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## Not Necessarily Unlawful: Asylum Seekers' Ability to Raise the Necessity Defense to Charges of Unlawful Entry

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# Not *Necessarily* Unlawful: Asylum Seekers’ Ability to Raise the Necessity Defense to Charges of Unlawful Entry

Daniel Hatoum

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## I. Introduction

The U.S.-Mexico Border is often considered a war zone—one a Honduran migrant, “Ian Doe,” knows too well.<sup>1</sup> Ian fled his home country of Honduras because members of narco-trafficking gangs were coming to murder him.<sup>2</sup> Ian was an anti-narco police officer, and was sure that criminal gangs were trying to kill him since the gang had accidentally murdered his brother thinking that his brother was him.<sup>3</sup> Before Ian could come to the United States to seek refuge from the people out to kill him, he first had to make his way through Mexico.<sup>4</sup> While in Mexico, Ian was

<sup>1</sup> Declaration of Ian Doe at 1, *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (19-cv-00807) [hereinafter Declaration of Ian Doe].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

detained and robbed by corrupt Mexican officials, and<sup>5</sup> witnessed rampant violence against migrants.<sup>6</sup> For example, some of the people Ian traveled with were killed in Mexico.<sup>7</sup> When Ian finally made it to the border and complied with the immigration rules by self-reporting that he had arrived at the border and wished to seek asylum, he was told he had to remain in Mexico for the pendency of his case.<sup>8</sup> Ian was justifiably afraid for his life, not just because of the violence in Mexico, but because he was also concerned that the people who wanted him dead in Honduras would not have much trouble finding him in Mexico.<sup>9</sup>

Ian's story is commonplace at the border. Today, tens of thousands of immigrants are fleeing violence in their home country—often sacrificing everything they have—to seek refuge in the United States.<sup>10</sup> The largest groups of these immigrants are coming from the Latin American Triangle, which is made up of El Salvador, Guatemala, and Honduras.<sup>11</sup> Their stories are generally different, but their similarities are significant. This is because many are fleeing different forms of violence in their home country, whether it be, for example: political violence (usually affecting the indigenous); gang violence; or femicide (the targeted killing of women).<sup>12</sup> Also, these asylum seekers, much like Ian, risk and face similar types of dangers for entering and passing through Mexico.<sup>13</sup>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4, 6.

<sup>7</sup> Declaration of Ian Doe at 4, 6, *Innovation Law Lab*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (19-cv-00807).

<sup>8</sup> *Id.* at 5–6.

<sup>9</sup> *Id.*

<sup>10</sup> Anastasia Moloney, *Latin America Grapples with Migrant Exodus that Looks set to Worsen in 2019*, REUTERS (Dec. 27, 2018 1:23 AM), <https://www.reuters.com/article/us-latam-immigration-forecast-analysis/latin-america-grapples-with-migrant-exodus-that-looks-set-to-worsen-in-2019-idUSKCN1OQ0DO>.

<sup>11</sup> Julian Borger, *Fleeing a Hell the US Helped Create: Why Central Americans Journey North*, THE GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy>.

<sup>12</sup> *Id.*

<sup>13</sup> Madeline Joung, *'Do Not Travel Due to Crime and Kidnappy.' Here's Where the U.S. Is Sending Asylum Seekers*, TIME ONLINE (July 11, 2019), <https://time.com/5624551/remain-mexico-asylum-doctors-borders/>.

Previously, such persons would flee to a port-of-entry somewhere along the U.S. border, declare their justified intention to seek asylum, and be admitted into the U.S. in some form or fashion.<sup>14</sup> Recently, however, the United States implemented two policies that have eliminated this option: 1) the “Remain in Mexico policy”<sup>15</sup>, and the proliferation of “Safe Third Country” Agreements with countries in the Latin American Triangle.<sup>16</sup>

The “Remain in Mexico Policy,” officially known as the “Migration Protection Protocol,” (“MPP”) requires that “asylum seekers arriving at ports of entry on the U.S.-Mexico Border will be returned to Mexico to wait (in Mexico) for the duration of their U.S. Immigration Proceedings.”<sup>17</sup> Such proceedings can take years, and they often do.<sup>18</sup> It is unsurprising, then, that some asylum seekers chose to merely cross the border of the United States to safety, rather than remain in a nation where they continue to face the risk of persecution, life, and limb.

Further, the proliferation of “Safe Third Country” agreements with countries in the Latin American Triangle takes advantage of a special provision of the INA to make it impossible for certain asylum seekers to attain asylum in the United States.<sup>19</sup> Safe Third Country Agreements “require migrants to seek asylum in the countries they travel through rather than in the United States.”<sup>20</sup> The United States has signed these

<sup>14</sup> Llona Bray, *Can You Request Asylum At the U.S. Border?*, ALLLAW (2020), <https://www.alllaw.com/articles/nolo/us-immigration/can-you-request-asylum-border.html>.

<sup>15</sup> Bob Owen, *‘Remain in Mexico’ Policy Inflicts Needless Cruelty*, HOUSTON CHRONICLE (Nov. 18, 2019), <https://www.houstonchronicle.com/opinion/editorials/article/Remain-in-Mexico-policy-inflicts-needless-14843659.php>.

<sup>16</sup> Peniel Abe, *The dangers of Trump’s “safe third country” agreements in Central America*, AMERICAN FRIENDS SERVICE COMMITTEE (Jan. 16, 2020), <https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america>.

<sup>17</sup> *All About the “Remain in Mexico” Policy*, LATIN AMERICA WORKING GROUP, <https://www.lawg.org/all-about-the-remain-in-mexico-policy/>.

<sup>18</sup> Priscilla Alvarez, *Immigration Court Backlog Exceeds 1 Million Cases, Data Group Says*, CNN (Sept. 18, 2019 5:42 PM), <https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html>.

<sup>19</sup> Abe, *supra* note 16.

<sup>20</sup> Claire Felter & Amelia Cheatham, *Can ‘Safe Third Country’*

agreements with Guatemala, El Salvador, and Honduras.<sup>21</sup> Thus, if an asylum seeker from El Salvador passes through Guatemala (which they would need to if traveling by foot or by car), that asylum seeker would be sent back to Guatemala to adjudicate their asylum claim there.<sup>22</sup> Further, this deportation happens quickly, prior to any hearing.<sup>23</sup> But in deporting people from Honduras or El Salvador back to Guatemala, the policy takes the asylum seeker “out of the frying pan and into the fire,” as asylum seekers returned to these Latin American countries are faced with gang violence, femicide, and ethnic violence.<sup>24</sup>

Interestingly enough, the U.S. has taken these agreements to an even further extreme, by claiming that *Mexican* asylum seekers can be sent to Guatemala instead of the United States.<sup>25</sup> Faced with either the “Remain in Mexico” policy, or inevitably being returned to violence under the “Safe” Third Country Agreements, it is unsurprising that many immigrants do not further risk their lives by crossing the border outside of a port of entry.

