haven to those legitimately fleeing communist regimes outweighed the possibility that some might fraudulently assert that their party membership was involuntary.

This duress issue similarly applies in the refugee context. Like those who joined the Communist Party to acquire access to food and shelter, those who provided material support to a terrorist organization under duress rendered such support for their own survival. Communists seeking to immigrate likely were considered an equal threat as those who provided material support to a terrorist organization. In 1952, when Congress enacted U.S.C.A. § 1182(a)(3)(D)(i), it did so at least in part as a response to the "'Red Scare' that followed a series of mail-bombings said to be the work of Bolshevik sympathizers." Despite the fear that Communists would harm the United States, Congress decided that offering a safe haven to those fleeing communism outweighed the risk that some might procure admission fraudulently. Similarly, refugees who provided material support to a terrorist organization under duress should not be barred from admission because some might fraudulently procure admission into the country.

130. Id. § 1182(a)(3)(D)(ii) (providing an exemption by operation of law or when the person applying was a member of the group when under the age of sixteen).
3. Immigration Law Relating to Violence Against Women

The Violence Against Women Act (VAWA) offers spouses who are victims of abuse committed by United States citizens or lawful permanent residents (LPR) an opportunity to "self-petition," rather than having to rely on their abusive spouses for immigrant petitions.132 VAVA offers a battered noncitizen spouse the opportunity to become a LPR, even if she entered and remained in the United States unlawfully.133 Among other requirements to obtain LPR status, the petitioner must prove good moral character.134 USCIS may forgive acts or convictions that would otherwise pose good moral character bars135 if an admissibility or deportability waiver136 would be available for such conduct and if the conduct was "connected to . . . having been battered or subjected to extreme cruelty."137

Many undocumented people in the United States live in fear of detection and deportation.138 Accordingly, VAVA provides an incentive for them to commit fraud to attain LPR status and enjoy the privileges granted to LPRs but denied to the undocumented. The pertinent incentives created by VAVA include both the incentive to fraudulently accuse a citizen or LPR spouse of abuse and to fraudulently assert that crimes committed by the self-petitioner were committed under the coercion of the citizen or LPR batterer.139 In passing VAVA, Congress likely acknowledged that the potential to commit fraud exists but found that it was insufficient to defeat this law. Had Congress failed to enact VAVA, it would have denied many people with legitimate claims the opportunity for relief.140 Ensuring that the law provides a safe haven to those suffering from violence is a clear theme underlying VAVA.141 Similarly, female refugees are often victims of the most heinous and violent acts.142 Denying protection to many who can

---

133. 8 U.S.C.A. § 1255(m) (West 2005).
135. Id. § 1101(f) (describing habitual drunkards, gamblers, perjurers, and convicts as persons who shall not be regarded as having good moral character).
136. See infra Part VI (discussing the waiver process).
141. See 8 U.S.C.A. § 1154 (providing battered noncitizens a way to leave their batterers and obtain lawful status in the United States).
142. Consider the case of the Liberian woman mentioned supra Part I.
legitimately be classified as refugees, solely to prevent some from obtaining fraudulent admission, perpetuates violence against women. This is something Congress did not intend.\textsuperscript{143}

Pointing to an incentive to commit fraud as a reason for denying refugees the right to assert a defense of duress fails to treat refugees equally with those similarly situated in the criminal, Communist immigrant, or VAWA context. Although finding refugees inadmissible for providing material support to a terrorist organization is a general policy that can be justified, refusing to afford applicants the opportunity to demonstrate the existence of extenuating circumstances unreasonably departs from the pattern of compassionate consideration given in extraordinary cases. To avoid this result, the duress exceptions already recognized in immigration and criminal law should be extended to those who are coerced to provide material support to terrorist organizations.

C. Confines of the Proposed Duress Exception

Critics may worry that recognizing a duress exception to the material support provision may pave the way for dangerous war criminals to enter the United States under the guise that they were coerced to support terrorists.\textsuperscript{144} Recognizing a duress exception to the material support provision does not, in effect, grant any person admission into the United States without regard to her past acts. A duress exception to the material support provision, if recognized, would not be without limits.

First, those who have participated in the persecution of others on account of “race, religion, nationality, membership in a particular social group, or political opinion” may not be classified as refugees and are consequently ineligible for asylum.\textsuperscript{145} The United States Supreme Court has held that those who persecute others are inadmissible regardless of whether the persecution is rendered involuntarily.\textsuperscript{146} In \textit{Fedorenko v. United States}, the government successfully

\textsuperscript{143} See supra Part II.C and accompanying text.

\textsuperscript{144} See infra Part V.C.

