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Plata o Plomo: Effect of Mexican Transnational Criminal Organizations on the American Criminal Justice System

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COMMENT

PLATA O PLOMO: EFFECT OF MEXICAN TRANSNATIONAL CRIMINAL ORGANIZATIONS ON THE AMERICAN CRIMINAL JUSTICE SYSTEM

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I. INTRODUCTION

A young man named Roberto[1] is walking home from the bus stop in his hometown of Nuevo Laredo, a border town located in Northern Mexico. Roberto has just finished a shift at a large *maquiladora*[2] where his meager salary is just enough to feed and provide modest shelter for his wife and small child. As Roberto walks down the dusty path to his small home he is forced off the road by a group of men in a black double-cab pickup truck with spinners. The men abruptly exit the vehicle and ask Roberto how his wife, Lupita, and son are doing. Roberto, who has never seen

1. Roberto is a fictional character and the story is a fictional account. Names, characters, businesses, places, events and incidents are either the product of the author's imagination or used in a fictitious manner. Any resemblances to actual persons, living or dead, or actual events are purely coincidental.

2. A *maquiladora* is the Spanish word for a manufacturing plant that takes advantage of decreased costs through export and import labor to decrease costs under a "value-added" basis. *Maquiladora*, ENCY. BRITANNICA (2017).

these men before, briefly wonders how the men know about his family before nervously stating he does not want any trouble and politely attempting to excuse himself from their presence. The men flash pistols and inform Roberto that he must follow their instructions if he wants his family to live. Roberto must meet them in two days at an abandoned house located several miles outside the town. He must also keep this encounter to himself, or else suffer the consequences. The men drive away, leaving Roberto wondering how he could possibly protect his family. With no confidence in the police force and no place to hide, Roberto follows the men's instructions. When Roberto arrives at the abandoned house he is met by a large group of men holding what appear to be automatic rifles. Inside the house, the smell of marijuana permeates the air. Roberto observes book-sized packages wrapped in duct tape being loaded into cheap backpacks by three men that look scared and dispirited. Roberto is given a backpack and instructed to pack it with as many bundles as will fit inside. Roberto and the other "mules" are then marched to the edge of the Rio Grande River and instructed to cross to the other side where they are to be met by someone who will provide further instructions. Roberto and the men do as they are told and cross the river. Within an hour, Roberto is apprehended by the United States Border Patrol and charged with possession with intent to distribute a controlled substance.

Based on the facts above, Roberto will have an excellent defense of duress. Or will he? Will the prosecutor buy his story and decline to prosecute? Does Roberto's fact scenario meet the elements the United States Supreme Court has determined are necessary to present a duress defense? Will a jury believe Roberto when presented with hard evidence and testimony from a U.S. agent stating that Roberto is responsible for bringing drugs into the United States?

Roberto has several options as his case proceeds through the criminal justice system: (1) he can plead guilty and ask for mercy from the court;[3] (2) he can present the story to the prosecutor and hope for use of prosecutorial discretion; or (3) he can plead not guilty, go to trial and attempt to present a duress defense to a jury.[4] Is the duress defense usable

3. *See* FED. R. CRIM. P. 11(a)(1) ("A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.").

4. *See* U.S. CONST. amend. VI (delineating an individual's right to a speedy trial by a jury of his or her peers).

in this situation, and if not, what other options are available for Roberto in the alternative? This question will be explored below.

In Part II, a history of the Mexican drug cartels' evolution into transnational criminal organizations ("TCOs") is presented.[5] The Mexican cartels' business model of *plata o plomo* is also discussed, along with the theory that the business model is so effective that individuals such as Roberto have no choice but to comply with the demands of the cartel. In Part III, the effect of the Mexican cartels on the United States criminal justice system is examined.[6] Furthermore, the correlation between the evolution of the cartels and the increase in drug and immigration prosecutions in the United States is analyzed.[7] This Comment then delves into a narrower, more specific legal issue that arises when the Mexican cartels force individuals to participate in crime.[8] In Part IV, the history and current state of the duress defense in the United States is explored.[9] Part V begins with an analysis of whether a duress defense is legally viable for a defendant who claims a Mexican cartel forced him to commit a crime.[10] Part V then concludes by arguing that changes in the law may make a claim of duress more viable for defendants who are forced into the commission of crimes.[11]

II. EVOLUTION OF MEXICAN TRANSNATIONAL CRIMINAL ORGANIZATIONS

A. *From Alcohol Smuggling to Marijuana*

In order to understand the effects that Mexican cartels have on the United States criminal justice system, it is important to realize the magnitude and reach of these organizations. In order to realize the magnitude of these organizations it is important to understand where they came from.

Recently, United States District Court Judge Andrew Hanen, sitting in the Southern District of Texas Brownsville division, wrote in a published opinion, that "[Mexican] cartels initiate and control the vast majority of the

5. *Infra*, Part II.
6. *Infra*, Part III.
7. *Infra*, Part III.
8. *Infra*, Part III.
9. *Infra*, Part IV.
10. *Infra*, Part V.A.
11. *Infra*, Part V.C.

drug trade, illegal cash and weapons smuggling, and human trafficking facing Mexico and the United States."[12] Judge Hanen's statement was validated by the Drug Enforcement Administration in the 2015 National Drug Threat Assessment Summary, which found that the main suppliers of narcotics to the United States are the Mexican transnational criminal organizations.[13] However, Mexican cartels have not always been powerful enough to be designated as TCOs. The powerful and violent Mexican TCOs came from humble beginnings.

In 1848, the Rio Grande River was established as the international boundary between the United States and Mexico under the Treaty of Guadalupe-Hidalgo.[14] Shortly after the establishment of the international boundary, individuals began smuggling goods from the United States to Mexico and vice versa.[15] In 1919, with the implementation of the Eighteenth Amendment to the Constitution, the United States outlawed the production, sale, and transport of alcohol.[16] However, even though the U.S. Government had banned alcohol, the American public still thirsted for it, which in turn led to the creation of a black market and a need for smugglers of the illegal substance. Smuggling alcohol soon became a profitable profession that rapidly proliferated.[17] Fourteen years later, the Eighteenth Amendment was repealed,[18] but the professional smuggling network that had been created stayed intact and quickly found other illicit goods to replace alcohol.[19] The smuggling networks that were

12. United States v. Ramirez, 38 F. Supp. 3d 818, 826 (S.D. Tex. 2014).

13. DRUG ENF'T ADMIN., U.S. DEP'T JUSTICE, DEA-DCT-DIR-008-16, 2015 NATIONAL DRUG THREAT ASSESSMENT SUMMARY iii (2015).

14. Amy White, *History of Smuggling*, TEX. LIBERAL ARTS, http://www.laits.utexas.edu/jaime/cwp4/esg/smugglehistory.html [https://perma.cc/P946-DUA3].

15. *Id.*

16. *See id.* ("The smuggling of alcohol in the United States from Mexico did not become hugely popular until the Prohibition Act of 1919 in the United States, which outlawed both the production and consumption of alcohol products."); *see also* U.S. CONST. amend. XVIII, §§ 1–3 (repealed 1933) (prohibiting the production and sale of alcohol in the United States).

17. White, *supra* note 14.

18. U.S. CONST. amend. XXI, § 1.

19. *See* Arthur Rizer, *Hannibal at the Gate: Border Kids, Drugs, and Guns – and the Mexican Cartel War Goes On*, 27 ST. THOMAS L. REV. 48, 55 (2015) ("By then end of the 1960s, Mexican criminal gangs had assumed control of the smuggling routes and infrastructure necessary to ship opium, marijuana, and domestically produced heroin to the Western United States.").

created to smuggle bootleg tequila are considered the forbearers of the Mexican cartel.[20]

B. *From Marijuana to Cocaine*

After the prohibition era, the smuggling routes used for smuggling alcohol were repurposed for the illegal transportation of marijuana and "poppy" into the United States.[21] Small, localized criminal groups continued to control and profit from these routes through the early 1980's.[22] During that same time, the United States war on drugs was focused on interdicting the importation of cocaine from Colombia that was being smuggled through the Caribbean.[23] As a consequence of those efforts, the United States began to successfully close off the Caribbean routes, which in turn forced the Colombian cartels to rely on the Mexican corridor to get their product into the United States.[24] As a result, the small local groups smuggling marijuana into the United States began to see increased profits as they incorporated cocaine smuggling into their repertoire.[25] Through these changes, the Mexican cartels, as they are recognized today, began to take shape.[26]

20. *See* Michael E. Martínez Peña, Organized Crime Growth and Sustainment: A Review of the Influence of Popular Religion and Beliefs in Mexico 48–49 (Mar. 2016) (unpublished M.A. thesis, Naval Postgraduate School) (on file with the St. Mary's Law Journal) (citing JUAN RAMÍREZ-PIMIENTA, CANTAR A LOS NARCOS: VOCES Y VERSOS DEL NARCOCORRIDO [SINGING TO THE NARCOS: VOICES AND VERSES OF THE NARCOCORRIDO] 20 (Federal District, Mexico: Temas De Hoy, 2011)) ("The [Thirteenth Amendment], also called the 'dry law,' lasted until 1933 and resulted in the illegal importation of alcohol from . . . Mexico . . . . On the repeal of [the Thirteenth Amendment] in 1933, drug smuggling became the primary illegal trade . . . .").

21. *See* Martín Paredes, *The Evolution of the Mexican Narcos*, EL PASO NEWS (Jan. 7, 2016), https://epn.xyz/2016/01/07/the-evolution-of-the-mexican-narcos/ [https://perma.cc/F7ET-989S] (noting Mexico has been home to many drug smugglers, and "[e]ach of them ran heroin and marihuana individually through the territories they each controlled"); *see also* Peña, *supra* note 20 (acknowledging the end of prohibition lead to the development of the drug trade).

22. Paredes, *supra* note 21.

23. *Id.*

24. *Id.*

25. *See* STEVEN DUDLEY, TRANSNATIONAL CRIME IN MEXICO AND CENTRAL AMERICA: ITS EVOLUTION AND ROLE IN INTERNATIONAL MIGRATION 4 (Migration Pol'y Inst. eds., 2012), http://www.migrationpolicy.org/sites/default/files/publications/RMSG-TransnationalCrime.pdf [https://perma.cc/GUD8-R6GM] (discussing the development of the cartels after the introduction of cocaine to the list of smuggled goods).

26. *See id.* (observing cocaine was initially distributed through the Mexican criminal organizations that "included the beginnings of what would later become known as the Sinaloa, Tijuana, Juarez, and Gulf cartels").

Commentators have used the term *cartel* to describe Mexican drug trafficking organizations.[27] Arguably, Mexican cartels are not cartels in the true sense of the word, as it does not appear that they are attempting to artificially control the pricing of their products.[28] Regardless, however, for purposes of this Comment, that distinction is irrelevant. Historians have traced the major Mexican cartels (with the exception of the Gulf and Zetas Cartels) back to one cartel—the Guadalajara Cartel.[29] Over time, the Guadalajara Cartel splintered into several groups that formed the beginning of today's major cartels.[30] At the outset, these groups generally operated in areas that were broken up by geographical boundaries within Mexico, referred to as plazas.[31] Each group owned and operated the smuggling routes in their respective geographical zones that were established back in the days of prohibition.[32] The Mexican cartels controlled what happened in their plazas by paying bribes to the politicians and police forces found in their geographical zones.[33] If the politicians or police refused bribes to cooperate, the cartels simply enforced their will through the use of violence.[34] Early in this time period, the major cartels were content with operating their plazas and reaping the profits generated from smuggling drugs.[35] However, this soon changed with the militarization of the cartels.[36]

27. Paredes, *supra* note 21.

28. *See id.* ("A cartel is an association of manufacturers or suppliers that artificially control pricing . . . . The Mexican drug organizations, for the most part, do not control the manufacture or distribution of the illicit drugs but instead act as conduits from the source to the final destination.").

29. *See id.* ("Mexican drug cartels evolved through familial, or blood ties directly from the Guadalajara cartel, all from family members originating in Sinaloa.").

30. *See id.* ("It also makes it easier to understand the constant evolution of the gangs as part of [] ever changing loyalties among the criminals that evolved from the Guadalajara drug cartel into over 20 drug gangs and two-to-three drug trafficking organizations operating in Mexico today.").

31. *See* DUDLEY, *supra* note 25, at 5 ("Plazas signify a territory controlled by a gang . . . ."); Paredes, *supra* note 21 ("Mexico has had many drug smugglers, each controlling their own routes into the United States.").