Sadly, in doing so, these migrants run afoul of the criminal law system. Specifically, the United States has two laws that criminalize crossing the border. The first is 8 U.S.C. § 1325, “Improper entry by alien,” which punishes illegal entry.<sup>26</sup> The second is 8 U.S.C. § 1326, “Reentry of removed aliens,” which criminalizes illegal *RE*-entry (the process of crossing the border to come back to the United States), after one has already been deported.<sup>27</sup> An individual can face time behind bars if found

*Agreements Resolve the Asylum Crisis?*, COUNCIL ON FOREIGN RELATIONS (Aug. 29, 2019), <https://www.cfr.org/in-brief/can-safe-third-country-agreements-resolve-asylum-crisis>.

<sup>21</sup> Nicole Narea, *Trump’s Agreements in Central America are Dismantling the Asylum System as We Know it*, VOX (Nov. 20, 2019, 3:08 PM), <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>.

<sup>22</sup> Felter & Cheatham, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> Borger, *supra* note 11.

<sup>25</sup> Nicole Narea, *The Trump Administration will Start Sending Mexican Asylum Seekers to Guatemala*, VOX (Jan. 8, 2020, 1:40 PM), <https://www.vox.com/policy-and-politics/2020/1/8/21055282/trump-asylum-guatemala-mexico-safe-third-agreement>.

<sup>26</sup> 8 U.S.C. § 1325 (1996).

<sup>27</sup> 8 U.S.C. § 1326 (1996).

guilty of either crime.<sup>28</sup> Yet, many who hear the stories of people crossing the U.S.-Mexico border may justifiably believe that the asylum seekers committed the lesser of two evils by crossing into the United States instead of taking on the risk of either remaining in Mexico or being returned to the Latin American Triangle.

This author agrees and recognizes that the law contains an escape valve from criminal censure for such persons: the necessity defense. This is also known as “the lesser of two evils defense.”<sup>29</sup> To succeed under this criminal defense, a defendant need only convince a jury that the action they took was the lesser of two evils.<sup>30</sup>

Thus, the thesis of this Article is that in the wake of policies such as the “Remain in Mexico Policy” and the “Safe Third Country Agreements,” asylum seekers, when charged with illegal entry and re-entry, can produce enough evidence to pose to a jury whether they are not guilty by reason of necessity. At which point, the jury can decide whether the asylum seeker broke the law, or instead, merely committed an act that was the lesser of two evils. In other words, this Article presents that both the law and the facts support putting the question of necessity to a jury when an asylum seeker is charged with illegal entry or illegal re-entry. The first section of this Article discusses the illegal entry and re-entry laws, as well as their history of enforcement. The second section reviews the necessity defense, and describes its differences from its close cousin, the duress defense. The third part of this Article will analyze the law as applied to asylum seekers and present a test case that demonstrates the strength of this defense, especially in the wake of the U.S.’s current policies. The final section will respond to concerns of the Article’s position.

## II. Illegal Entry and Illegal Re-Entry

It is illegal to enter the United States without proper

<sup>28</sup> *See id.*

<sup>29</sup> *Choice of Evils Defense Law and Legal Definition*, USLEGAL (2019), <https://definitions.uslegal.com/c/choice-of-evils-defense/>.

<sup>30</sup> Stephen S. Schwartz, *Is there a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1259 (2008).

authorization, or to re-enter the United States once one has already been deported.<sup>31</sup> Illegal entry is a misdemeanor, and illegal re-entry is a felony.<sup>32</sup> These laws have been criticized for punishing asylum seekers and migrants since their inception, which is no surprise, given their roots<sup>33</sup> These laws stem from a 1929 proposal by Senator Coleman Livingston Blease of South Carolina, who was a known white supremacist, as well as a proponent of pro-lynching.<sup>34</sup> This racist history is also reflected in the laws' current application. For example, in the 2016 fiscal year, ninety-nine percent of individuals convicted of illegal re-entry were Latino.

Since its inception, prosecutions of the law were relatively low until the Bush Administration launched a plan to increase the amount of prosecutions.<sup>35</sup> This program remains today, and is known as "Operation Streamline."<sup>36</sup> The goal of the program is to fast-track asylum seekers into truncated hearings.<sup>37</sup> For example, "under Operation Streamline, dozens of defendants at a time are charged, plead guilty, and ultimately convicted and sentenced of the federal misdemeanor of illegal entry, all within a matter of hours and sometimes even minutes."<sup>38</sup> This method of trying cases has allowed the number of prosecutions for illegal entry to increase rapidly.<sup>39</sup> The rapid rise is reflected in the numbers: "40,000 in 2007, to 80,000 in 2008, rising to nearly 98,000 in 2013 under the Obama administration."<sup>40</sup> That means that under the Obama Administration, for each weekday (not excluding holidays), the United States must have prosecuted 375 cases a *day*.

Not to be outdone, in his first week in office, President

<sup>31</sup> § 1325; § 1326.

<sup>32</sup> *Id.*

<sup>33</sup> Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SECURITY (July 18, 2019), <https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *US: Reject Mass Migrant Prosecutions*, HUMAN RIGHTS WATCH (July 28, 2015, 11:13 PM), <https://www.hrw.org/news/2015/07/28/us-reject-mass-migrant-prosecutions>.

<sup>39</sup> Acer, *supra* note 33.

<sup>40</sup> *Id.*

Trump signed an order making the prosecution of immigration-related crimes a “high priority,” yet again sharply increasing the number of prosecutions.<sup>41</sup> As part of this initiative, the Trump Administration announced its “Zero Tolerance Policy,” which subjected all immigrants to prosecution, even those immigrants who arrived with children.<sup>42</sup> As a result, over “three thousand children were taken from parents” so their parents could be referred for prosecution.<sup>43</sup> It is accurate to say that the separation of children from their parents at the border was caused by the Trump Administration’s zealous attempt to enforce illegal entry laws.

The illegal entry statutes have also attracted attention for violating international law.<sup>44</sup> Under the 1951 Convention Relating to the Status of Refugees, signing countries are prohibited from punishing asylum seekers and refugees for illegally entering the country.<sup>45</sup> The United States has not only ratified this treaty, but was one of the leaders in drafting it, making the treaty binding on the United States.<sup>46</sup> Despite these obligations, the Customs and Border Protection (“CBP”) has regularly referred asylum seekers for prosecution, even though those asylum seekers who made their intentions to seek asylum exceedingly clear.<sup>47</sup> This practice is so widespread that the DHS Inspector General reported in 2015 that the United States was violating its international treaty obligations.<sup>48</sup>

Despite all of this, the law does not actually work. “[T]he DHS Inspector General found, in its 2015 report, that CBP was unable to demonstrate that Border Patrol referrals of apprehended migrants for prosecution by U.S. Attorney’s Offices actually deterred unauthorized migration.”<sup>49</sup> Yet, the rate at which we prosecute these offenses means resources have to be diverted from other law enforcement efforts to handle illegal

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Acer, *supra* note 33.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



entry cases.<sup>50</sup>

In fact, the increase in enforcement of illegal entry may actually increase instances of people attempting to enter the U.S. As enforcement measures have increased in recent years, the cost of smugglers has increased twelve-fold, from \$1,000 to \$12,000.<sup>51</sup> Thus, in order for families to make the journey, they have to take out huge loans, and the “only hope of paying off those loans is to reach the U.S., so even if they fail at their quest, they have no choice but to try again, and again.”<sup>52</sup>

If one opposes the fast tracking of these immigration laws, this Article’s thesis will be a welcome thought. One problem with defending an illegal entry case is that the case is usually cut-and-dry. Either the defendant is a citizen, or not, and either they were apprehended in the U.S., or not. That is why it is possible to fast track the cases so expeditiously. However, by introducing the necessity defense into the equation, it is harder to prosecute these cases because they become less cut-and-dry, especially considering that defense attorneys on the border have been surveyed saying that nearly fifty percent of their criminal defense clients are asylum seekers.<sup>53</sup> These defense attorneys now have ammunition to use to protect their clients’ interests.