\textsuperscript{145} 8 U.S.C.A. § 1101(a)(42); id. § 1158(b)(2)(A)(i); see also \textit{In re McMullen}, 19 I. & N. Dec. 90 (BIA 1984), aff’d on other grounds, McMullen v. Immigration and Naturalization Servs., 788 F.2d 591, 594 (9th Cir. 1986) (noting that McMullen, a former member of the Provisional Irish Republican Army (PIRA), an anti-British terrorist organization operating in Northern Ireland and Great Britain, was denied asylum and withholding of removal by the United States because he had assisted in the persecution of others on account of political opinion); \textit{Legomsky, supra} note 23, at 1069 (noting that denying refugee status to those who have persecuted others does not appear to violate the Convention’s principle against nonrefoulement because the Convention intended to exclude war criminals, “whose trials were a recent memory at the time the Convention was drafted” in 1951).

\textsuperscript{146} Matthew Happold, \textit{Excluding Children From Refugee Status: Child Soldiers and Article IF of the Refugee Convention}, 17 AM. U. INT’L L. REV. 1131, 1158 n.153 (2002) (noting that Congress did not intend “to allow a concentration camp guard, whether service as such was voluntary or involuntary, to remain in the United States” (citing Fedorenko v. United States, 449 U.S. 490 (1981))).
obtained denaturalization of Fedorenko because, as a concentration camp guard during World War II, he had participated in the persecution of camp inmates.\textsuperscript{147} The Supreme Court ruled that duress was not an available defense for an individual who engaged in the persecution of others.\textsuperscript{148} In the \textit{Matter of Rodriguez-Majano}, the Board of Immigration Appeals (BIA) followed the precedent set by \textit{Fedorenko} when it held that “[t]he participation or assistance of an alien in persecution need not be of his volition to bar him from relief [from deportation].”\textsuperscript{149}

Second, asylum and withholding of removal\textsuperscript{150} are unavailable when the Attorney General finds reasonable grounds for believing that the noncitizen is a danger to the security of the United States.\textsuperscript{151} Consequently, a noncitizen who has been convicted of a serious crime, which would render her a danger to the United States, is ineligible for asylum.\textsuperscript{152}

Therefore, worries that recognizing a duress exception to the material support provision might pave the way for dangerous war criminals to enter the United States are unfounded because refugees are inadmissible and/or removable when they have persecuted others or are deemed a danger to the United States.

\section*{VI. PROPOSED SOLUTIONS}

To ensure that refugees victimized by terrorists are not needlessly re-victimized by the government refusing their admission, material support rendered under duress should not serve as a bar to resettlement in the United States. A requirement that material support be voluntary to justify barring admission can be achieved in three ways: Congressional amendment to the material support provision of the INA; a DHS-issued interpretation of the material support provision; or judicial decision.\textsuperscript{153}

A congressional amendment to the material support provision of the INA not only appears to be a possible way to ensure protection of vulnerable refugees, but it is the best solution.\textsuperscript{154} On July 27, 2006, Representative Joe Pitts (Sixteenth Congressional District of Pennsylvania) proposed an amendment to the INA that...
sought to protect vulnerable refugees and asylum seekers. House Resolution (HR) 5918 proposed amending U.S.C.A. § 1182(a)(3)(B)(iv)(VI) to create a duress exception to the material support provision. Had HR 5918 been enacted into law, an individual would be found inadmissible for committing:

an act (other than as the result of undue coercion or duress) that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training to a terrorist organization.

While the 109th Congress adjourned in December 2006 without passing the Pitts legislation, on January 5, 2007, Representative Pitts announced his plan to reintroduce the legislation during the 110th session. Representative Pitts describes the bill as “sensible, sound policy” and sees no reason it “can’t be considered by the new Democrat-controlled Congress.”

However, not all lawmakers support the Pitts amendment. Senator Arlen Specter argues that an amendment to the material support provision is unnecessary because the Secretary of State has the discretion to waive the provision under existing law. On a case-by-case basis, the Secretary of State and the Secretary of Homeland Security, after consultation with each other and the Attorney General, can decide not to apply the material support bar to a particular individual or group. In support of his assertion, Senator Specter notes that Secretary of State Condoleezza Rice recently exercised the waiver to allow for resettlement of 9300 ethnic Karen refugees housed in a Thailand camp who backed the Karen National Union.
Moreover, in January 2007, DHS Secretary Michael Chertoff announced that as a result of a shift in DHS’s policy toward granting material support waivers, he will consider “applications for refugee status, asylum, or adjustment of status ‘from some who have provided material support to [terrorist] groups while under duress.’” Chertoff elected to waive the material support bar with regards to “the following eight groups: the Karen National Union and Karen National Liberation Army, Chin National Front and Chin National Army, Chin National League for Democracy, Kayan New Land Party, Arakan Liberation Party, Tibetan Mustangs, Cuban Alzados, and Karenni National Progressive Party.” Recognizing that some people who are not a threat to national security are excluded by the material support provision, Rachel Brand, head of the Justice Department’s legal policy office, argues that “‘[t]he answer . . . is to waive them in, not change the definition [of material support] . . . . Narrowing the definition would make it harder to exclude people who are actual threats.’”