32. *See* Paredes, *supra* note 21 (discussing the various drug routes used by traffickers); *see also* Peña, *supra* note 20 (discussing the development of the drug trade following the end of prohibition).

33. *Id.*

34. *See id.* (examining the use of intimidation to control a plaza).

35. *See* DUDLEY, *supra* note 25, at 4–5 (describing the early history of the cartels as "small, family-based organizations").

36. *See id.* (militarizing the cartels transformed them from smuggling organizations to sophisticated criminal organizations).

C. *From Cocaine to Human Smuggling*

In the late 1990's, the Gulf Cartel began to hire deserted military special forces soldiers to provide protection for their smuggling routes, and to enforce their organizational goals.[37] The Gulf Cartel soon realized that by employing their own personal army, it was possible to encroach on the other cartels' plazas—effectively co-opting, or outright stealing, other cartels' established smuggling routes.[38] At the same time that the Gulf Cartel began expanding their geographic area of operation, they (along with other cartels) also began to expand into other areas of crime.[39] Crimes such as kidnapping, theft and resale of oil and gas, and weapons smuggling soon became part of the illicit activities that the cartels were profiting from.[40] Another area that the cartels took a high interest in was human smuggling.[41]

Human smuggling organizations, like the early alcohol smuggling groups, were typically run by small, criminal organizations.[42] These organizations charged money in exchange for a guide, or "coyote," to bring persons into the United States illegally.[43] As the cartels expanded their criminal organizations, they took over human smuggling groups either directly by operating them, or indirectly by forcing the smaller groups to pay a "piso" (tax) to operate in the cartel's area.[44] Human smuggling organizations often engaged in practices such as holding the smuggled individual against their will until the individual's family paid

37. *See* DAVID A. SHIRK, COUNCIL ON FOREIGN RELATIONS, THE DRUG WAR IN MEXICO 10 (2011) (describing the Zetas as "a paramilitary enforcer group comprising elite former military forces recruited by the Gulf Cartel").

38. DUDLEY, *supra* note 25, at 5.

39. *Id.*

40. Damon Tabor, *Radio Tecnico: How The Zetas Cartel Took Over Mexico With Walkie-Talkies*, POPULAR SCIENCE (Mar. 25, 2014), http://www.popsci.com/article/technology/radio-tecnico-how-zetas-cartel-took-over-mexico-walkie-talkies [https://perma.cc/W6XR-ERA8].

41. *Id.*

42. Kyra Gurney, *Mexico Human Trafficking Web Exposes Changing Role of Cartels*, INSIGHT CRIME (July 31, 2014), http://www.insightcrime.org/news-briefs/human-trafficking-drug-cartels-mexico [https://perma.cc/GEX2-A9A7].

43. DUDLEY, *supra* note 25, at 14–15.

44. *Id.* at 14; *see also* Ana Davila, *Drug Cartels: Where Human Trafficking and Human Smuggling Meet Today,* THE HUFFINGTON POST (June 16, 2016), http://www.huffingtonpost.com/ana-davila/drug-cartels-where-human-trafficking-and-human-smuggling-meet-today_b_7588408.html [https://perma.cc/AVC5-QVKJ] (reporting the absorption or destruction of smaller human trafficking organizations by major cartels).

additional fees.[45] However, the cartels upped the ante by using smuggled individuals to supplement their work force.[46] There is documented evidence that cartels have forced people to smuggle drugs into the United States, and have executed them if they refused to participate.[47]

D. *From Cartel to Quasi-State*

From their humble beginning of smuggling tequila, discussed in Section A above,[48] Mexican cartels have grown from organizations with influence, primarily in Mexico, to multi-billion dollar organizations with influence and operations all over the world.[49]

In some areas in Mexico, the cartels' act as quasi-states.[50] In those areas, the Mexican government is incapable or unwilling to confront the groups.[51] The cartels have their own military,[52] communication networks,[53] and language.[54] They use weapons that are the kind and grade deployed by national militaries.[55] In 2009 (the last year that the National Drug Assessment provided a profit estimate), the United States Department of Justice estimated the Mexican cartels' gross profits to be as high as thirty-nine billion dollars a year.[56] That amount is higher than the

45. DUDLEY, *supra* note 25, at 14.

46. *Id.* at 16.

47. *Id.*

48. *Supra*, Part II.A.

49. *Money, Guns, and Drugs: Are U.S. Inputs Fueling Violence on the U.S.–Mexico Border? Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the Comm. On Oversight and Gov't Reform*, 111th Cong. 33, 35 (2009) [hereinafter *Money, Guns, and Drugs*] (statement of Michael A. Braun, Managing Partner, Spectre Group International, LLC).

50. *See* SHIRK, *supra* note 37, at 3 ("[S]ome [cartels] capitalize on antigovernment sentiments and have operational control of certain limited geographical areas.").

51. *See* Tabor, *supra* note 40 ("[Zetas] operate with such impunity that their authority eclipsed that of the Mexican government itself.").

52. *See* SHIRK, *supra* note 37, at 10 (stating the Gulf Cartel was the first cartel to hire former Mexican special forces soldiers).

53. Tabor, *supra* note 40 ("[The Zetas] understood that a widespread communications system would provide a crucial competitive edge over other cartels.").

54. *See* Ken Ellingwood, *Grim Glossary of the Narco-world*, L.A. TIMES (Oct. 28, 2009), http://www.latimes.com/la-fg-narco-glossary28-2009oct28-story.html [https://perma.cc/X8RR-84M3] (listing Mexican media's vocabulary of Mexican Cartel actions); *see also* JOINT PUBL'N RESEARCH SERV. REPORT, JPRS-LAM-89-002, LATIN AMERICA REFERENCE AID: GLOSSARY OF SPANISH AND PORTUGUESE NARCOTICS TERMS (1989) (cataloging words used as code words by the cartel in order to disguise their conversations).

55. *See* SHIRK, *supra* note 37 (detailing the types of weapons used by cartels).

56. NAT'L DRUG ADMIN. INTELLIGENCE CTR., U.S. DEP'T OF JUSTICE, PRODUCT NO. 2008-Q0317-005, 2009 NATIONAL DRUG THREAT ASSESSMENT III (2009).

gross domestic product of over 100 countries in the world.[57] The Mexican cartels also have their own intelligence networks that watch and report on everything that happens in the area.[58] The networks are so advanced and complete that the cartels know everything that is happening in the areas that fall under their respective geographical purview.[59] In many areas of Mexico, the cartels are better informed than the government as to what is happening in a town or city.[60] In Nuevo Laredo, Tamaulipas, Mexico, the Zetas Cartel infiltrated the city police force to such an extent that they controlled the city's emergency response.[61] As a result, the Zetas gained the ability to track and control all aspects of daily life.[62] All of this control and manipulation, creates a reality where citizens are unable to turn to their government for intervention and have little choice but to try and avoid the cartels.[63]

E. *Transnational Criminal Organization Designation*

As discussed above, the major Mexican cartels have expanded their involvement from narcotics smuggling to any manner of crime that will result in a profit.[64] A Transnational Criminal Organization is defined by the United States Government as an organization that conducts illegal and legal operations across national borders in order to obtain monetary gains,

57. *See Economy > GDP: Countries Compared*, NATIONMASTER, http://www.nationmaster.com/country-info/stats/Economy/GDP#2009 [https://perma.cc/5SWC-UBDN] (ranking all the countries in the world by gross domestic product); *see also* CENT. INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2010 (2010) (providing gross domestic product for every nation in the world).

58. *See* George W. Grayson, *Los Zetas: The Ruthless Army Spawned by a Mexican Drug Cartel*, FOREIGN POL'Y RES. INST. (May 13, 2008), http://www.fpri.org/article/2008/05/los-zetas-the-ruthless-army-spawned-by-a-mexican-drug-cartel/ [https://perma.cc/383P-EG2E] (describing the complex system of workers that alert cartel members about day-to-day activities).

59. *See* Tabor, *supra* note 40 (noting the cartels have a multitude of informants, including, shoe shiners, taxi drivers, taco vendors, and police officers).

60. *See id.* ("The [Zetas] developed a Stasi-like army of spies and integrated technology and social media . . . . The result . . . was an intelligence network 'without equal in the Americas.'").

61. *Id.*

62. *See id.* (describing the sophisticated network of informants at the cartel's disposal)

63. *See* Carrie F. Cordero, *Breaking the Mexican Cartels: A Key Homeland Security Challenge for the Next Four Years*, 81 UMKC L. REV. 289, 292 (2012) (indicating officials and citizens have little choice but to cooperate with the cartels or face death).

64. *See, e.g.*, Tabor, *supra* note 40 (discussing the expansion of the Gulf Cartel "into prostitution and gambling along the Rio Grande, building out a small but profitable criminal enterprise").

power, and influence.[65] The definition further provides that these groups proactively protect their operations through the use of violence and corruption.[66] The United States Government has acknowledged the growth of the Mexican cartels into TCOs and has started designating them as such.[67] Currently, there are at least eight Mexican cartels that the United States Government has designated as such.[68] This designation is a recognition by the United States Government that the groups pose a threat to the security of the United States.[69] As will be discussed below, these groups also affect the United States criminal justice system.[70]

F. *Plata O Plomo As a Business Model*

In the late 1970's, the Colombian cartels were the main suppliers of cocaine to the United States.[71] The Colombian cartels, particularly the Medellín Cartel run by Pablo Escobar, were highly successful in running their drug smuggling organizations through the use of a business model known as *plata o plomo*—silver or lead.[72] *Plata o plomo* is a Faustian choice of being paid a bribe (silver) to participate in a criminal organization or, in the alternative, participating under the threat of being shot and killed (lead).[73] Mexican cartels have adopted the *plata o plomo* business model, which has proved to be effective in developing their organizations.[74]

65. Nat'l Sec'y Council, *Strategy to Combat Transnational Organized Crime: Definition*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/definition [https://perma.cc/6V6M-UMBN].

66. *Id.*

67. Tom Barry, *Transnational Criminal Organizations and Mexico's Drug Wars*, BORDER LINES BLOG (June 24, 2011), http://borderlinesblog.blogspot.co.uk/2011/06/transnational-criminal-organizations.html [https://perma.cc/9AEG-DTZG].

68. DRUG ENF'T ADMIN., U.S. DEP'T JUSTICE, DEA-DCT-DIR-065-15, UNITED STATES: AREAS OF INFLUENCE OF MAJOR MEXICAN TRANSNATIONAL CRIMINAL ORGANIZATIONS 2 (2015).

69. Barry, *supra* note 67.

70. *Infra*, Part III.

71. Scott Stewart, *From Colombia to New York City: The Narconomics of Cocaine*, BUS. INSIDER (June 27, 2016, 8:50 AM), http://www.businenessinsider.com/from-colombia-to-new-york-city-the-economics-of-cocaine-2015-7?IR=T [https://perma.cc/2K8Y-JUGK].

72. Paredes, *supra* note 21.

73. *Id.*

74. *See* Lynn Vincent, *Border Wars,* WORLD MAG. (Mar. 28, 2009), https://world.wng.org/2009/03/border_wars [https://perma.cc/DYA5-JVU8] (reporting law enforcement in Mexico is impotent against the cartels due to their use of the *plata o plomo* business model).

III. EFFECTS OF THE MEXICAN DRUG CARTELS ON THE UNITED STATES CRIMINAL JUSTICE SYSTEM

As discussed above, the Mexican cartels have evolved into TCOs that are involved in every area of criminal activity.[75] In some geographical areas of Mexico, the cartels operate as quasi-governments.[76] This ability to control and manipulate all aspects of the cartels' adopted geographical areas, affects citizens of those areas through their inability to do anything other than cooperate with the cartels.[77] The effects of the Mexican cartels, however, are not limited to Mexico.[78] Mexican cartels also have an effect in the United States in many ways and on different levels.[79] Specifically, their effects on the United States criminal justice system can be seen at both the macro and micro level. This section will briefly discuss the macro effects before turning to the micro effects.

A. *A Macro Effect*

The Mexican cartels' total domination of both drug and human smuggling into the U.S. has had a profound impact on the country's criminal justice system.[80] This impact can be seen in such things as spillover violence, criminal dockets, and prison population explosions.[81]

75. *See* Tabor, *supra* note 40 (recognizing cartels are involved with not only narcotics, but also prostitution and gambling).

76. *See id.* (acknowledging Mexico's Gulf Cartel "formed its own paramilitary unit . . . to seize territory and dispatch rivals").

77. *See* Cordero, *supra* note 63, at 292 ("When the choice is to cooperate, or face death of oneself or one's family, there really is no choice."); Paredes, *supra* note 21 (noting cartels provide citizens with only two options: "submit to the will of the smuggler and benefit from their money or die opposing them").