### III. The Necessity Defense

The Necessity Defense is a type of justification defense;<sup>54</sup> which is a type of defense that will “exculpate a person whose conduct would otherwise be criminal when special circumstances exist that render the conduct socially and morally acceptable.”<sup>55</sup> This defense first and famously appeared in *Regina v. Dudley & Stephens*<sup>56</sup>, a British admiralty case from the 1800s,<sup>57</sup> involving four sailors who were stranded at sea for

<sup>50</sup> *Id.*

<sup>51</sup> Borger, *supra* note 11.

<sup>52</sup> *Id.*

<sup>53</sup> Acer, *supra* note 33.

<sup>54</sup> Fatima E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 161 (2019).

<sup>55</sup> *Id.*

<sup>56</sup> *Regina v. Dudley & Stevens*, 14 QBD 273 (1884).

<sup>57</sup> *Id.*

weeks.<sup>58</sup> To survive, three of the members killed and ate one of the other sailors after this sailor fell very ill.<sup>59</sup> Had the sailors not done so, all of them would have died.<sup>60</sup> The defendants were eventually found not guilty by reason of necessity.<sup>61</sup> The U.S. Supreme Court initially applied the necessity defense in *United States v. Kirby*.<sup>62</sup> In that case, the Supreme Court found that it would be “absurd” for a surgeon to be convicted for “dr[awing] blood in the streets” when that surgeon had “opened the vein of a person that fell down in the street in a fit” to save that person’s life.<sup>63</sup>

In order to succeed on the necessity defense, a defendant must show:

(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.<sup>64</sup>

As demonstrated by *United States v. Aguilar*,<sup>65</sup> this defense can be fairly difficult, and it is especially difficult to satisfy the last element of there being “no other legal alternatives to violating the law.” In *Aguilar*, the “[a]ppellants were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexican border with Arizona.”<sup>66</sup> This underground railroad was made up of a series of churches that acted to give migrants

<sup>58</sup> Schwartz, *supra* note 30, at 1259.

<sup>59</sup> Michael G. Mallin, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens*, 34 U. CHI. L. REV. 387, 388 (1967).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 387.

<sup>62</sup> Marouf, *supra* note 54, at 161 (citing *United States v. Kirby*, 74 U.S. 482, 486–87 (1868)).

<sup>63</sup> *Id.*

<sup>64</sup> *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 666.

sanctuary.<sup>67</sup> Then from Arizona, the migrants were sent to Chicago so they could be dispersed throughout the United States.<sup>68</sup> All appellants maintained that every migrant was a political refugee, deserving of protection under U.S. Law, yet, all appellants also counseled the migrants they smuggled to avoid immigration authorities, and to lie if apprehended.<sup>69</sup> Because of their actions and advice, they were ultimately charged with violating federal criminal and immigration law.<sup>70</sup> The appellants advanced several arguments to justify their advice, but only one is relevant for the purposes of this article:<sup>71</sup> that is that the appellants had lost faith in the immigration system, because the Immigration National Service (INS)<sup>72</sup> failed to approve meritorious asylum cases.<sup>73</sup> Thus, to protect the migrants, the appellants had no choice but to help the migrants enter the United States, rather than put them in a position where they may face deportation.<sup>74</sup>

The Ninth Circuit held that the appellants did not successfully produce evidence sufficient to instruct the jury on the necessity defense.<sup>75</sup> Specifically, the Court held that appellants “failed to establish that there were no other legal alternatives.”<sup>76</sup> The Court noted that the appellants failed to allege any true deficiencies of the INS.<sup>77</sup> Further, if such deficiencies existed, appellants could have brought a civil suit to correct those deficiencies, and such suits had succeeded in the past.<sup>78</sup> Relevant for this Article’s analysis, the Ninth Circuit seems to be saying here that the system, as it existed at the time of *Aguilar*, was not designed to return migrants with legitimate claims of asylum to the harm the asylum seekers were fleeing.

<sup>67</sup> *Id.* at 667.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Aguilar*, *supra* note 64, at 667.

<sup>71</sup> *Id.*

<sup>72</sup> After 9/11, the Immigration National Service was dissolved and replaced by United Citizenship Immigration Services, and Immigration and Customs Enforcement.

<sup>73</sup> *Aguilar*, *supra* note 64, at 667.

<sup>74</sup> *Id.* at 692–93.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 693.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Finally, *Aguilar* is relevant because it demonstrates the highest hurdle that current migrants must overcome to successfully allege a necessity defense. Namely, migrants must demonstrate that they have no legal alternative by waiting for the system to adjudicate their claims. As part II of this Article will argue, the proliferation of the “Remain in Mexico Policy” and “Safe Third Country Agreements” plugs this last hole, creating justification for the necessity defense.

#### A. Why not the Duress Defense?

Before diving into the facts that further justify the use of the necessity defense in the immigration context, it is important to cover the difference between the necessity defense and the duress defense, as some believe that these defenses are nearly identical. For example, the elements of duress are:

that defendant was under an unlawful and present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;

that defendant had not “recklessly or negligently placed [her]self in a situation in which it was probable that [s]he would be [forced to choose the criminal conduct];

that defendant had no “reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm”; and

that a direct causal relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm.<sup>79</sup>

The most prototypical duress case is one in which a defendant steals with a gun to his/her head, with an explicit threat that if the defendant did not steal, whoever was holding a gun to his/her head would shoot.

<sup>79</sup> United States v. Gant, 691 F.2d 1159, 1163 (5th Cir. 1982).

A casual observer may notice that the similarities between the two defenses are numerous, especially the focus on imminence of the harm, and the focus on lack of other alternatives. However, there are three important differences.

First, while the necessity defense is a type of justification defense, the duress defense is an “excuse defense.”<sup>80</sup> “Unlike justification defenses, excuse defenses do not involve a claim that the individual acted appropriately under the circumstances.”<sup>81</sup> Instead, excuse defenses argue that the defendant is not *culpable* for the action.<sup>82</sup> To further examine this, take the above classic gun-to-the-head example. Under the duress defense, the thief may argue that he/she knew stealing was wrong, but he/she had no choice because he/she objectively believed that he/she would be shot and killed if he/she did not steal. Thus, the defendant is not *culpable*.