Senator Specter and Rachel Brand fail to mention a number of important facts that demonstrate why the discretionary waiver is insufficient. First, although Congress gave the Secretary of State the authority to make exceptions to the material support bar, the authority had never been used until a waiver was provided for the Karen refugees. In fact, the authorization for resettlement of the Karen refugees only occurred after several years of interagency meetings. Speaking at a hearing on Iraqi Refugees, Senator Leahy “rejected arguments that the waiver process is sufficient, pointing out that, in the years since these bars were first expanded, the administration has used the waiver only under pressure and then sparingly.” Essential to the new waiver policy is that DHS “has defined three sets of terrorist groups, two of which list organizations by name. But the third set, known as tier three, is defined by action and encompasses any group of two or more people, organized or not, that uses any device or weapon to cause injury to person or property.” Under the new waiver policy, DHS may

164. DHS May Lift Material Support Bar in the Case of Certain Applicants for Refugee Status, Asylum, or Adjustment of Status, 84 INTERPRETER RELEASES 191 (Jan. 22, 2007).
165. Id.
169. Senate Judiciary Committee Holds Hearing on Iraqi Refugees, 84 INTERPRETER RELEASES 267, 267 n.76 (Jan. 29, 2007) (citations omitted).

This authority was first exercised in May 2006 when Secretary of State Condoleezza Rice granted an exemption for certain ethnic Karen refugees from Burma . . . . This exemption was extended to a second group of Karen refugees in September 2006 . . . . Secretary Rice exercised her authority for the third time on October 11, 2006, when she exempted certain Chin refugees from Burma living in Malaysia, Thailand, and India from the bar . . . .

Id.
waive the material support bar for refugees and asylum seekers “who supported Tier 3 terrorist groups under duress, but only if the material support policy is the only obstacle to their asylum claim.”

Although Paul Rosenzweig, Acting Assistant DHS Secretary for Internal Affairs, claims that DHS’s waiver “policy changes will take care of a number of the most heart-wrenching cases,” Jennifer Daskal, United States Advocacy Director for Human Rights Watch, “point[s] out that people coerced to help groups specified by name on the terrorist lists would still have no way of winning refuge in the United States.” Daskal also notes that even DHS’s revised waiver policy still leaves those forced to provide a glass of water to a member of a designated terrorist group or forced into sexual slavery to such a group defined and barred entry to the United States as a ‘terrorist’—a result that makes no sense from a human rights, moral or national-security perspective.

Since the waiver has been used only sparingly, thousands and thousands of refugees who pose no security risk have not received a waiver.

Second, since the waiver can only be granted when three governmental departments are in agreement, deciding whether to exercise the waiver is a decision that heavily taxes governmental resources. Due to the cumbersome

171. Id.
174. Id.; see also Suzanne Gamboa, Bush Administration Eases Anti-Terrorism Restrictions on Asylum, Legal Residency, ASSOCIATED PRESS, Jan. 12, 2007 (“If indeed DHS does finally set up a process for refugees to be exempted from these provisions, it will be a welcome step forward. It is, however, a long overdue step and a step that fails to cover many of the most vulnerable refugees” (quoting Eleanor Acer, Director of Refugee Protection for Human Rights First)); Rachel Swarns, Administration Offers Plan to Ease Rules on Asylum, N.Y. TIMES, Jan. 12, 2007, at A18 (noting that “Colombians forced to support their country’s largest rebel group, the Revolutionary Armed Forced of Colombia” are ineligible for the waiver because the Revolutionary Armed Forced of Colombia appears on the government’s list of terrorist groups).
175. See also UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, supra note 5, at 9.

[The United Nations High Commissioner for Refugees] (UNHCR) Assistant High Commissioner for Protection who visited Ecuador last year and observed the resettlement program first-hand, recently stated that, as a result of the material support bar, resettlement of Colombians outside the region has dropped by seventy-five percent while the number of referrals made by UNHCR has fallen to twenty-five percent of former levels. The Assistant High Commissioner cautioned that the United States refusal to accept refugees with material support concerns could have a stigmatizing effect on these refugees, who would normally be eligible for resettlement in the United States and other countries.