78. *See* Tabor, *supra* note 40 (explaining how a cartel built its drug empire, spanning across Mexico and into the United States, by smuggling drugs worth several billions of dollars into the United States).

79. Cordero, *supra* note 63, at 292–96 (2012) (indicating some families on the U.S. side of the border "periodically need to hide or evacuate to avoid cross-border gunfire," others have been kidnapped or killed, and noting a number of U.S. officers who protect the border have been corrupted by cartels).

80. *See generally Money, Guns, and Drugs*, *supra* note 49 (discussing factors that impact the U.S. justice system such as: how those involved in the drug and human smuggling between Mexico and the U.S. will face an adversarial judicial system, which they are not accustomed to; the need for more crime labs; and the increase in kidnappings and killings).

81. *Compare* JAN CHAIKEN & DOUGLAS MCDONALD, BUREAU OF JUSTICE STATISTICS, NCJ-111763, DRUG LAW VIOLATORS, 1980–86 at 5 (Frank D. Balog ed., 1988) (noting the number of offenders incarcerated for drug offenses was only 71% of those convicted in 1980), *with* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012

It has, however, been acknowledged that the American populace's desire for drugs contributes to a large extent to the presence of Mexican cartels and their illegal activity in the United States. Nonetheless, the efficiency of the *plata o plomo* business model has produced a well-oiled machine that pumps drugs and aliens into the criminal justice system at a historic rate.

The macro effects on the criminal justice system can be seen by looking at the increased number of prosecutions for narcotics crimes and immigration offenses.[82] Bureau of Justice statistics reveal that in 1980, around the time the Mexican cartels began to rise, the United States Government convicted approximately 5,244 persons for drugs offenses.[83] Furthermore, in 1985, it charged 7,239 persons with an immigration offense.[84] By 2012, those numbers rose to 28,427 convictions for drug offenses and 25,682 for immigration offenses.[85] One-third of the federal drug arrests in 2012 were made in the federal judicial districts located on the United States–Mexico border.[86] The exponential rise in the number of prosecutions for drug and immigration offenses from the early 1980s through 2012 mirrors the expansion and evolution of the Mexican cartels.[87] Similarly, the number of those incarcerated for drug and immigration offenses also mirrors the development of the Mexican cartels.[88] Although other factors certainly play an important part in the

STATISTICAL TABLES 21 (Irene Cooperman & Jill Thomas eds., 2015) (reporting 90.5% of those convicted of drug offenses were incarcerated, and 76.1% of those convicted for immigration offenses were incarcerated in 2012). Looking at these statistics, it is easy to see a correlation between the presence of cartels and an increase in the percentage of incarcerations. CHAIKEN & MCDONALD, *supra* at 5; MOTIVANS, *supra* at 21.

82. *See* JOHN SCALIA & MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, NCJ 191745, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2000 at 1, 5 (Tina Dorsey & Tom Hester eds., 2002) (explaining the amount of U.S. prosecutions of noncitizens for drug trafficking between 1985 and 2000 increased from 1,799 to 7,803; and the amount persons suspected of immigration offenses increased from 7,239 to 16,495 in the same timeframe).

83. CHAIKEN & MCDONALD, *supra* note 81, at 4 (Frank D. Balog ed., 1988).

84. SCALIA & LITRAS, *supra* note 82, at 9. The report only provided data for the number of persons charged with an immigration offense, and did not provide conviction data for 1985. *Id.*

85. MOTIVANS, *supra* note 81, at 17.

86. *Id.* at 7.

87. *See* CHAIKEN & MCDONALD, *supra* note 81, at 4 (providing the number of drug related convictions increased by approximately 7,000 from 1980 to 1986); MOTIVANS, *supra* note 81, at 17 (showing the number of convictions for drug related offenses in 2012 was 28,427, while immigration convictions increased to 25,682); Tabor, *supra* note 40 (recognizing Cartels have consistently grown in Mexico since the 1980s).

88. *See* CHAIKEN & MCDONALD, *supra* note 81, at 5 (acknowledging the percent of offenders sentenced to incarceration for drug offenses increased from 71% in 1980 to 77% in 1986, and the

increase of prosecutions and prisoners throughout the years, it is particularly significant that the Southwest Border has had the greatest rise in number of prosecutions for drug and immigration offenses.[89] These statistics, which parallel the growth and strengthening of Mexican cartels, are a strong indicator that their illegal activity within the United States have a large impact on this country's criminal justice system. It is anticipated that a more in-depth analysis of prosecution and incarceration statistics would further strengthen the argument that the system is being affected at the macro level. However, further analysis at the macro level is outside the scope of this Comment.

B. *A Micro Effect – Forced Participation in Crime*

While the effects of Mexican TCOs on the United States criminal justice system can be readily observed at the macro level, as discussed in Part I,[90] the Mexican TCOs have also had an effect on a micro level. One of the ways that the Mexican TCOs have had an effect on the system at a micro level is by forcing individuals to commit crimes.[91] Defendants have alleged that cartels have forced them to participate in an array of crimes, from drug smuggling to murder.[92] Statistically speaking, this does not appear to have a large effect on the criminal justice system. However, the problem is growing and there are no easy answers to the legal issue that is created when an individual is forced to participate in a crime.[93] Can the defendant present a duress or necessity defense at trial or in mitigation of punishment at sentencing? Even if they can, will it be successful?

percent of offenders sentenced to incarceration for non-drug offenses increased from 41% in 1980 to 43% in 1986); MOTIVANS, *supra* note 81, at 21 (informing 90.5% of the drug offenders and 76.1% of the immigration offenders sentenced were incarcerated between October 2011 and September 2012); Tabor, *supra* note 40 (discussing the Cartels' growth in Mexico since the 1980s).

89. *See* MOTIVANS, *supra* note 81, at 10 (confirming 2012 statistics that "1 in 5 matters referred to U.S. attorneys by the DEA were from 5 federal districts along the U.S.-Mexico border").

90. *Infra*, Part I.

91. *See* John Burnett, *Migrants Say They're Unwilling Mules for Cartels*, NPR (Dec. 4, 2011, 6:16 AM), http://www.npr.org/2011/12/04/143025654/migrants-say-theyre-unwilling-mules-for-cartels [https://perma.cc/K2LH-LDQV] (detailing the cartels' use of force to coerce migrants into committing crimes).

92. *Id.*; Kevin Krause, *Defendant in Southlake Cartel Lawyer Killing Says He Was 'Forced' to Stalk Victim*, DALLAS NEWS (May 5, 2016) (on file with the St. Mary's Law Journal).

93. *See* Burnett, *supra* note 91 (noting the government's skepticism regarding duress claims and the differing views of prosecuting and defense attorneys).

IV. DEFINING, ANALYZING, AND UTILIZING THE AFFIRMATIVE DEFENSES OF NECESSITY AND DURESS

As shown in Part II,[94] one of the effects that the Mexican cartels have on the criminal justice system is the difficult legal issue that arises from forcing individuals to participate in crime. What are the options for individuals who, after being threatened with harm to their family, commit crimes? Prosecutors have the authority to withhold prosecution if they find the claim of forced participation with no viable alternatives to be credible.[95] Prosecutors, however, may not be inclined to decline prosecution based on an arrested individual's truthful or self-serving claim of forced participation given their inability to verify its veracity. Absent a declination of prosecution, the defendant is left with two options: plead guilty and rely on the mercy of the court, or plead not guilty and present a duress or necessity defense at trial.[96] Section A below defines the affirmative defenses of necessity and duress and presents their history in federal jurisprudence.[97] Section B analyzes the defenses of necessity and duress as presented in federal jurisprudence.[98] Section C discusses the utilization of the duress and necessity defenses at both the trial and sentencing phases of a case.[99]

A. *Federal Jurisprudence Definition of Duress and Necessity Defenses*

Black's Law Dictionary defines duress in criminal jurisprudence as "[t]he use or threatened use of unlawful force—usu. that a reasonable person cannot resist—to compel someone to commit an unlawful act."[100] The same dictionary defines necessity in criminal jurisprudence as "[a] justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions."[101] In most legal

94. *Supra*, Part II.

95. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-4.3(d) (4th ed. Am. Bar Ass'n) ("A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.").

96. *See* FED. R. CRIM. P. 11(a)(1) ("A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.").

97. *Infra*, Part IV.A.

98. *Infra*, Part IV.B.

99. *Infra*, Part IV.C.

100. *Duress*, BLACK'S LAW DICTIONARY (9th ed. 2009).

101. *Necessity*, BLACK'S LAW DICTIONARY (9th ed. 2009).

applications, duress has been classified as an excuse and necessity has been classified as a justification.[102] Traditionally, the defense of duress is applicable when a defendant is forced to participate in a crime by threat of force from a human source.[103] On the other hand, a necessity defense is available when a defendant is coerced into a criminal act by a force of nature.[104] The distinctions between the defenses of necessity and duress—along with arguments of whether they are excuses or justifications—have been, and continue to be, the source of great debate.[105] Fortunately, a resolution of that debate is outside the scope of this Comment. It is sufficient to recognize that the distinction exists.[106]

The federal court system in the United States was established in 1789.[107] Shortly thereafter, the United States Supreme Court recognized that duress was a permissible defense to a violation of law.[108] Since then, the duress defense has been utilized with differing results in cases charging offenses such as: possession with intent to distribute drugs,[109] felon in

102. *See* MODEL PENAL CODE § 3.02 cmt. 1 (AM. LAW INST. 1985) (commenting that the defense of necessity is generally held to be a justification for criminal conduct); WAYNE R. LAFAVE, CRIMINAL LAW 491–92, 523 (4th ed. 2003) (footnote omitted) (finding an individual who commits a crime under duress may be excused for committing the crime, and "[n]ecessity . . . is a defense belonging in the justification category of defenses rather than the excuse category"); Monu Bedi, *Excusing Behavior: Reclassifying The Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575, 575 (2011) ("Most scholars categorize duress as an excuse . . . and necessity as a justification . . . ."); Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 745 (1995) (asserting most jurisdictions classify duress as an excuse and necessity as a justification). *But see* Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 863 (2003) (arguing for the classification of duress defenses as justifications).

103. *See* LAFAVE, *supra* note 102, at 491–92, 523 (4th ed. 2003) (describing duress as acting "under the pressure of an unlawful threat from another human being").

104. *Id.* at 523.

105. *See* Bedi, *supra* note 102, at 578 ("Scholars have extensively examined whether necessity and duress are properly understood as excused or justified acts."); Doré, *supra* note 102, at 744–745 (1995) (analyzing whether duress is a justification or an excuse); LAFAVE, *supra* note 102, at 491–92, 523 (4th ed. 2003) (detailing arguments between authors on the classification of the defenses as an excuse or justification).

106. *See* LAFAVE, *supra* note 102, at 448 ("At early common law, the distinction between justification and excuse was a critical one . . . .").

107. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1652 (2012)).

108. *See* United States v. Vigol, 2 U.S. (2 Dall.) 346, 347 (C.C.D. Pa. 1795) (No. 16,621) (finding the law recognizes fear as an excuse for committing a crime).

109. *See* United States v. Villegas, 899 F.2d 1324, 1344 (2d Cir. 1990) (determining generalized fear is not sufficient to show fear of serious bodily harm or death).

possession of a firearm,[110] escape,[111] kidnapping,[112] and mutiny.[113] The Court's decision in *United States v. Vigol*[114] is the earliest known criminal case in the United States that references the defense of duress.[115] In its decision, the Court stated, "[F]ear[,] which the law recognizes as an excuse for the perpetration of an offence[,] must proceed from an immediate and actual danger, threatening the very life of the party."[116] In affirming the defendant's guilt, the Court determined that fear of property loss or apprehension of personal injury was not sufficient to avail oneself of a duress defense.[117]

Not long after recognizing a defense of duress, the Court, in a series of admiralty law decisions,[118] recognized a defense of necessity.[119] The facts presented in each of those cases involved a ship that violated trade laws by entering prohibited ports in the West Indies.[120] In each case, the defendants acknowledged breaking the law, but argued a necessity to enter the off-limit ports to save their crew and cargo because of foul weather and faulty or damaged ships.[121] The Court held, in all three cases, that a

110. *See* United States v. Alston, 526 F.3d 91, 98 (3d Cir. 2008) (affirming a defendant's conviction after determining that there was no evidence of an immediate threat of death or bodily injury).

111. *See* United States v. Michelson, 559 F.2d 567, 571 (9th Cir. 1977) (concluding the defendant was not entitled to a duress instruction because all elements of the defense were not met).