Second, and importantly for this Article, duress tends to result from the actions of individuals or concerted actions, while necessity tends to arise from environmental or circumstantial factors.<sup>83</sup> If the actions are shared among persons, duress occurs when the group shares a specific goal. This is embodied in the fourth element of duress, which requires a direct causal relationship with the anticipated harm. However, in the case of necessity, the groups of persons may not share a specific goal, even if their actions tend to force the defendant to commit the crime. Alternatively, necessity may arise from entirely *environmental* factors, such as the classic stranded-at-sea example. Thus, the coercion need not be as direct for the necessity defense as the duress defense. This is significant because immigrants fleeing across the U.S. Border are most often influenced by a confluence of environmental factors, as opposed to immediate and concerted threats or use of force.<sup>84</sup>

This is also significant for duress because the action usually must be a focused use of force or threat of violence.<sup>85</sup> In this way,

<sup>80</sup> Marouf, *supra* note 54, at 165.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Necessity and Duress*, LAWSELF, <https://lawshelf.com/courseware/entry/necessity-and-duress> (last visited Mar. 14, 2020).

<sup>84</sup> See Borger, *supra* note 11.

<sup>85</sup> *Necessity and Duress*, *supra* note 83.

duress gives the jury something similar to a straightforward rule to apply. If there is a direct threat of force, then the defendant is not guilty. However, necessity could be based on any number of environmental factors, meaning that it is closer to something like a standard than a rule.<sup>86</sup> Thus, a jury has more power to judge the outside influences in a necessity case than they would in a duress case. Such ambiguity could be beneficial in a period of time when immigrants are heavily discriminated against because it allows juries, as members of the community, to act as a safety valve against overzealous prosecution of immigration related crimes, when such crimes are used against persons who have fled a confluence of atrocities outside of their control.

B. What must the defendant show to get the Necessity  
Defense in front of a jury?

Before going further, it is important to discuss the necessity defense's burden of production, in order to understand how such a defense can be provided to a jury. A burden of production is the "party's obligation to come forward with sufficient evidence to support a particular proposition of fact. Satisfying the burden of production may also be referred to as establishing a *prima facie* case."<sup>87</sup> This is different than a burden of proof, which is what the jury uses to ultimately weigh if the defendant has sufficiently provided evidence to prove a fact in court.<sup>88</sup>

The standard that courts apply to determine if this burden is met is that "a party is not entitled to a charge unless the record, viewed most charitably to the proponent of the instruction, furnishes an arguable basis for application of the proposed rule of law."<sup>89</sup> For example, in *United States v. Rodriguez*, the government charged the defendant with multiple counts of drug related crimes.<sup>90</sup> The defendant met an informant

<sup>86</sup> Schwartz, *supra* note 30, at 1261.

<sup>87</sup> *Burden of Production*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/burden\\_of\\_production](https://www.law.cornell.edu/wex/burden_of_production), (last visited Mar. 14, 2020).

<sup>88</sup> *Burden of Proof*, CORNELL LEGAL INFO. INST., [https://www.law.cornell.edu/wex/burden\\_of\\_proof](https://www.law.cornell.edu/wex/burden_of_proof) (last visited Mar. 14, 2020).

<sup>89</sup> *United States v. Rodriguez*, 858 F.2d 809, 813 (1st Cir. 1988).

<sup>90</sup> *Id.* at 810.

for the Drug Enforcement Administration (DEA), and the informant testified that the defendant intended to acquire a kilo of cocaine.<sup>91</sup> The defendant claimed that the informant initially asked him for drugs, and that the defendant told the informant that he did not have or knew where to acquire drugs.<sup>92</sup> The defendant claimed that the undercover informant was very pushy, and only after pressure did the defendant give in.<sup>93</sup> The two eventually had a series of calls where the defendant agreed to sell the informant a kilo of cocaine.<sup>94</sup> During the sale, the defendant was arrested.<sup>95</sup>

The government then charged the defendant with the sale of the drugs, and during the trial, the defendant attempted to get a jury instruction for entrapment.<sup>96</sup> Afterwards, the district judge denied the instruction.<sup>97</sup> The First Circuit, on review, recognized that “[i]t is hornbook law that an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it.”<sup>98</sup> When applying this rule, the district courts cannot weigh evidence or make credibility findings; instead they must “examine the evidence of record and the inferences reasonably to be drawn therefrom to see if the proof, taken most hospitably to the accused, can plausibly support the theory of defense.”<sup>99</sup> Therefore, it requires examining the bare “legal sufficiency” of the evidence.<sup>100</sup> In *Rodriguez*, the court vacated and remanded the defendant’s case, because if the district court took the hospitable view of the evidence, then the defendant *could* have been entrapped.<sup>101</sup> Thus, the defendant had met his burden of production.

#### IV. The Asylee-Defendant

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 811.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Rodriguez*, 858 F.2d at 811–12.

<sup>96</sup> *Id.* at 812.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 812.

<sup>100</sup> *Id.*

<sup>101</sup> *Rodriguez*, 858 F.2d at 815.

– Trigger Warning –

*This section contains descriptions of violence against women, including murder and kidnapping.*

This section will discuss the general conditions of people that are typically charged with illegal entry and illegal re-entry and apply those facts to the legal standard. Several books can, and have, been written about this subject, but this Article will attempt to provide a broader perspective. By providing background facts, this Article will make clear the confluence of factors that could lead people to flee from Central America, as well as what factors could be raised when arguing the necessity defense.

A. The Violence in Central America that leads asylum seekers to flee their country

The vast majority of people crossing into the United States come from the countries of the Latin American Triangle: Guatemala, Honduras, and El Salvador. These nations share several problems, most notably a fairly recent history of military conflict.<sup>102</sup> In 1996, Guatemala ended a long and bloody civil war that raged for more than 40 years and took over 200,000 lives.<sup>103</sup> El Salvador also suffered a long and bloody civil war that ended in the 1990s.<sup>104</sup> Although Honduras did not have a civil war in the 1990s, it has instead been struck with more recent political conflict.<sup>105</sup> In 2009, the military of Honduras seized the president and flew him out of the country.<sup>106</sup> Important land dispute resolutions destabilized without the president.<sup>107</sup> The land dispute conflicts became militarized, and hundreds were killed.<sup>108</sup>

<sup>102</sup> See Borger, *supra* note 11.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Borger, *supra* note 11.