Id. (citations omitted).
176. See also Senate Judiciary Subcommittee Hears from Witnesses Regarding the U.S. Refugee Admissions Program, 83 INTERPRETER RELEASES 2212 (Oct. 16, 2006) (noting that Father Kenneth Gavin, Vice-Chair of Refugee Council U.S.A. and National Director of Jesuit Refugee Service U.S.A., argued that the
nature of the waiver process, it is highly unlikely that the Secretary of State would exercise the waiver on an individual basis. Even DHS’s new waiver policy ‘contains no process for individuals to apply for a waiver.’ Given the tendency of the waiver to benefit groups over individuals, refugees who have been singled out for persecution but do not belong to a large group will be unlikely to be granted discretionary relief.

Third, it is important to note that unlike the definitional change proposed by Congressman Pitts, the discretionary waiver may be revoked at any time and for any reason. Refugee rights groups argue that refugees admitted via waiver will never feel entirely secure inside the United States because the government may revoke the waiver at any time. Refugees, by definition, have already been persecuted in their home countries; the United States government compounds the trauma already suffered and perpetuates refugees’ feelings of insecurity by refusing to grant permanent resettlement—a consequence of exercising the waiver rather than changing the definition of material support.

Finally, the fact that the material support bar has crippled the United States resettlement program by preventing thousands of refugees from resettling when they pose no security threat demonstrates that the mere fact that the Secretary of State has the power to waive the material support provision is insufficient to solve the problem. If Congress does not swiftly fix the problem it created, “tens of thousands of human rights victims will … pay the price.”

Since much control over immigration law has traditionally been vested in Congress, the best way to correct the current injustice would be for Congress to...
statutorily clarify that the material support must be voluntarily provided to serve as a bar to admission. If Congress embraces the explicit mandate advocated by Congressman Pitts, DHS and the courts would certainly follow the mandate.

Should Congress fail to adopt the Pitts amendment, DHS could bring about a similar result by abandoning its reliance on the waiver policy, which keeps deserving refugees waiting indefinitely and, instead, developing a legal interpretation of material support that bars from admission those having provided voluntary material support to a terrorist organization but not those who provided material support under duress. Following this approach, DHS would stop impeding admission of refugees who provided material support under duress. These individuals would be granted admission regardless of whether or not the coerced support was provided to a tier one, two, or three terrorist organization. This approach is logical because the victim of a listed terrorist organization poses no greater threat to national security than any other terrorist victim seeking admission. Since USCIS, ICE, and CBP are all required to follow DHS's administrative regulations, if such regulations are issued, enforcement of the material support provision would be limited to finding inadmissible those who voluntarily provided material support.

Finally, The BIA and the federal courts could interpret the current material support provision narrowly to exclude acts accomplished by duress, as suggested above. Scholars have noted that “statutory language is imperfect . . . and issues may arise from a statute that legislators did not contemplate.” Judges who determine that the statute is unclear and open to judicial interpretation may look to legislative history as a guide for interpretation. Since proponents of the REAL ID Act publicly stated that the purpose of the Act was “to keep out those who intended to cause harm to the United States while continuing to give ‘hope and shelter to people who can legitimately claim and receive asylum,’” a judicial interpretation that admits refugees who committed acts of material support under duress would be consistent with legislative intent and, therefore, appropriate for the courts to adopt.

186. See Letter from Friends Comm. on Nat'l Legislation, to Michael Chertoff, DHS Secretary (Jan. 6, 2006) (on file with the McGeorge Law Review) (“We urge the Administration to develop a legal interpretation of 'material support' that is in line with a common-sense reading of the statute, one that exempts bona fide refugees from the bar to admission.”); see also ACER ET AL., supra note 16, at 12.


188. Id.

VII. CONCLUSION

Although legitimate reasons may exist for cautiously scrutinizing those seeking admission to the United States as refugees, the United States has historically played an important role in responding to the urgent needs of those suffering persecution in their homelands and should continue to welcome with open arms people who can persuasively demonstrate that their cause is just and their hearts are without blame. Nineteenth century poet Emma Lazarus captured this fervent value best in her verse that graces the Statue of Liberty and welcomed untold throngs of immigrants at Ellis Island:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!

The current interpretation of the material support provision ensures that victims of persecution are needlessly re-victimized by the United States Government’s refusal to admit them as refugees. These individuals are refused admission despite the fact that their conduct was undertaken not to further a political agenda or harm any interest of the United States but to survive. Such behavior lacks the intent to further terrorist aims and poses no national security threat. Precluding refugee resettlement in the United States based on coerced participation in domestic servitude, or other actions taken due to sexual assault-based coercion, unjustly impacts women. From both a human rights and women’s rights perspective, this injustice merits the enactment of a duress exception to the material support provision, as proposed by Representative Pitts.