112. *See* United States v. Pestana, 865 F. Supp. 2d 357, 367 (S.D.N.Y 2011), *aff'd sub nom,* United States v. Oriz, Nos. 11-4860(L), 11-4931(CON), 2013 WL 2150722 (2d Cir. 2013) (noting the unavailability of a duress defense because there was no immediate threat of force).

113. *See* United States v. Haskell, 26 F. Cas. 207, 210 (C.C. Pa. 1823) (giving a jury instruction which required a well-grounded fear of death for the availability of an excuse defense).

114. United States v. Vigol, 2 U.S. (2 Dall.) 346 (C.C.D. Pa. 1795) (No. 16,621).

115. Bedi, *supra* note 102, at 585 n.58.

116. *Vigol*, 2 U.S. (2 Dall.) at 347.

117. *Id.*

118. *See* The New York, 16 U.S. 59 (1818) (recognizing a necessity defense when there was a need to bring a ship into port because of a loss of the rudder); Brig Struggle v. United States, 13 U.S. (9 Cranch) 71 (1815) (addressing a claim of necessity when the ship's crew prematurely sold cargo at another port to preserve the integrity and safety of their ship); Brig James Wells v. United States, 11 U.S. (7 Cranch) 22 (1812) (considering the defense of necessity as it applied to adverse weather conditions affecting the safety of the ship's route).

119. *See* Bedi, *supra* note 102, at 580 (footnote omitted) ("The first reference to necessity as a defense to a violation of law appears to come from admiralty cases.").

120. The New York, 16 U.S. (3 Wheat.) at 68; Brig Struggle, 13 U.S. (9 Cranch) at 76; Brig James Wells, 11 U.S. (7 Cranch) 22*; see also* Bedi, *supra* note 102, at 580 n.13 (discussing the admiralty cases).

121. The New York, 16 U.S. (3 Wheat.) at 68; Brig Struggle, 13 U.S. (9 Cranch) at 72–73; Brig James Wells, 11 U.S. (7 Cranch) at 22–23.

claim of necessity would be viable with sufficient evidence to support the claims; however, the Court in each case also found that the defendants did not produce sufficient evidence to support the assertion of the defense.[122]

The United States Supreme Court, in *United States v. Kirby*,[123] inferred a necessity defense when deciding whether a county sheriff had violated a federal statute that prohibited the delay of mail delivery by arresting a postman for murder.[124] In its decision, the Court provided an example of a prisoner escaping a burning jail as a justification for committing the crime of escape.[125] The Court cited "common sense" in concluding that the sheriff was justified in violating the statute.[126] In its opinion, the Court never used the term necessity; the Court examined the issue by framing the sheriff's choice as allowing the mail to be delivered or arresting a murderer, thereby implying the sheriff's necessity to break the law.[127]

As discussed above, the United States Supreme Court recognized both necessity and duress defenses early in the nation's history; however, it would be over one hundred years before the United States Supreme Court discussed the defenses at length.[128]

In 1980, the Supreme Court decided *United States v. Bailey*,[129] which, like the example the Court referenced in *United States v. Kirby*, dealt with the issue of whether an inmate who had escaped from a prison could present a duress or necessity defense.[130] In its decision, the Court stated, "[W]e must decide . . . the elements that constitute defenses such as duress and

122. The New York, 16 U.S. (3 Wheat.) at 68; Brig Struggle, 13 U.S. (9 Cranch) at 76; Brig James Wells, 11 U.S. (7 Cranch) at 25–26.

123. United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868).

124. *See id.* at 486–87 (implying the necessity defense by analogy to a hypothetical prisoner escaping a burning prison).

125. *Id.* at 487.

126. *Id.*

127. *See id.* at 486–87 (holding the sheriff's arrest of the mail carrier was necessary and a better choice than allowing the murderer to go free so that the mail recipients would not be inconvenienced).

128. After the Supreme Court decided *Kirby*, the defenses of necessity and duress were not discussed at length until the Supreme Court heard *United States v. Bailey*. United States v. Bailey, 444 U.S. 394 (1980). *See* Bedi, *supra* note 102, at 585 (noting *Bailey* "provides the first detailed discussion of duress in the criminal context").

129. United States v Bailey, 444 U.S. 394 (1980).

130. *See id.* at 415 ("An escapee who flees from a jail . . . may well be entitled to an instruction on duress or necessity . . . ."); Kirby, 74 U.S. (7 Wall) at 487 ("[T]hat a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire . . . .").

necessity."[131] The Court, nonetheless, did not list the specific elements of either defense, but instead discussed the defenses as shaped by common law.[132] The Court wrote that, at common law, a defense of duress excused criminal conduct when an individual was under "threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law."[133] The Court further noted that at common law a duress defense could only be used when an individual was forced to participate in a crime by other human beings.[134] It provided an example of the proper use of a duress defense through the hypothetical situation of individual *B* threatening to kill individual *A* if *A* did not destroy a dike.[135] The Court then distinguished the necessity from duress, and described necessity as a choice of evils that was applicable "where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."[136] It described the proper use of a necessity defense through a hypothetical situation where *A* could argue a necessity if *A* destroyed a dike to keep valuable property from flooding.[137] After defining both the necessity and duress defenses, the Court indicated that neither defense could be used if a defendant had a reasonable, legal alternative to committing a crime.[138] The Court applied these definitions and their exception to its conclusion that the defendants could not avail themselves of the defenses because of insufficient evidence to support either claims.[139]

Twenty-one years later, in *United States v. Oakland Cannabis Buyers' Cooperative*,[140] the United States Supreme Court cited *United States v. Bailey* when acknowledging the existence of a necessity defense, stating it had never completely rejected the defense.[141] The Court defined the necessity

131. *Bailey*, 444 U.S. at 397.

132. *See id.* at 409–10 ("Common law historically distinguished between the defenses of duress and necessity.").

133. *Id.* at 409.

134. *See id.* at 409–10 (1980) (reviewing the common elements of duress).

135. *Id.* at 410.

136. *Id.*

137. *Id.*

138. *See id.* ("[I]f there [is] a reasonable, legal alternative . . . the defenses will fail.").

139. *See id.* at 417 (holding the respondents failed to provide sufficient evidence because a critical element was missing).

140. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

141. *See id.* at 490 ("[T]his Court has discussed the possibility of a necessity defense without altogether rejecting it.").

defense as the "situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."[142]

In *Dixon v. United States*,[143] the Court took one step closer to adopting specific elements of a duress defense.[144] In a footnote discussion, the Court noted that the elements of a duress defense are not defined in any federal statute.[145] In the same footnote, the Court then listed specific elements for a duress defense, qualifying such with: "[W]e presume the accuracy of the District Court's description of these elements."[146] The Court then, citing a Fifth Circuit case,[147] provided the following requirements:

> (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.[148]

Although the case was ultimately decided on other grounds, and the defense was not central to the holding, the Court appeared to embrace the Fifth Circuit's definition of duress.[149]

Until recent times, discussing the traditional definitions of duress and necessity would sufficiently chronicle the legal community's approach to justification defenses. The two defenses were not mixed or crossed and, as detailed, have been categorized as two separate and distinct defenses. Notwithstanding their separateness, both the United States Supreme Court

142. *Id.* at 490 (quoting *Bailey*, 444 U.S. at 410).

143. Dixon v. United States, 548 U.S. 1 (2006).

144. *See id.* at 4 n.2 (acknowledging the district court's description of the elements of defense).

145. *Id.*

146. *Id.*

147. *Dixon*, 548 U.S. at 4 n.2 (citing United States v. Harper, 802 F.2d 115, 117 (5th Cir. 1986)); *accord* United States v. Montes, 602 F.3d 381, 389 (5th Cir. 2010) (reciting the four elements of a duress defense); *see also* United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994) (summarizing the four common elements of duress); United States v. Gant, 691 F.2d 1159, 1162–63 (5th Cir. 1982) (purporting the same).

148. *Dixon*, 548 U.S. at 4 n.2.

149. *See id.* at 4 n.2, 17 (2006) (relying on the District Court's description of the elements).

and federal appeals courts have stated that, "Modern cases have tended to blur the distinction between duress and necessity."[150] When discussing the hybrid that emerges from merging the defenses of duress and necessity, courts have labeled such as a "justification" defense, providing a definition that mirrors the four elements the Supreme Court referenced in *Dixon v. United States*.[151] Combining the two defenses into one justification defense may signal willingness from courts to eschew the traditional separation of defenses along the lines of forces of nature (necessity) versus human forces (duress).[152]

The history of the Court's definition of the duress and necessity defenses will form the foundation for analyzing how courts have applied both defenses.

B. *Analyzing the Defenses of Duress and Necessity*

1. Duress

As discussed above, federal courts have embraced the definition of duress as having four elements. The first element reads: "The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury . . . ."[153] In analyzing the first element, it is necessary to break the element into three parts: (1) the defendant was under imminent threat, (2) the threat was of a nature of death or serious bodily injury, and (3) the threat induced a well-grounded fear.

In order to meet the first element of the duress defense, courts have consistently emphasized that a defendant must provide evidence that they were operating under a present threat.[154] Courts have required that the

150. United States v. Bailey, 444 U.S. 394, 410 (1980); United States v. Contento-Pachon, 723 F.2d 691, 695 (9th Cir. 1984); *see* United States v. Butler, 485 F.3d 569, 572 n.1 (10th Cir. 2007) (stating the defenses of duress and necessity have been blurred "to the point of merger" (quoting United States v. Holliday, 457 F.3d 121, 127 (1st Cir. 2006)).

151. *See* United States v. Leahy, 473 F.3d 401, 409 (1st Cir. 2007) (citing *Dixon*, 548 U.S. at 4 n.2).

152. *See, e.g.*, *Butler*, 485 F.3d at 572 n.1 ("Courts have used the terms duress, necessity, and justification interchangeably." (citing *Leahy*, 473 F.3d at 406)).

153. *Dixon*, 548 U.S. at 4 n.2.

154. *See* United States v. Tanner, 941 F.2d 574, 587 (7th Cir. 1991) (concluding the evidence must show the threat of harm as one that is "present, immediate, or impending"). *But see* United States v. Barash, 365 F.2d 395, 401–02 (2d Cir. 1966) (finding a threat of economic harm by a government official, although not as complete of a defense as duress, may be considered when analyzing the specific intent needed for a bribery conviction).

threat be immediate, and have rejected fear of future harm as being sufficient to meet the standard.[155] In *United States v. Salgado-Ocampo*,[156] the court analyzed the word *imminent*.[157] The defendant in that case received a single phone call that threatened harm at a later time.[158] The court, in finding the defendant did not meet the requirement of acting under imminent fear or bodily harm, found that the words *imminent* and *later* were opposites.[159] In *United States v. Haynes*,[160] the Seventh Circuit similarly declined to find imminent harm, even though harm might occur within several hours.[161] The Seventh Circuit's refusal to find imminent harm, when the facts showed the harm was likely to occur within several hours, is representative of courts' view that the harm must be akin to simultaneous.[162] In fact, courts have stated that finding the type of imminent danger that would justify a duress defense would be a rarity.[163] Although courts have stressed that all elements of the duress defense must be present to utilize the defense, the immediacy element is often a court's focus when determining if the defense is allowed.[164] Courts' strict interpretation of imminent danger casts doubt on the receptiveness of an argument that presents duress due to threat of future harm as a defense to a crime.

155. *See* Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 359 (9th Cir. 1951) ("We know of no rule that would permit one . . . to claim immunity from prosecution . . . by setting up a claim of mental fear of possible future action . . . .").

156. United States v. Salgado-Ocampo, 159 F.3d 322 (7th Cir. 1998).

157. *See id.* at 326–27 (interpreting *imminent* to mean the opposite of later).

158. *Id.* at 326.

159. *Id.* at 326–27 (citing United States v. Haynes, 143 F.3d 1089, 1090 (7th Cir. 1998)).

160. United States v. Haynes, 143 F.3d 1089 (7th Cir. 1998).

161. *See id.* at 1090 (holding threat of action, which was set to occur later that afternoon, was insufficient to raise the justification defense).

162. *See* United States v. Panter, 688 F.2d 268, 269, 271–72 (5th Cir. 1982) (finding an implication that harm was imminent when the defendant had been stabbed in the stomach); *see also* United States v. Paolello, 951 F.2d 537, 542 (3d Cir. 1991) (concluding the defendant was in imminent harm when a gun was produced during an altercation).

163. *See* United States v. Perrin, 45 F.3d 869, 874 (4th Cir. 1995) ("It has been only on the rarest of occasions that our sister circuits have found . . . the type of imminent danger that would warrant the application of a justification defense.").