The United States was involved in each conflict.<sup>109</sup> In Guatemala, the United States Central Intelligence Agency added fuel to the conflict when it overthrew the democratically-elected president.<sup>110</sup> In El Salvador, the U.S. “train[ed] and fund[ed] rightwing death squads in the name of fighting communism.”<sup>111</sup> In Honduras, the United States supported the efforts that ousted the president.<sup>112</sup>

Besides outright military conflict, the countries in Latin America are also suffering from an epidemic of violent crime and gang violence.<sup>113</sup> “Latin America is home to about eight percent of the world’s population but has about one-third of its homicides—in 2016, that meant some 400 homicides a day, or roughly 146,000 a year.”<sup>114</sup> In the wake of the civil wars that plagued the region, *maras*, or street gangs, took root.<sup>115</sup> Exacerbation of socio-economic problems, such as poverty, ostracized portions of the population, helping solidify the power of such gangs.<sup>116</sup> Additionally, mass deportations from the United States to Latin America helped street gangs form.<sup>117</sup> For example, the MS-13, one of the most infamous street gangs, started as a low level youth street gang in Los Angeles.<sup>118</sup> In the wake of mass deportations under the Clinton Administration,

<sup>109</sup> *Id.*

<sup>110</sup> Amy Bracken, *Why You Need to Know about Guatemala’s Civil War*, PUB. RADIO INT’L. (Dec. 29, 2016 11:45 AM), <https://www.pri.org/stories/2016-12-29/why-you-need-know-about-guatemalas-civil-war>.

<sup>111</sup> Borger, *supra* note 11.

<sup>112</sup> *Id.*

<sup>113</sup> Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN REL. (Oct. 1, 2019), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle>.

<sup>114</sup> Christopher Woody, *400 murders a day: 10 reasons why Latin America is the world’s most violent place*, BUS. INSIDER (Sept. 10, 2019 8:47 AM), <https://www.businessinsider.com/latin-america-is-the-worlds-most-violent-region-crime-2019-9>.

<sup>115</sup> Ivan Briscoe & David Keseberg, *Only Connect: The Survival and Spread of Organized Crime in Latin America*, PRISM (Feb. 26, 2019), <https://cco.ndu.edu/News/Article/1767435/only-connect-the-survival-and-spread-of-organized-crime-in-latin-america>.

<sup>116</sup> *Id.*

<sup>117</sup> Darad Lind, *MS-13 Explained*, VOX (Feb. 5, 2019, 9:45 PM), <https://www.vox.com/policy-and-politics/2018/2/26/16955936/ms-13-trump-immigrants-crime>.

<sup>118</sup> *Id.*

the criminal enterprise was exported to Latin America.<sup>119</sup>

These street gangs started with minor acts of extortion.<sup>120</sup> However, this extortion has evolved into a large criminal enterprise, becoming one of the main sources of revenue for many criminal organizations in the Latin American Triangle.<sup>121</sup> For example, in Honduras “some seventy-nine percent of registered small businesses . . . and eighty percent of the country’s informal traders report they are extorted.”<sup>122</sup> Likewise, in El Salvador, seventy percent of businesses are extorted.<sup>123</sup>

Another major source of crime in this region is narco-trafficking.<sup>124</sup> At one point, large gangs and governments had complete control over drug routes to the United States. But over time, the strength of large narco-trafficking organizations waned.<sup>125</sup> As a result, smaller gangs began to form, controlling certain trafficking routes, and fighting with other gangs for territory.<sup>126</sup> Innocent people are often caught up in these power struggles, either simply as bystanders caught in the wrong place at the wrong time, or because these people have some interest (such as property or wealth) that the gangs want to acquire to help in the gang’s battle with its rival drug gangs.<sup>127</sup> Again, it is worth noting that since much of the drug conflict is caused by narco-trafficking, the United States should share some of the blame because it is a large source of the demand for these trafficked drugs.<sup>128</sup>

These gangs have further been entrenched by attempted efforts to weaken their hold on Latin America.<sup>129</sup> Governments in the Latin American Triangle have tried to implement *mano*

<sup>119</sup> *Id.*

<sup>120</sup> Briscoe & Keseberg, *supra* note 115.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Briscoe & Keseberg, *supra* note 115.

<sup>127</sup> *Id.*

<sup>128</sup> Daniel Hatoum, *America’s Modern Day Internment Camps: The Law of War and the Refugees of Central America’s Drug Conflict*, 21 TEX. J. ON CIV. LIBERTIES & CIV. RTS. 61 (2015).

<sup>129</sup> *Id.*

*dura* (iron fist) policies—“*Cero Tolerancia* in Honduras, *Plan Mano Dura* in El Salvador, and *Plan Escoba* in Guatemala”—leading to indiscriminate mass arrests of thousands of alleged gang members.<sup>130</sup> However, such policies have only fed the feelings of frustration that fueled criminal violence in the region in the first place.<sup>131</sup> Further, decisions to segregate imprisoned gang members by group, which originally seemed like a necessity to prevent in-fighting within the prison, actually allowed *maras* to better organize in prisons, helping them to evolve into more sophisticated criminal organizations.<sup>132</sup> For example, “segregation allowed the gangs to turn the prisons into their own criminal fiefdoms and bases of both internal and external operations, facilitating the development of a gang hierarchy where power flowed down from incarcerated gang leaders.”<sup>133</sup>

Violence in the Latin American Triangle is particularly dangerous for women.<sup>134</sup> For example, “femicide—the targeted killing of a woman, particularly by a man, due to her gender—plagues much of Latin America and the Caribbean.”<sup>135</sup> Femicide is particularly prevalent in the Latin American Triangle.<sup>136</sup> As one author states, “despite these countries’ comparatively small population (just five percent of the region’s total population), together, the three countries rank third in terms of the largest *total* number of femicides, with 1,804 deaths in 2016 alone.”<sup>137</sup> Honduras has the highest femicide rate in the world.<sup>138</sup> In El Salvador, the country saw femicide rates double in 2013.<sup>139</sup> El

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Juan Forero, *Women in Latin America Are Being Murdered at Record Rates*, WALL STREET J. (Dec. 19, 2018, 11:44 AM), <https://www.wsj.com/articles/it-is-better-not-to-have-a-daughter-here-latin-americas-violence-turns-against-women-11545237843>.

<sup>135</sup> María Fernanda Pérez Arguello & Bryce Couch, *Violence Against Women Driving Migration from the Northern Triangle*, ATL. COUNCIL (Nov. 8, 2018), <https://www.atlanticcouncil.org/blogs/new-atlanticist/violence-against-women-driving-migration-from-the-northern-triangle/>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Forero, *supra* note 135.

Salvador's murder rate is more than six times that of the U.S., and Guatemala's numbers track closely with those of El Salvador.<sup>140</sup> Gang violence can explain some of this harm, with many of the major gangs developing a culture that encourages the kidnapping, rape, and beating of young women.<sup>141</sup> While some of the violence can be attributed to gang activity, it does not account for all the violence, or even, most of it.<sup>142</sup> "Specialists studying violent crimes in Central America say the killing of women often comes at the hands of their partners."<sup>143</sup> In more than half of the cases of slain women, the murderer was a partner, an ex-partner, a family member or an acquaintance.<sup>144</sup> These deaths are often gruesome as well: "whereas men are often shot to death [in Latin America], women are killed with particular viciousness."<sup>145</sup> According to a 2015 Salvadorian government study, female victims were tortured in a number of ways: having their fingers cut off, being raped, being tied up, or being burnt.<sup>146</sup> Many of the people fleeing to the United States from the Latin American Triangle are women attempting to flee specific violence directed against them because of their gender.<sup>147</sup>

The volatility of the Central American Triangle also puts the LGBT+ community at lethal risk of violence, due to the discrimination that members of already face.<sup>148</sup> Among LGBT+ asylum seekers, eighty-eight percent faced gender-based or sexual violence in their home country.<sup>149</sup> Once again, gang violence exacerbates the violence against this community.