164. *See* United States v. Patrick, 542 F.2d 381, 388 (7th Cir. 1976) (classifying all elements of a duress defense as necessary, but emphasizing "the element of immediacy" as one of "crucial importance").

To allow a duress defense, courts have not only required the harm to be immediate, but that it also involve death or serious bodily injury.[165] Courts have declined to allow a duress defense based on a threat of incarceration,[166] property damage,[167] or economic coercion.[168] What is not clear is whether courts will deny the defense if the threat of death or serious bodily injury is directed towards a third party.[169] In *Iva Ikuko Toguri D'Aquino v. United States*,[170] the Ninth Circuit decided a case in which the appellant was convicted of treason, and appealed the verdict based on, among other issues, an argument that the district court committed errors when addressing her duress defense.[171] The appellant had been convicted of treason for working as a radio broadcaster for the Japanese Government during World War II.[172] She argued that the trial court erred when providing jury instructions that indicated that a duress defense required the fear of imminent death or serious bodily harm be directed toward her, personally.[173] The appellant presented evidence during trial, indicating that she knew the Japanese government had tortured and killed individuals that did not participate in radio broadcasts and, because of this knowledge, she was afraid for her safety and was, thus,

165. *See* Dixon v. United States, 548 U.S. 1, 4 n.2 (2006) (requiring the harm to be "of such a nature as to induce a well-grounded apprehension of death or serious bodily injury").

166. *See* United States v. Alexander, 287 F.3d 811, 818 (9th Cir. 2002) (receiving threats of incarceration "is not sufficient coercion to excuse the commission of a crime" (citing United States v. Lemon, 824 F.2d 763, 765 (9th Cir. 1987)); *see also* United States v. Martin, 740 F.2d 1352, 1361 (6th Cir. 1984) (holding a jury instruction, which provided that threat of incarceration is insufficient for a duress defense, was proper (citing United States v. Campbell, 675 F.2d 815, 820–21 (6th Cir. 1982)).

167. *See* United States v. Agard, 605 F.2d 665, 666–68 (2d Cir. 1979) (declining to allow a duress defense for a store owner who believed he was going to be robbed).

168. *See* United States v. Colacurcio, 659 F.2d 684, 690 (5th Cir. 1981) (finding coercion by law enforcement officers insufficient to create a duress defense based on "economic coercion").

169. *See, e.g.*, United States v. Contento-Pachon, 723 F.2d 691, 694 (9th Cir. 1984) (acknowledging the possibility of immediacy when believable threats were directed to related third persons); *contra* Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 360–61 (9th Cir. 1951) (concluding there was insufficient evidence of immediacy when threats were made against known third persons).

170. Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951).

171. *See id.* at 357 (detailing the defendant's argument, which contended that the trial court provided inappropriate jury instructions for her duress defense).

172. *Id.* at 347–48.

173. *See id.* at 360 (recounting the defendant's assertion that the trial court erred by concluding knowledge of harm to other prisoners of war did not create a mental state sufficient to support a duress defense).

coerced into working at the radio station.[174] The Ninth Circuit noted the trial court granted the appellant latitude by allowing evidence of atrocities and threats of atrocities against third persons, under the theory that this information had a bearing upon the appellant's state of mind.[175] However, the court ultimately denied the appeal and affirmed the conviction by upholding the trial court's jury instruction.[176] It should be noted that the appellant made a compelling argument that the element of duress requiring apprehension of impending death or serious bodily harm should be inapplicable in cases where a defendant was in an enemy country and was compelled to act by an enemy government.[177] Because she was unable to get protection from the United States, the appellant argued that it was erroneous for the duress defense to require an imminent threat of death or bodily harm.[178] The appellant provided authority for the proposition that if an individual joined a rebellion because he was forced to, and could provide proof of such force, then a presumption exists that the individual continued in the rebellion against his will even if there was no constant force keeping him from leaving.[179] The Ninth Circuit considered whether this argument would be viable for an individual claiming forced service into enemy military service, before determining it was inapplicable to the facts of the case before it.[180]

The Ninth Circuit has allowed a duress defense to be presented when a defendant alleged a third party was the recipient of a threat of imminent harm.[181] In *United States v. Contento-Pachon*,[182] the court remanded the

174. *See id.* (providing accounts of other prisoners of war who were punished for disobeying orders).

175. *See id.* at 361 (acknowledging the trial judge's theory of relevance for threats against third persons "as bearing upon the state of mind of the appellant").

176. *See id.* ("We think that the record [as a] whole discloses that the jury was not misled . . . .").

177. *See id.* at 358–59 (addressing the defendant's contention that known threats of death or torture made by enemy governments against its prisoners of war satisfies the immediacy requirement).

178. *Id.*

179. *See id.* at 359 (citing EDWARD HYDE EAST, TREATISE OF THE PLEAS OF THE CROWN 70–71 (P. Byrne eds., 1806)) ("It may perhaps be impossible to account for every day, week, or month; and therefore *it may be sufficient to excuse him if he can prove an original force upon him*[.]").

180. *Id.*

181. *See* United States v. Contento-Pachon, 723 F.2d 691, 693–94 (9th Cir. 1984) (setting forth a duress defense, which alleged threats against third persons, namely, the defendant's wife and child).

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

case back to the district court to allow evidence of a duress defense to be presented to a jury.[183] In that case, Contento-Pachon lived in Bogota, Colombia, where he was employed as a taxi driver.[184] On one occasion, Contento-Pachon was offered a job as a "drug mule" to carry cocaine to the United States.[185] Contento-Pachon turned down the offer to transport the drugs, which resulted in a death threat against his wife and child if he did not cooperate.[186] Contento-Pachon eventually complied, due to the threat, and agreed to carry the drugs.[187] Prior to departing the country with the drugs, Contento-Pachon was informed he was being watched, and that if he did not follow all instructions, he, along with his family, would be killed.[188] Nonetheless, the trial court found Contento-Pachon's evidence was "insufficient to support a duress defense."[189] The appeals court noted that the trial court denied the duress defense because it had found the threats of harm to Contento-Pachon were not immediate.[190] The Ninth Circuit, however, found Contento-Pachon's testimony credible and held the threats of harm to him and his family were not threats of future harm, but were in fact immediate.[191] In support of its finding, the court cited evidence that the individual that had threatened Contento-Pachon was deeply involved in the distribution of narcotics, their drugs were worth a lot of money, and information regarding Contento-Pachon's family and residence had been specifically mentioned in the threats against him.[192] In its opinion, the Ninth Circuit specifically discussed the threat to a third party (the defendant's family) in the determination that the defendant was entitled to present evidence of a duress defense.[193] Although the court considered the threats to the defendant along with the threats to a third party, the court did not hesitate

183. *Id.* at 695–96.

184. *Id.* at 693.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.* at 694 ("The district court found that the initial threats were not immediate because 'they were conditioned on defendant's failure to cooperate in the future and did not place defendant and his family in immediate danger.'").

191. *Id.*

192. *Id.*

193. *Id.*

in finding that threats to a third party should be considered as proof of coercion.[194]

Lastly, courts have required that imminent threats must induce a well-grounded fear.[195] Courts have rejected evidence of a generalized fear and have required that the threat be specific and, as previously discussed, immediate.[196] In using an objective standard, requiring that the fear be well-grounded, courts do not allow a defendant to make an arbitrary claim that he was afraid.[197] In *United States v. Nwoye*,[198] the court asserted, "Reasonableness is the touchstone of a duress defense."[199] In its decision, the court held that the fear of imminent death or serious bodily harm must be reasonable.[200]

The second element of the duress defense requires "the defendant . . . not recklessly or negligently place . . . herself in a situation in which it was probable that she would be forced to perform the criminal conduct[.]"[201] The Second Circuit discussed this element at length in its *United States v. Agard*[202] decision.[203] In the *Agard* case, the facts indicate that the appellant was working in his shop when he initiated an altercation between himself and three other individuals.[204] When the altercation escalated, the appellant grabbed an assault rifle and fired at the individuals.[205] On a subsequent occasion, the appellant attempted to assist the police in apprehending an armed individual that had shot a police

194. *See id.* (addressing the multiple threat factors against the defendant that supported a duress defense).

195. *See id.* at 693 (noting one of the three elements of duress is "a well-grounded fear that the threat will be carried out").

196. *See* United States v. Housand, 550 F.2d 818, 825 (2d Cir. 1977) ("[T]he fear must be more than a general apprehension of danger, particularly if one has the chance to escape or to seek the protection of government.").

197. *See, e.g.*, Dixon v. United States, 548 U.S. 1, 4 n.2 (requiring the fear to "induce a well-grounded apprehension of death or serious bodily injury"). *But see* United States v. Nwoye, 824 F.3d 1129, 1137 (D.C. Cir. 2016) ("[A]ny assessment of the reasonableness of a defendant's actions must take into account the defendant's 'particular circumstances,' at least to a certain extent.").

198. United States v. Nwoye, 824 F.3d 1129 (D.C. Cir. 2016).

199. *Id.* at 1136.

200. *Id.*

201. *Dixon*, 548 U.S. at 4 n.2.

202. United States v. Agard, 605 F.2d 665 (2d Cir. 1979).

203. *See id.* at 667–68 (holding there can be no defense where a defendant negligently or recklessly subjects themselves to duress).

204. *Id.* at 666.

205. *Id.*

officer.[206] The appellant armed himself with a shotgun and approached the police to offer his assistance.[207] The police arrested the appellant when they discovered that he was armed.[208] The appellant was subsequently charged and convicted of unlawful possession of a firearm.[209] Thereafter, the appellant appealed the conviction because the trial court refused to instruct the jury on a duress defense.[210] The court determined, in its analysis, that the defendant had deliberately placed himself in a situation where he felt the need to arm himself.[211] In making such determination, the court relied on the evidence presented at trial, which showed that the appellant leapt over the counter of his pizza shop and tried to physically remove the individuals he believed may have been threatening him.[212] The evidence showed that only after the appellant initiated the fight, which eventually escalated, did he feel the need to arm himself with a firearm.[213] The court noted that the shop owner took action despite any evidence that the men were armed or any request by the appellant for the men to leave.[214] It determined that the appellant actively placed himself in the high-risk situation and, therefore, could not receive a jury instruction on duress for possessing a weapon.[215] The court also concluded that the appellant similarly placed himself in an unsafe situation when he armed himself with a shotgun and tried to assist the police in apprehending a dangerous individual.[216] Because the appellant recklessly or negligently placed himself in a position of danger, he was not entitled to a jury instruction on a defense of duress.[217] Although the second element

206. *Id.* at 666–67.

207. *Id.* at 667.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See id.* at 668 (noting the "appellant admitted that he initiated the altercation, which resulted in his seeking a weapon").

212. *See id.* ("By attempting to physically eject the men from his shop . . . appellant cause[d] himself to be placed in a situation in which he could well have expected possible harm.").

213. *Id.*

214. *See id.* ("Although [the defendant] testified that there was 'talk of gunplay' and vague threatening motions by one of the men involved, he did not see any weapons nor did he demand that they leave his shop.").

215. *Id.*

216. *Id.*

217. *See id.* ("Therefore, having placed himself in such a potentially dangerous situation, appellant can hardly be heard to claim that the danger he encountered justified his unlawful conduct. He was not entitled to a jury instruction regarding the defense of duress and coercion.").

must be analyzed when affirmatively pleading a duress defense, the hypothetical situation discussed in the introduction of this Comment would likely not qualify as a situation in which an individual has recklessly or negligently placed himself in a position in which he must perform a crime.

The third element of the duress defense requires that a "defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm."[218] In *Shannon v. United States*,[219] the Tenth Circuit heard an appeal from defendants that were convicted of conspiracy to commit kidnapping.[220] The appellants were appealing the trial court's refusal to give jury instructions which would have allowed the jury to acquit the appellants if they were found to have been acting under coercion.[221] In its decision, the appeals court recognized that coercion could excuse the commission of a crime; however, it noted that the availability of an opportunity to avoid the criminal act, would render the defense unavailable.[222] The facts indicate that the appellants first became involved in the conspiracy when a kidnapped individual was brought to their ranch.[223] The appellants allowed the kidnapped individual to remain at their ranch under guard for a couple of days.[224] The kidnapped individual was then moved to another location where he remained under guard for several more days.[225] Throughout the ordeal, the appellants assisted in guarding the kidnapped individual, and also provided ice and meals to the other individuals that were involved in the crime.[226] The evidence showed that the appellants participated in the crime voluntarily and were not threatened in any manner until the day the kidnapped individual was released.[227] In its decision, the court analyzed the facts and determined that the appellants had ample opportunity to end their

218. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).

219. Shannon v. United States, 76 F.2d 490 (10th Cir. 1935).

220. *Id.* at 491.

221. *Id.* at 492.

222. *See id.* at 493 ("One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion . . . .").

223. *Id.* at 492.

224. *Id.*

225. *Id.* at 492–93.

226. *Id.* at 493.

227. *Id.*

participation in the crime and report such to the police.[228] The court seemed to focus on the large amounts of time the appellants were not in the presence of the individuals that eventually threatened them when it stated, "One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury."[229]

The Sixth Circuit has stated that "the keystone of the analysis" of a duress claim is whether or not there is an alternative to violating the law.[230] In *United States v. Singleton*,[231] the court found that if there is an alternative to committing a crime that arises before or during the event, failure to take the alternative will result in a denial of a duress defense.[232] The Fifth Circuit's standard is slightly more onerous, requiring the defendant actually try the alternative in order to argue that he had no alternative.[233]

The Tenth, Sixth, and Fifth Circuits' analysis of the third duress element leaves little room for support of a duress defense for the hypothetical presented in the introduction of this Comment. However, the First Circuit's decision in *R.I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.*[234] seems to detail a more forgiving analysis of when a defendant will or will not have a reasonable legal alternative to committing a crime.[235] The court acknowledged that coercion will excuse crimes if each element of the defense is met.[236] The facts of the case indicate that the plaintiff received a phone call from his brother's wife requesting that he meet his brother at a location in Pawtucket, Rhode Island.[237] When the plaintiff arrived at the meeting he was forced into a vehicle, told that he would be

228. *Id.*

229. *Id.*

230. United States v. Singleton, 902 F.2d 471, 473 (6th Cir. 1990) (citing United States v. Bailey, 444 U.S. 394, 410 (1980)).

231. United States v. Singleton, 902 F.2d 471 (6th Cir. 1990).

232. *Id.* at 473.

233. *See* United States v. Estrada-Monzon, No. 16-40542, 2017 WL 2813855, at *3 (5th Cir. June 28, 2017) ("Because duress is an affirmative defense, a defendant must present evidence of each of the elements before it may be presented to a jury." (quoting United States v. Posada-Rios, 158 F.3d 832, 873 (5th Cir. 1998))).

234. R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603 (1st Cir. 1949).

235. *See id.* at 606 (finding no basis for the assumption that a police force would be unable to protect any person that may be threatened if an individual, committing a crime under coercion, alerts the authorities).

236. *Id.* at 605.

237. *Id.* at 604.

driven to his place of business, and ordered to remove cash from the safe and take it to armed individuals.[238] The armed individuals informed the plaintiff that if he did not comply with their orders, his brother and his brother's wife would be harmed.[239] The plaintiff complied with the orders, gave the money to the armed individuals, and then alerted the police as to what had occurred.[240] The plaintiff argued he had been acting under coercion and, as such, he was innocent of any dishonesty, fraud, or criminal act.[241] The appeals court affirmed the trial court's judgment against the plaintiff.[242] In its decision, the appeals court focused on the fact that the plaintiff was allowed to leave the presence of the armed individuals, enter the building, remove the money, and walk over a mile to deliver the money.[243] Like the Tenth Circuit's decision in *Shannon v. United States,* the First Circuit determined that the plaintiff had plenty of time to avoid the crime and alert the authorities.[244] The court dismissed the plaintiff's argument that he was unable to alert the authorities because he pre-supposed that the police would be unable to protect him and his family.[245] The court based the dismissal on its belief that the police forces in Pawtucket and Providence, Rhode Island were adequately equipped and staffed to take on the armed individuals and protect the plaintiff and his family.[246] The court's analysis, thus, opens an argument that a case could be distinguished if the facts indicate that threats are made from individuals that the local police or authorities are unable to provide protection from.

The fourth and final element of the duress defense requires that there be "a direct causal relationship . . . reasonably anticipated between the criminal act and the avoidance of the threatened harm."[247] In *United States v. Alston*,[248] the Third Circuit discussed the fourth element of the duress defense.[249] The facts indicate that the appellant was arrested for

238. *Id.*
239. *Id.*
240. *Id.* at 604–05.
241. *Id.* at 605.
242. *Id.* at 606.
243. *Id.* at 605–06.
244. *Id.* at 606.
245. *Id.*
246. *Id.*
247. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).
248. United States v. Alston, 526 F.3d 91 (3d Cir. 2008).
249. *See generally id.* at 96 (3d Cir. 2008) (discussing the causal relationship as it applies to a felon in possession of a firearm).

"possession of a firearm by a convicted felon" after Philadelphia Police responded to reports of gunshots in the city.[250] The appellant admitted to possessing the firearm but stated that he needed the gun for self-defense because he had seen a man that had shot him one-year prior.[251] The appellant, who was wearing a bulletproof vest when arrested, asserted that the man who had previously shot him had told him "he was going to 'get'" him.[252] The appellant further indicated that after being told this, he retrieved a gun from his mother's house for protection.[253] The appellant was arrested the same day he started carrying the weapon.[254] The trial court denied the appellant the use of the justification defense, and the appellant filed a timely appeal.[255] The appeals court determined there was "no direct causal relationship between the criminal action (possession of a firearm) and avoidance of the threatened harm (retaliation by Bentley)."[256] In its analysis, the court concluded that even though the appellant had seen the man who had shot him and had heard him say that, "he was going to 'get'" him, the appellant's actions were not sufficiently connected to the crime.[257] When making this determination, the court focused on the imminence of the harm to gauge the appellant's need for the weapon.[258] Because the court ascertained that the harm was not imminent, the court found the connection of the crime to the avoidance of the harm to be attenuated, and, therefore, the appellant was precluded from using a duress defense.[259] The court then proceeded to analyze imminence in depth by citing cases previously discussed above in the analysis of the first element of the duress defense.[260]

The *Alston* court's focus on the imminence of the harm—to determine the presence of a causal connection—brings the analysis of the elements of the duress defense full circle.

250. *Id.* at 93.
251. *Id.*
252. *Id.*
253. *Id.*
254. *See id.* ("As noted, Alston was arrested around 10 p.m. that same night.").
255. *Id.* at 93–94.
256. *Id.* at 95–96.
257. *See id.* ("The causal relationship in these circumstances is attenuated at best.").
258. *Id.*
259. *Id.* at 96.
260. *See id.* (citing United States v. Paolello, 951 F.2d 537 (3d Cir. 1991); *see also* United States v. Panter, 688 F.2d 268 (5th Cir. 1982) (discussing the imminence requirement needed for a duress defense).

2. Necessity

The United States Supreme Court has not provided the elements of a necessity defense; however, in *United States v. Maxwell*,[261] the First Circuit determined that a necessity defense required a defendant to prove "that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law."[262] In *United States v. Maxwell*, the defendant was convicted of unauthorized entry into a naval installation.[263] The facts indicate that the defendant entered a United States naval station located on the island of Vieques, Puerto Rico in an attempt to disrupt live-fire artillery exercises that the Navy planned to conduct on the island.[264] The defendant believed that the live-fire exercises would involve a Trident nuclear submarine.[265] The defendant appealed his conviction on multiple grounds, including the trial court's denial of the presentation of a necessity defense.[266] The necessity defense that the defendant proposed ran as follows: the unlawful entry on the naval station designed to stop the exercise and the deployment of a nuclear submarine was a lesser evil than allowing the Navy to continue with the live-fire exercise; the harm was imminent because the defendant believed one of the submarines was in the immediate vicinity of the island; the defendant believed that committing the unlawful entry would halt the live-fire exercise leading to the dispersion of the nuclear submarine; and, finally, the defendant had previously taken other actions to no avail.[267] As such, there was no other alternative but to trespass on the naval station.[268] In analyzing the defendant's appeal, the *Maxwell* court discussed the elements of a necessity defense as they applied to the facts of the defendant's case.[269]

As for the first element, the appeals court did not provide any meaningful analysis of the defendant's claim that he had chosen the lesser

261. United States v. Maxwell, 254 F.3d 21 (1st Cir. 2001).

262. *Id.* at 27 (citing United States v. Turner, 44 F.3d 900 (10th Cir. 1995)).

263. *Id.* at 23–24.

264. *See id.* at 23 (noting the history of protests that have arisen as a product of politically controversial, live-fire artillery and bombardment exercises carried out on the island).

265. *Id.* at 27.

266. *See id.* at 24 (detailing Maxwell's arguments concerning his appeal).

267. *See id.* at 27.

268. *Id.*

269. *Id.* at 26–29.

of two evils.[270] The court assumed, for the sake of argument, that the defendant's claim—that he committed the unlawful entry onto the naval station because it was less of an evil than allowing the Navy to deploy a nuclear submarine and perform live-fire exercises on the island—was sufficient to carry the burden of production necessary to proceed with the necessity defense.[271] The court was more skeptical of the defendant's arguments regarding the three remaining elements.[272]

Next, the court discussed the element of imminent harm.[273] The court defined the term imminent harm as being one of "a real emergency . . . involving immediate danger to oneself or to a third party."[274] The court was dismissive of the defendant's claim that the deployment of the nuclear submarine was an imminent harm.[275] The court took apart the defendant's claim of imminent harm in two steps.[276] It first determined that the defendant was unable to offer evidence that the submarine was in the area.[277] Subsequently, the court found that even if the defendant had provided evidence that the submarine was in the area, without proof that the submarine was going to actually detonate anything, the defendant's claims were insufficient to demonstrate an imminent harm.[278]

After discussing the first and second elements of the necessity defense, the court turned to the third element.[279] It stated that in order to show a reasonable anticipation of averting harm in the context of a protest, the "defendant must demonstrate [a] cause and effect between an act of protest and the achievement of the goal[.]"[280] The court further

270. *See id.* at 27 (foregoing any discussion of a two-evils analysis, and instead assuming that the requirement was met).

271. *See id.* ("We assume, for argument's sake, that Maxwell carried the entry-level burden of production on the first component ('lesser of two evils').").

272. *See id.* (discounting the last three elements of Maxwell's defense).

273. *Id.* at 27–28.

274. *Id.* at 27.

275. *See id.* ("[E]ven if Maxwell could have shown that a nuclear submarine was close at hand, it is doubtful that the mere presence of such a vessel, without some kind of realistic threat of detonation, would suffice to pose an imminent harm.").

276. *See id.* at 27–28 (addressing the elements of imminent harm and "reasonable anticipation of averting harm").

277. *See id.* ("The record contains no evidence to support Maxwell's naked averment that the harm he feared was imminent.").

278. *Id.*

279. *Id.* at 28.

280. *Id.*

determined that the defendant did not present any evidence supporting a reasonable belief that his unlawful entry would cause the Navy to cancel the exercises and disperse the submarine.[281] In its analysis, the court focused on the reasonableness aspect of whether the defendant could anticipate harm being averted.[282] The court did not present a definition of reasonableness, but it did provide an example of what would not be reasonable behavior.[283] Referring to a case that is factually similar to *United States v. Maxwell*, the court cited *United States v. Montgomery*,[284] an Eleventh Circuit decision, that held it was not reasonable to believe that entering a nuclear launch site and vandalizing it would lead to nuclear disarmament.[285]

Lastly, the *Maxwell* court discussed the legal alternative element.[286] The court stated that in order for a necessity defense to succeed, a defendant must show that he violated the law because there was no legal alternative.[287] The court expounded on this element by stating that the necessity defense does not arise from a choice of an action from all available actions.[288] The defense is only available when a defendant's actions are necessary and preclude all other options.[289] The court placed a high burden on this element of the necessity defense when it asserted, "A defendant's legal alternatives will rarely, if ever, be deemed exhausted when the harm of which he complains can be palliated by political action."[290] The Fifth Circuit addressed this element in *United States v. Posada-Rios*,[291] by noting that a defendant's subjective belief of whether alternatives were available was not the standard.[292] The *Maxwell* court found that, because the defendant had not exhausted his legal alternatives,

281. *See id.* ("Maxwell's anticipation [was] pure conjecture, not [a] reasonable belief.").

282. *See id.* ("On this record, then, Maxwell could not reasonably have anticipated that his act of trespass would avert the harm that he professed to fear.").

283. *See id.* (finding trespass and temporary disruption could not reasonably ward off the harm the defendant intended to prevent).

284. United States v. Montgomery, 772 F.2d 733 (11th Cir. 1985).

285. *Maxwell*, 254 F.3d at 28 (citing *Montgomery*, 772 F.2d at 736).