There are also a number of reasons why the crime in Latin America likely will not substantially subside. Inequality

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Forero, *supra* note 135.

<sup>146</sup> *Id.*

<sup>147</sup> Pérez Arguello & Couch, *supra* note 136.

<sup>148</sup> Molly Hennessy-Fiske, *For Transgender Migrants Fleeing Death Threats, Asylum in the U.S. is a Crapshoot*, L.A. TIMES (Oct. 29, 2019), <https://www.latimes.com/world-nation/story/2019-10-29/trump-administration-returns-vulnerable-lgbt-asylum-seekers-to-mexico>.

<sup>149</sup> *Id.*

problems are still rampant, with unemployment remaining extremely high.<sup>150</sup> These problems often correlate highly with an increase in homicide and petty crime.<sup>151</sup> Further, lack of investment in education systems creates poor school systems that also exacerbates inequality and crime.<sup>152</sup> Violence has become widespread among people looking for a solution to the crises in Latin American Triangle countries.<sup>153</sup> Vigilantism has taken root in Latin America, because ordinary citizens feel that they can take the enforcement of law into their own hands, and combat violence with violence.<sup>154</sup> A proliferation of weapons following armed conflicts in the region encourages the use of violence, and makes vigilantism easy to execute. The groups that have been provided weapons to end political conflict often devolve into criminal enterprises that extort the very people they had originally set out to protect.<sup>155</sup> There is also a high level of corruption in Latin America, with criminal gangs infiltrating many levels of the police and government.<sup>156</sup> As a result, criminal organizations can act with a high level of impunity.

Outside of the crime described above, there is also violence, sometimes state directed, against ethnic minorities, especially indigenous people.<sup>157</sup> This creates another subset of asylum seekers from the Latin American Triangle. Specifically, the spread of extractive industries, militarization, paramilitarism, and organized crime has created a conflict with the indigenous population in the Latin American Triangle for land.<sup>158</sup> Such protests against extractive competition by indigenous persons are met with resistance from the governments.<sup>159</sup> At its worst, government military groups have used sexual violence as a tool

<sup>150</sup> Woody, *supra* note 115.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Woody, *supra* note 115.

<sup>157</sup> Rachel Sieder, *Indigenous Women's Struggles for Justice in Latin America (sidebar)*, NACLA (Feb. 9, 2015), <https://nacla.org/article/indigenous-women%E2%80%99s-struggles-justice-latin-america-sidebar>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

displace indigenous persons.<sup>160</sup>

For example, Guatemala experienced a genocide against the indigenous Mayan people during its long civil conflict.<sup>161</sup> Many activists are concerned that in recent conflicts over resources and land, the country is returning to a culture of violence against Mayans.<sup>162</sup> In 2019, there were a series of high profile killings of native activists.<sup>163</sup> Yet, the government of Guatemala has refused to condemn the murders, or even meet with the indigenous persons in an effort to discuss the uptick in violence.<sup>164</sup> In response to this ethnic violence, sociologist Edelberto Torres-Rivas told NPR, “[i]t’s no surprise that we see . . . tens of thousands of Guatemalans fleeing the country going into Mexico trying to get to the United States to flee a country that is in free-fall—where there are no guarantees and there is no security.”<sup>165</sup>

People from Mexico are fleeing to the United States for similar reasons that people are fleeing from the Latin American Triangle.<sup>166</sup> Typically, Mexican asylum seekers are fleeing cartel violence, which actually includes organized crime groups that tend to be larger and more powerful than the street gangs of Central America.<sup>167</sup> Ethnic violence is also rampant.<sup>168</sup> Mexico has a high amount of gender violence, similar to the violence found in Central America.<sup>169</sup> In other words, the problems faced by asylum seekers coming from Mexico are similar, if not the exact same, as the problems faced by the majority of asylum seekers coming from the Latin American Triangle.

This demonstrates how remaining in Mexico is not a safe

<sup>160</sup> *Id.*

<sup>161</sup> Maria Martin, *Killings of Guatemala’s Indigenous Activists Raise Specter of Human Rights Crisis*, NPR (Jan. 22, 2019), <https://www.npr.org/2019/01/22/685505116/killings-of-guatemalas-indigenous-activists-raise-specter-of-human-rights-crisis>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Narea, *supra* note 25.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Mexican Capital Declares Gender Violence Alert*, AP (Nov. 21, 2019), <https://apnews.com/86745590002a41ecafd71453ee3fea90>.

option for people coming from the Latin American Triangle.<sup>170</sup> First, these migrants are entering a nation where they could face the very problems they were fleeing from in their home country. Second, migrants passing through Mexico are frequently extorted, robbed, attacked, and even kidnapped by virtue of their status as migrants.<sup>171</sup> In addition, rape is also a frequent occurrence.<sup>172</sup> This puts women fleeing femicide in a vulnerable position once more. Also, members of the LGBT+ community are extremely vulnerable, with two-thirds of such persons suffering sexual and gender based violence when they travel through Mexico.<sup>173</sup> While theoretically there should be protections in place for migrants attempting to flee their home country *and* who are afraid of remaining in Mexico, under the MPP program implemented by the Trump Administration, such persons are typically returned to Mexico despite their well-founded fears.<sup>174</sup> In fact, the CBP has regularly sent people back to Mexico who were not only afraid, but also have already faced persecution because of their status as migrants.<sup>175</sup>

All of this background is important because it demonstrates the type of dangers that asylum seekers face, both in their home countries, as well as when they attempt to reach the United States via travel through Mexico. From this background, we can confirm that cases involving illegal entry of asylum seekers typically stem from sustained violence in the asylum seeker's home country and a high risk of violence when passing through Mexico. Thus, the best way to test the application of the necessity defense to an asylum seeker would be to select the asylum seeker based on the typical criteria, and then apply the law to that case.

<sup>170</sup> Gus Bova, *Attacked in Mexico, Returned to Mexico: Trump Policy Ignores Danger to Asylum-Seekers*, TEX. OBSERVER (Sept. 30, 2019, 1:02 PM), <https://www.texasobserver.org/attacked-in-mexico-returned-to-mexico-trump-policy-ignores-danger-to-asylum-seekers/>.

<sup>171</sup> *Id.*

<sup>172</sup> Camille Squires, *Torture, Rape, and Kidnapping at the Border: A New Report Lays Bare the Horror of Trump's Asylum Plan*, MOTHER JONES (Jan. 23, 2020), <https://www.motherjones.com/politics/2020/01/migrant-protection-protocols-remain-in-mexico-trump/>.

<sup>173</sup> Hennessy-Fiske, *supra* note 149.

<sup>174</sup> Bova, *supra* note 172.