286. *Id.* at 28–29.

287. *Id.* at 28.

288. *Id.*

289. *See id.* (describing the necessity defense as arising from an emergent crisis with only one course of action).

290. *Id.* at 29.

291. United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998).

292. *Id.* at 874.

he did not meet the burden of production on the fourth element of the necessity defense.[293]

C. *Utilizing Duress and Necessity Defenses*

A defendant has a right to utilize an affirmative defense at trial, at the sentencing phase, or both.[294] Regarding the right to utilize an affirmative defense at trial, the First Circuit Court of Appeals concluded, in *United States v. Rodriguez*,[295] that if the defense theory is valid and the record contains evidence to support the theory, then a defendant is entitled to a jury instruction on the theory.[296] In order to utilize a duress or necessity defense, it is necessary to clear two hurdles: (1) the defendant must present relevant evidence;[297] and (2) the defendant must present evidence sufficient to support the burden of production.[298] If both of these hurdles are cleared, then the issue of who—defense or prosecution—carries the burden of persuasion, arises.

1. Utilizing Duress and Necessity Defenses at Trial

As noted above, a court must first determine whether the evidence to support a defense of duress or necessity is relevant.[299] For evidence to be admissible, it must be relevant.[300] Federal Rule of Evidence 401 states, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[301] The United States Supreme Court has interpreted the Rule's standard of relevance as being a liberal

293. *Maxwell*, 254 F.3d at 28–29.

294. *See id.* at 26 (finding a defendant has a broad right to utilize a defense); *see also* United States v. Amparo, 961 F.2d 288, 292 (1st Cir. 1992) (determining rejection of a duress defense by the jury does not preclude the judge from giving a lower sentence based on that defense). *But see* United States v. Ruiz, 905 F.2d 499, 508–09 (1st Cir. 1990) (restating the view that a defendant cannot appeal a sentence based on the sentencing court's refusal to depart from the appropriate sentencing guideline range).

295. United States v. Rodriguez, 858 F.2d 809 (1st Cir. 1988).

296. *Id.* at 812.

297. *See Maxwell*, 254 F.3d at 26 (finding no right to present irrelevant evidence).

298. *Id.* at 26.

299. *See id.* (emphasizing the need that evidence be relevant in order to invoke a criminal defendant's right to present such).

300. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) (citing FED. R. EVID. 402).

301. FED. R. EVID. 401.

one.[302] Trial judges make the determination of whether evidence is relevant or not.[303]

After determining whether evidence is relevant or irrelevant, a trial court will then determine if the evidence is sufficient to support the burden of production.[304] The United States Supreme Court has ruled that, in order to present evidence of a duress or necessity defense at trial, a defendant must "meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense . . . ."[305] The trial court determines the minimum standard a defendant must meet.[306] In order to make the determination of whether the defendant has met the minimum standard, the trial court does not engage in fact-finding, but merely makes an inquiry into whether the evidence is legally sufficient.[307] Courts have determined that evidence is legally sufficient when "it creates a genuine factual dispute."[308] Other courts have stated that evidence is legally sufficient when it is more than "flimsy or insubstantial."[309] In making this determination, courts will look at the evidence in the light most favorable to the defendant.[310] Courts have generally described the evidence that is necessary to support the burden of production in broad strokes (i.e., "more than flimsy;" must create a triable issue); however, courts have determined that a defendant's conclusory or self-serving statements are not sufficient to create a triable issue.[311]

302. *Daubert*, 509 U.S. at 587.

303. United States v. Diaz, 878 F.2d 608, 614 (2d Cir. 1989) (quoting United States v. Cruz, 797 F.2d 90, 95 (2d Cir. 1986)).

304. *See, e.g.*, United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001) ("Thus, when the proffer in support of an anticipated affirmative defense is insufficient as a matter of law to create a triable issue, a district court may preclude the presentation of that defense entirely." (quoting United States v. Bailey, 444 U.S. 394, 414–15 (1980))).

305. *Bailey*, 444 U.S. at 415.

306. *See* United States v. Rodriguez, 858 F.2d 809, 812 (1st Cir. 1988) ("[T]he court's function is to examine the evidence of record . . . to see if the proof, taken most hospitably to the accused, can plausibly support the theory of defense.").

307. *Id.*

308. United States v. Ortiz, 804 F.2d 1161, 1164 (10th Cir. 1986).

309. *Id.* at 1165 (quoting United States v. Nations, 764 F.2d 1073, 1080 (5th Cir. 1985)).

310. United States v. Reyes, 645 F.2d 285, 287 (5th Cir. 1981) (citing United States v. Hill, 626 F.2d 1301, 1304 (5th Cir. 1980)).

311. *Ortiz*, 804 F.2d at 1165–66 (citing United States v. Kakley, 741 F.2d 1, 4 (1st. Cir. 1984), *cert. denied*, 469 U.S. 887 (1984)).

The last issue that must be addressed for a defendant to utilize a duress or necessity defense at trial is deciding which side will have to carry the burden of persuasion. In *In re Winship*,[312] the United States Supreme Court explicitly held that the Due Process Clause of the Constitution requires the prosecution to prove a defendant's guilt beyond a reasonable doubt.[313] In *McKelvey v. United States*,[314] the United States Supreme Court concluded that affirmative defenses must be set up and established by the side relying on the defense.[315] In *Dixon v. United States*, the United States Supreme Court decided a case in which a petitioner contended that the trial court erroneously instructed the jury that she was required to prove a duress defense by a preponderance of the evidence instead of requiring the prosecution to carry the burden of persuasion beyond a reasonable doubt.[316] The facts of the case indicate that the petitioner was indicted and convicted of making false statements linked to a firearm acquisition (18 U.S.C. § 922(a)(6)) and receiving a firearm during the time she was under felony indictment (18 U.S.C. § 922(n)).[317] At trial, the petitioner admitted to committing the offenses, but claimed she did so because her boyfriend threatened her with death or harm to her family if she did not purchase the weapons.[318] The petitioner's argument contained two assertions: (1) her duress defense "controverted the *mens rea* required for conviction" and, therefore, the prosecution was required to carry the burden of persuasion; and (2) modern common law requires the government to bear the burden of persuasion.[319]

The *Dixon* Court addressed the petitioner's arguments by analyzing the issue of who is required to carry the burden of persuasion.[320] The Court began its analysis by noting that the statutes the petitioner was charged and convicted of violating contain a *mens rea* element.[321] 18 U.S.C. § 922(a)(6)

312. *In re Winship*, 397 U.S. 358 (1970).

313. *Id.* at 364.

314. McKelvey v. United States, 260 U.S. 353 (1922).

315. *See id.* at 357 (reinforcing the notion that a party asserting a defense must bear the burden of proof on that defense).

316. Dixon v. United States, 548 U.S. 1, 4–5 (2006).

317. *Id.* at 3.

318. *Id.* at 4

319. *Id.* at 5.

320. *See id.* at 5–17 (discussing the assignment of the burden upon either the government or the defendant).

321. *See id.* at 5 (noting the crimes petitioner was convicted of require one to act "knowingly" or "willfully").

requires the accused to have acted "knowingly" and 18 U.S.C. § 924(a)(1)(D)[322] requires the accused to have acted "willfully."[323] The Court, referencing *In re Winship*, asserted that the prosecution bore the burden of proving the *mens rea* elements beyond a reasonable doubt.[324] The Court determined, however, that the prosecution met its burden when the petitioner admitted in court, through her testimony, that she committed the crimes.[325] In admitting that she committed the crimes, the petitioner argued that she was forced to commit the crimes and, therefore, did not meet the *mens rea* required by the statute.[326] Nevertheless, the Court, citing *United States v. Bailey*, noted that affirmative defenses do not negate *mens rea*; instead, the defenses "allow . . . the defendant to 'avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.'"[327] The Court also supported its decision by noting that the crimes the petitioner was convicted of violating are statutory offenses that are not analogous to any common law crime, and that a duress defense does not disprove any elements of a statutory crime.[328]

The Court then discussed how the burden of persuasion has been historically allocated in statutory offenses.[329] It began its discussion by observing that federal crimes are exclusively created by statute and the elements of those crimes are defined by the legislature.[330] The Court further affirmed that, for the crimes at hand, Congress defined the specific mental states as requiring the defendant to act "knowingly" or "willfully."[331] Furthermore, the Court determined that the prosecution is required to prove those specific mental states beyond a reasonable doubt.[332] The Court, citing *Patterson v. New York*,[333] indicated that "[t]he

322. 18 U.S.C. § 922(n) does not contain a *mens rea* requirement, but 18 U.S.C. § 924(a)(1)(D)—the sentencing provision of the statute—does. *See Dixon*, 548 U.S. at 5 (detailing the difference between the statutes).

323. *See Dixon*, 548 U.S. at 5 ("[T]he term 'willfully' in § 924(a)(1)(D) requires a defendant to have 'acted with knowledge that his conduct was unlawful.'").

324. *Id.* at 5–6 (citing *In re* Winship, 397 U.S. 358, 364 (1970)).

325. *Id.* at 6.

326. *Id.*

327. *Id.* at 7 (citing United States v. Bailey, 444 U.S. 394, 402 (1980)).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* (citing Patterson v. New York, 432 U.S. 197, 211 n.12 (1977)).

333. Patterson v. New York, 432 U.S. 197 (1977).

applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case."[334] The Court then concluded its analysis of the petitioner's argument—that a duress defense controverts the *mens rea* of the offense—by finding that there is no constitutional basis for requiring the prosecution to carry the burden of persuasion.[335]

The *Dixon* Court subsequently addressed whether modern common law requires the prosecution to disprove the petitioner's duress defense beyond a reasonable doubt.[336] The Court, citing both *Patterson v. New York* and *Mullaney v. Wilbur*,[337] began its analysis by observing that common law requires that the defendant carry the burden of persuasion for affirmative defenses.[338] The Court noted that the common law rule, in the duress defense context, is in accord with the doctrine that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."[339] The petitioner argued that "two important developments" supported her contention that modern law requires the government to bear the burden of persuasion: (1) the Supreme Court decision of *Davis v. United States*; and (2) the Model Penal Code.[340]

The Court first addressed the petitioner's reliance on *Davis v. United States*[341]—a United States Supreme Court decision requiring the government to carry the burden of persuasion on whether a defendant was sane.[342] The Court found that *Davis v. United States* did not support the petitioner's argument for multiple reasons.[343] First, the Court noted that the *Davis* Court required the prosecution to prove the defendant's sanity beyond a reasonable doubt because that evidence disproved an essential element of the murder charge.[344] The *Dixon* Court thus dismissed the petitioner's argument, finding that the evidence produced at trial did not

334. *Dixon*, 548 U.S. at 7–8 (citing *Patterson*, 432 U.S. at 211 n.12).

335. *Id.* at 8.

336. *Id.*

337. Mullaney v. Wilbur, 421 U.S. 684 (1975).

338. *Dixon*, 548 U.S. at 8.

339. *Id.* at 9 (citing 2 J. STRONG, MCCORMICK ON EVIDENCE 415 (5th ed. 1999)).

340. *Id.* at 8.

341. Davis v. United States, 160 U.S. 469 (1895).

342. *Dixon*, 548 U.S. at 8.

343. *See id.* at 9–15 (distinguishing *Davis* from the present case and expounding on why *Davis* was not applicable).

344. *Id.* at 11 (citing *Davis*, 165 U.S. at 378).

disprove the elements of the crimes she was convicted of.[345] Second, the *Dixon* Court acknowledged that *Davis v. United States* may have "establish[ed] a general rule for federal prosecutions . . . that an accused is 'entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.'"[346] This rule, in effect, required the government to prove a defendant's sanity beyond a reasonable doubt if a defendant was able to carry the burden of production as to his sanity.[347] The Court then foreclosed the petitioner's argument by noting that *Leland v. Oregon*[348] determined that the *Davis* rule was not mandated by the Constitution.[349] Furthermore, Congress had overruled *Davis* by creating a statute that required a defendant to carry the burden of persuasion as to "his insanity by clear and convincing evidence."[350] As such, the Court determined that the petitioner was unable to argue that the *Davis* decision was relevant to a duress defense argument.[351] Lastly, the *Dixon* Court echoed its previous observation that all federal crimes are statutory and, as such, the Court must enforce the duress defense as contemplated by Congress in the context of the crimes at hand.[352] The Court noted that Congress did not include a duress defense in the statute that the defendant was convicted of violating.[353] Consequently, the Court assumed that Congress—familiar with the common law requirement that the defendant bear the burden of proving an affirmative defense and the Court's holding in *McKelvey v. United States*—would expect courts to apply those same approaches to a duress defense.[354]

The Court then addressed whether the Model Penal Code is evidence of a new common law rule that the government must bear the burden of persuasion and disprove a duress defense beyond a reasonable doubt.[355] The petitioner argued that the Model Penal Code placed the burden on the prosecution to disprove a duress defense beyond a reasonable doubt; that

345. *Id.*
346. *Id.* (quoting Leland v. Oregon, 343 U.S. 790, 797 (1952)).
347. *Id.*
348. Leland v. Oregon, 343 U.S. 790 (1952).
349. *Dixon*, 548 U.S. at 12.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* at 13.
354. *Id.* at 13–14.
355. *Id.* at 15–17.