<sup>175</sup> *Id.*

## V. Applying the Necessity Defense

Based on both the law and the facts, the necessity defense should at least be given as a jury instruction for asylum seekers who have been charged with illegal entry. In order to help the reader understand this more clearly, this section provides an example of a typical Latin American asylum seeker, and then applies the necessity defense to their situation. Luckily, this Article already contains such a person, Ian Doe (our protagonist from the Introduction).<sup>176</sup> To briefly reiterate the facts of his case, Ian was a victim of sustained gang violence due to his role as an anti-narco police officer in Honduras.<sup>177</sup> His brother had been killed in Ian's place, leading Ian to flee his country.<sup>178</sup> However, while traveling through Mexico, his companions were also killed, and Ian himself suffered violence at the hands of corrupt Mexican officials.<sup>179</sup> It is also important to note here that when Ian tried to apply for asylum in the United States, he was sent back to Mexico under the MPP.<sup>180</sup>

Now, let us assume that instead of remaining in Mexico after being sent back, Ian crossed the border illegally into the United States by walking across a shallow section of the Rio Grande River. Next, let us assume that a CBP official watched Ian cross the border into the United States, arrested him after he crossed the border, and then referred him to prosecution. Let us further assume that Ian has no previous deportations, and is thus charged with illegal entry. Ian decides to forgo any plea (likely because it would lead to his deportation back to Honduras where he will be killed), and instead opts to go to trial. His attorney has him testify to all of the above facts in the hopes of advancing the necessity defense. His defense attorney must show, in conjunction with the facts listed above, that there is enough evidence sufficient to instruct the jury on the necessity defense.

In other words, his defense attorney must show that (1) when Ian crossed the border he was faced with a choice of two

<sup>176</sup> See *supra* Introduction.

<sup>177</sup> Declaration of Ian Doe, *supra* note 1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*



evils, and chose the lesser evil; (2) Ian acted to prevent imminent harm; (3) Ian reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and (4) (and perhaps most importantly) there were no other legal alternatives available to avoid violating the law. To meet the burden in order to get the necessity defense in front of the jury, Ian's defense attorney must demonstrate that the record, when "viewed most charitable" to Ian, contains sufficient evidence that the defense could be applicable.

The first three elements are easily disposed of based on the record in Ian's case. When Ian crossed the border, he was faced with two evils: either (1) he could cross into the United States, committing a misdemeanor, or (2) he could remain in Mexico and hope to continually evade the threat of violence and death. Considering the likely threat on his life, a jury could reasonably conclude that Ian chose the lesser of two evils when he committed a victimless misdemeanor.

Next, the record indicates that the threat was indeed imminent. Far from being a speculated harm, Ian's fear of remaining in Mexico was real, pervasive, and prevalent. He had already been personally attacked, with several of his traveling companions already having been killed during their journey through Mexico. Ian was merely waiting for his number to be up, and thus, a jury could easily conclude that the threat of violence was imminent as well. Further, the threat of violence was imminent if Ian returned or was sent back to his home country because gang members had already tried to kill him.

Third, Ian also reasonably believed he would be safe in the United States. This is because the United States has a stronger and more protective legal system which he could rely on when fleeing violence from both his home country and Mexico. While there was a possibility he could still be faced violence in the United States, someone crossing the border could infer that this was far less likely, and thus, a jury could conclude that the third element is met.

Therefore, we are only left with the fourth element of the claim, which is whether there are any legal alternatives to violating the law. As discussed earlier, this has often been the

most difficult element to overcome.<sup>181</sup> As the *Aguilar* case noted, asylum seekers at one time had a legal alternative to crossing the border.<sup>182</sup> That alternative was to present themselves at a port-of-entry, and then wait in the United States for the pendency of their asylum claim. If the asylum seeker was truly seeking refuge from imminent and life-threatening harm, then they (likely)<sup>183</sup> had a strong asylum claim, and would not only remain in the U.S. during the pendency of their claim, but also could succeed on their claim and attain U.S. citizenship.

However, the adoption of the MPP, a.k.a. the “Remain in Mexico Policy,” and the adoption of Safe Third Countries Agreements has eliminated this legal alternative. Under the MPP policy, if Ian presents himself at the border, instead of being allowed in the U.S., he is forced to return to Mexico, where he continues to face threats of violence and death.<sup>184</sup> In reality, Ian did try to present himself at a port-of-entry and was subsequently sent back to Mexico under the MPP.<sup>185</sup> Thus, Ian’s legal alternative, the legal alternative that was damning for the defendant’s in *Aguilar*, is not available. Accordingly, a jury could conclude that Ian only had one option left, which was to cross into the United States without presenting himself at the border. Since a jury could reasonably draw this conclusion, the defense should be put before the jury in the form of a jury instruction.

It is also worth noting that although Ian was sent back to Mexico, it was possible for the United States, under its Safe Third Country Agreements, to send him to Guatemala and force him to seek asylum there. But this creates the same problem as the MPP in that it forces Ian to go to a country where he faces an imminent threat of danger and death, especially as a police officer who fought gang members in Central America. This is especially true considering that the same gangs operate in both Guatemala and Honduras, and thus, Ian would be returning to

<sup>181</sup> *Supra* Sec. I.

<sup>182</sup> *See Aguilar*, *supra* note 64, at 693.

<sup>183</sup> This author is highly sympathetic to the position that even under the pre-Trump era system, asylum seekers were generally still treated unfairly. However, not so unfair as to persuade the courts. This piece’s advocacy is that the system has become so unfair, that the courts must take another look.

<sup>184</sup> Declaration of Ian Doe, *supra* note 1.

<sup>185</sup> *Id.*

the very people he was attempting to flee in the first place. Therefore, even under slightly different facts, where Ian is returned pursuant to the Safe Third Countries Agreements, he would still be able to show that he has no legal alternatives to escape these threats of violence and death. Thus, the necessity defense should still be placed in front of the jury.

By examining the facts of Ian's case, it demonstrates that an asylum seeker fleeing violence should be able to advance the necessity defense. While gang violence is one major problem that an asylum seeker may flee from, as discussed above, there are many other reasons why people from Central America have been fleeing to the United States. Any or all of these reasons can form the basis of a necessity defense, because what ties these instances together is that people are fleeing immediate threats of violence or death, and such persons cannot remain safe in Mexico. In other words, while facts may differ from case-to-case, the reality is that this defense will be open to the many asylum seekers who are fleeing to the United States and being forced to remain in Mexico or Central America for the pendency of their claims.

## VI. Response to Concerns

This final section addresses specific concerns to the position advanced by this Article that have not already been addressed. First, opponents of the thesis of this paper may point out that while this Article's argument may hold true for illegal *entry*, it should not hold true for illegal *RE*-entry. These opponents would indicate that illegal re-entry only applies when an immigrant has already been deported.<sup>186</sup> Since such immigrants have already been deported, this implies that these specific immigrants also do not have a valid asylum claim, or otherwise they would have asserted that claim at their initial deportation. Finally, without a valid asylum claim, there could not be an "imminent threat" that the immigrant is fleeing, and therefore, they should be unable to prove one of the elements of the necessity defense.

However, the flaw with this argument is that it makes two

<sup>186</sup> 8 U.S.C. § 1326 (1996).

fatal assumptions: first, it assumes that the circumstances of an immigrant did not change after deportation, and second, that the immigrant had the tools to assert the claim in the first place. The first assumption is fairly flawed because the situation in Central America is so unstable that the person who was deported could be faced with a new and different life-threatening situation. For example, someone who previously had not attracted the ire of a gang may finally be caught in the crosshairs after she returns to her initial country again. In fact, American immigration law recognizes this, since it allows a person who has previously been deported to seek a form of asylum relief by demonstrating that they cannot safely be returned to their country.<sup>187</sup>

Second, it is not true that immigrants always have the tools to assert the asylum claim in the first place. The following is the epitome of the understatement that the asylum-immigration system is complicated.<sup>188</sup> As a result, the system is very difficult to navigate without the assistance of a lawyer.<sup>189</sup> For example, prior to being placed before an immigration court, an immigrant must first participate in an interview with an asylum officer to determine whether the immigrant has a substantial likelihood of succeeding on their asylum claim.<sup>190</sup> During this interview, the asylum officer will be listening for specific information to try and determine the validity of the asylum claim.<sup>191</sup> The immigrant, however, will not usually know what information they should present, or may leave out details that would otherwise be helpful for their case, out of fear that it may weaken their claim.<sup>192</sup> This is only the first pitfall that the asylum seeker could fall prey to while trying to navigate the complicated

<sup>187</sup> Immigration and Nationality Act (INA) § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006) (statute allowing for withholding of removal).

<sup>188</sup> See generally Samantha Balaban, Sophia Alvarez Boyd & Lulu Garcia-Navarro, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR (Feb. 25, 2018 2:10 PM), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>.

<sup>189</sup> *Id.*

<sup>190</sup> *Requesting Asylum at U.S. Border? What to Expect at Credible Fear Interview*, NOLO (2020), <https://www.nolo.com/legal-encyclopedia/what-happens-credible-fear-interview.html>.

<sup>191</sup> See *id.*

<sup>192</sup> See Balaban et. al, *supra* note 190.

asylum system, ultimately leading to the failure of a valid asylum claim in which the immigrant truly faces an imminent threat.<sup>193</sup> Yet, many asylum seekers cannot obtain (or afford) a lawyer, therefore leading to deportation.<sup>194</sup> This undermines the second assumption that is fatal to the illegal re-entry argument.

Another potential criticism of this Article's thesis is that it invites jury nullification. For example, "jury nullification is the power that jurors have to find a defendant not guilty even if they think that he committed the crime, . . . it is a power that comes from the Bill of Rights, which says that a person cannot be tried for the same crime twice."<sup>195</sup> Critics of this Article might argue that the necessity defense merely provides a hook to legitimize jury nullification by jurors who disagree with the United States current enforcement of immigration policies.

In responding to this criticism, first, this contention assumes that jurors who find a defendant not guilty by reason of necessity must necessarily have an improper motive. However, as previously stated, it is possible to find that this defense applies to facts of the typical asylum seeker. As with any defense, because of double jeopardy, jurors could abuse the defense to serve political ends. That does not mean the defense should not be presented to the juror when the burden of production can be met. In fact, the burden of production exists for the purpose of being a check to prevent rampant jury nullification. Thus, the concern of jury nullification is heavily mitigated.

Second, this contention makes an assumption that jury nullification is somehow a terrible result. There are numerous benefits of jury nullification. First and foremost, jury nullification can be a powerful protest tool to force change to a system that the political system has tried, and consistently failed, to change for years, such as the immigration system.<sup>196</sup> In fact, jury nullification has a long history of forcing positive

<sup>193</sup> *See id.*

<sup>194</sup> *Id.*

<sup>195</sup> German Lopez, *Jury Nullification: How Jurors Can Stop Unfair and Racist Laws in the Courtroom*, VOX (May 2, 2016 9:00 AM), <https://www.vox.com/2016/5/2/11538752/jury-nullification-paul-butler>.

<sup>196</sup> *See id.* (discussing the use of jury nullification to change the criminal justice system).

changes to the laws. For example, “there are famous cases, including the [John Peter] Zenger case, in which American patriots were charged with sedition against the British crown, and jurors nullified in those cases because they thought that the law was unfair.”<sup>197</sup> It has also been wielded in the civil rights field. Historically, “in cases involving fugitive slaves: When people were prosecuted for trying to help a slave escape, those folks were prosecuted. And in the North, the jurors would nullify.”<sup>198</sup> In more recent years, jury nullification has been used to prevent the conviction of persons charged criminally for having consensual gay sex.<sup>199</sup> Therefore, to assume jury nullification is a terrible result one flawed from a historical perspective.

Additionally, jury nullification can provide a system of checks and balances to the current mass system of immigration prosecution. The whole purpose of a “trial by jury” is to balance the authoritarian power of the state. Yet, in the United States, not even a judge can overturn a not-guilty verdict (although a judge may for a guilty verdict). This gives the citizens of the state the ability to balance the power of the state. Further, in doing so through jury nullification, the jurors can provide this check without detection, and therefore, not be concerned about attracting the ire of an authoritarian state. Thus, jury nullification itself is not bad, as the contention assumes, because it can serve as a powerful check on authoritarianism.

Lastly, critics of this Article may advance one final defensive position which is that the significance of this Article will only last for the current political moment, due to the Trump Administration’s current implementation of the MPP and Safe Third Country Agreements. While it is true that this Article’s thesis focuses on the implementation of these policies, anyone who advances this criticism against this Article is missing the broader and more salient point: when laws are rewritten to create new pressures on weak and vulnerable groups, other areas of the law will often step in to create a safety valve. This Article is an example of this principle because it illustrates how attempts to create pressure against asylum seekers can, and

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

should, trigger a safety valve in another area of the law to protect these very same persons.

Law is a human invention, and it is impossible to remove humanity from the law. This Article's thesis demonstrates that even the most obvious and powerful attempts to strip compassion out of our legal system will end in failure. That significance does not end with our current political moment.

## VII. Conclusion

The United States is inarguably going through a particularly noteworthy time in its history of treatment towards immigrants, especially asylum seekers. As a backdrop to this moment, the United States currently has two statutes that punish asylum seekers for crossing the border into the United States. Because many asylum seekers' only option is to cross the border or be returned to their home country in either Latin America or Mexico—where they face threats of life or limb—the asylum seekers are really left with only one choice, which is to violate U.S. criminal law. This Article suggests that since no viable options remain, the necessity defense should step in to fill in the legal gap. After all, ever since Ian Doe had been targeted by criminal gangs in his home country, his life was a series of terrible events all leading to the moment he arrived at the U.S. border. Jurors already have the tool they need to stop an additional evil from perpetuating against someone who seemingly has no other choice. Ian Doe should know it is his right to use the necessity defense, and defense attorneys should teach juries that our law is capable of halting the parade of evils asylum seekers face.