Congress was familiar with the Model Penal Code; and that Congress intended to model the statutory language for the crimes at hand after the Model Penal Code.[356] The Court rejected the petitioner's argument by noting that the statutory language of the crimes at hand did not adhere to the language of the Model Penal Code and, therefore, it was unlikely that Congress intended the Court to interpret the statutes through the lens of the Model Penal Code.[357]

The Court concluded its analysis by finding that Congress could require the prosecution to disprove a duress defense beyond a reasonable doubt if it were to include such language in enacted legislations.[358]

2. Utilizing Duress and Necessity During Sentencing

All hope is not lost if a defendant is unable to bring a duress or necessity defense to the jury. As noted above, courts have recognized a defendant's right to utilize a defense of duress when sentenced.[359] Defendants are allowed to argue, at the time of sentencing, that they committed a crime under duress or necessity regardless of whether or not the defense is sufficient to present to a jury.[360] The United States Sentencing Commission recognized that duress and necessity can be utilized at sentencing, and included both defenses in the section of the United States Sentencing Guidelines Manual, which discusses grounds for departure.[361] In *United States v. Booker*,[362] the United States Supreme Court held that the United States Sentencing Guidelines are advisory, and that courts are no longer bound to apply the Guidelines when pronouncing a sentence.[363] However, the *Booker* Court did make clear that a sentencing court must still consider the Guidelines as a factor when

356. *Id.* at 15–16.

357. *Id.* at 16.

358. *Id.* at 17.

359. United States v. Amparo, 961 F.2d 288, 292 (1st Cir. 1992).

360. *Id.*

361. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.11–5K2.12 (U.S. SENTENCING COMM'N 2016) (discussing grounds for downward departure based on evidence of duress or necessity).

362. United States v. Booker, 543 U.S. 220 (2005).

363. *See id.* at 264 (noting district courts are not required to apply the Guidelines during sentencing).

calculating a sentence.[364] As such, a sentencing court must consider all relevant grounds for departure contained in the Guidelines Manual.[365]

As noted above, the Guidelines Manual recognizes both duress and necessity as grounds for departure from a guideline sentence.[366] In section 5K2.11, the Guidelines Manual discusses when a departure for a necessity defense may be appropriate.[367] The relevant language contained in the Guidelines Manual states that it may be appropriate for a court to reduce a sentence when a defendant committed a crime out of necessity to avoid a greater harm.[368] Much like the definition of necessity at the liability stage, the Guidelines do not indicate how to categorize levels of harm.[369] However, the Guidelines require that the actions taken by the defendant "significantly diminish society's interest in punishing the conduct."[370]

In section 5K2.12, the Guidelines Manual discusses when a duress defense is grounds for departing from the Guidelines.[371] Similar to the finding made by the *Amparo* Court, the Guidelines state that a defense of duress may be used to argue for a reduced sentence even if the defense was not sufficient to amount to a complete defense.[372] The Guidelines Manual states that any decrease in the sentence based on a duress claim should take into account: (1) the reasonableness of actions taken; (2) the defendant's actions in proportion to the duress involved; and (3) the extent to which the defendant's conduct was less harmful than what the defendant believed it to be.[373] The Guidelines Manual limits any reduction of a sentence to cases that involve threat of physical injury,

364. *See id.* at 259–60 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

365. U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.11–5K2.12 (U.S. SENTENCING COMM'N 2016) ("Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual causes into account by departing from the guidelines.").

366. *Id.*

367. *See id.* at § 5K2.11 ("Sometimes, a defendant may commit a crime in order to avoid a perceived grater harm").

368. *Id.*

369. *See* Bedi, *supra* note 102, at 592 ("[T]he Guidelines make no reference to the *kind of harm* required to be averted." (emphasis added)).

370. U.S. SENTENCING GUIDELINES MANUAL § 5K2.11 (U.S. SENTENCING COMM'N 2016).

371. *Id.* at § 5K2.12.

372. *Id*; *see* United States v. Amparo, 961 F.2d 288, 292 (1st Cir. 1992).

373. U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (U.S. SENTENCING COMM'N 2016).

substantial property damage, or similar injury that results from a third party's unlawful actions.[374]

V. VIABILITY OF A DURESS OR NECESSITY DEFENSE GOING FORWARD

Part IV defined and analyzed the defenses of duress and necessity as utilized in the federal court system. The question then becomes: Where does the current state of the law pertaining to a duress defense leave the hypothetical case of Roberto? Under the current state of the law, can Roberto find justice or is he relegated to being punished for his forced involvement in a crime? Court analysis indicates that a duress defense is not very successful at trial or during the sentencing phase.[375] The main issue with a duress defense in this context is that, in the majority of situations, a judge or jury is forced to weigh the uncorroborated testimony of a defendant, who has been caught breaking the law, against the evidence of the crime (i.e., drug loads or other tangible evidence).[376] There is rarely any tangible evidence to corroborate the defendant's story that he was forced to participate in the crime.[377] In the case of Roberto, even if he was willing to provide testimony that he only participated in the crime because his family was threatened, will he be willing to provide sufficient testimony in light of the fact that his family is still in danger? The remainder of the Comment will analyze Roberto's case under the state of the current law and suggest arguments that may offer defendants, in situations similar to Roberto's, a way to find justice.

A. *Is a Duress Defense Viable?*

Assuming—based on the hypothetical—that Roberto will be charged with possession with intent to distribute a controlled substance (21 U.S.C. § 841),[378] the prosecution will have to prove beyond a

374. *Id.*

375. Burnett, *supra* note 91.

376. *Id.*

377. *See id.* (describing the defense as a trendy one that rarely works but is nonetheless used in hopes that it will work).

378. It is also likely that Roberto would be charged with conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. § 846), as prosecutors frequently add-on this charge in order to increase leverage on the defendant. Daniel Medwed, *Memo to Marty Walsh: Why Prosecutors Love to Charge Defendants with Conspiracy*, WGBH NEWS, (Aug. 10, 2016), http://www.news.wgbh.org/2016/08/10/news/memo-marty-walsh-why-prosecutors-love-charge-defendants-conspiracy [https://perma.cc/GP9W-HL5Q]. A conspiracy charge would beg the question: whether Roberto, acting under duress, could possibly be in agreement with the individuals

reasonable doubt that Roberto knowingly or intentionally possessed the drugs with intent to distribute them.[379] Roberto will be forced to decide if he wants to plead guilty, and be eligible to receive a benefit, such as a sentence reduction for accepting responsibility, or fight the charge by attempting to present evidence of duress, which is considered an affirmative defense.[380] He must consider the possibility that if he is unsuccessful in his duress defense, he will not receive any credit at sentencing for acceptance of responsibility, which will likely lead to a longer sentence.[381] The following analysis is based on Roberto's hypothetical decision to utilize a duress or necessity defense.

As discussed in Part IV, if Roberto chooses to assert an affirmative defense, he must first offer relevant evidence that is sufficient to support the burden of production.[382] It is beneficial to Roberto that courts have interpreted the standard of relevance liberally.[383] Thus, Roberto's testimony of how he was forced to smuggle drugs into the United States is relevant in that "it has [a] tendency to make a fact more or less probable . . . ."[384]

A bigger concern for Roberto is his ability to meet the burden of production. Roberto will likely be forced to attempt to carry the burden of production based solely on his testimony, which creates a problem. Although courts will look at the evidence in the light most favorable to the

that coerced him into the commission of the crime. In *United States v. Cessa*, the Fifth Circuit Court of Appeals addressed this issue. United States v. Cessa 861 F.3d 121, 130–133 (5th Cir. 2017). The court noted that the defendant must be allowed to tell his story. *See id.* at 130 ("Defendants charged with participating in a conspiracy to launder money may argue that they did not 'join[] the conspiracy[.]'" (quoting United States v. Cessa 785 F.3d 165, 175 (5th Cir. 2015))). The defendant argued that he was not part of a conspiracy by directly attacking the element of conspiracy that requires a specific intent to join a conspiracy. The court, in its decision to remand the case, pointed out that the defendant was not arguing that he joined the conspiracy under duress; instead, the defendant was arguing that he was involved with the Cartels (conspirators) out of fear. *Id.*

379. 21 U.S.C. § 841(a)(1) (2012).

380. *See* FED. R. CRIM. P. 11(a)(1) (listing the pleas available for a criminal defendant); *see also* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(A) (U.S. SENTENCING COMM'N 2016) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by [two] levels.").

381. U.S. SENTENCING GUIDELINE MANUAL § 3E1.1 cmt. 2 (U.S. SENTENCING COMM'N 2016).

382. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) (citing FED. R. EVID. 401); *see* United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001) (explaining a defendant's duty to present relevant evidence in support of an affirmative defense).

383. *Daubert*, 509 U.S. at 587.

384. FED. R. EVID. 401(a).

defendant, courts have stated that a defendant's self-serving statements are not sufficient to meet the minimum standard.[385] However, in *United States v. Contento-Pachon*—a case directly on point with the case at hand—the Ninth Circuit Court of Appeals reversed the trial court's decision that the defendant had not offered sufficient evidence to support a duress defense.[386] The *Contento-Pachon* court did not discuss the type of evidence offered in the case; however, the court constantly referenced Contento-Pachon's testimony when making the determination that the evidence offered was sufficient to support a duress defense.[387] Furthermore, the *Contento-Pachon* court found that "[f]actfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law."[388] Relying on *Contento-Pachon*, Roberto's testimony that he was forced to bring drugs into the United States creates a genuine factual dispute and, thereby, is arguably sufficient to carry his burden of production.

As discussed in Part IV,[389] Roberto must carry the burden of production for each element of the duress or necessity defense.[390] The first element of the duress defense requires that the defendant act under immediate threat of death or serious bodily injury.[391] In light of the narrow definition of what constitutes an immediate threat, it may be difficult for Roberto to meet the immediate-threat standard.[392] The hypothetical facts indicate that Roberto's family was implicitly threatened and then, days later, he smuggled the drugs into the United States. However, Roberto has a viable argument when viewed through the lens supplied by the *Contento-Pachon* court. Much like the hypothetical case at hand, Mr. Contento-Pachon and his family were threatened with bodily harm if he did not smuggle drugs into the United States.[393] The *Contento-*

385. United States v. Ortiz, 804 F.2d 1161, 1164–66 (10th Cir. 1986).

386. *See* United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984) ("We reverse because there was sufficient evidence of duress to present a triable issue of fact.").

387. *See id.* at 693–95 (analyzing the elements of duress through the defendant's testimony).

388. *Id.* at 693.

389. *Supra*, Part IV.

390. *See Contento-Pachon*, 72 F.2d at 693 ("There are three elements of the duress defense: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm.").

391. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).

392. *See Contento-Pachon*, 72 F.2d at 694 ("The element of immediacy requires that there be some evidence that the threat of injury was present, immediate, or impending.").

393. *See id.* at 693 ("Jorge told Contento-Pachon that his failure to cooperate would result in the death of his wife and three-year-old child.").

Pachon court acknowledged that "a veiled threat of future unspecified harm" did not satisfy the definition of immediate.[394] The court determined, however, that the evidence provided supported the argument that future threats to Mr. Contento-Pachon and his family would have come to fruition in the form of immediate and harsh consequences if he had refused to cooperate.[395] The court supported its conclusion by noting that the man that threatened Mr. Contento-Pachon was deeply involved in the drug business and that large amounts of money were involved in the transaction.[396] The court also indicated that the man threatened Mr. Contento-Pachon's wife and child even though he had evidently never met them.[397]

As previously discussed, the first element of a duress defense also requires that the threat of death or serious bodily injury be well-grounded.[398] In Part II of this Comment,[399] the discussion led to the conclusion that Mexican Cartels are violent and more than capable of carrying out threats of violence. Roberto's testimony—that the men who coerced him into participating in a crime appeared to be working for a large well-organized group—would support the argument that his fear was reasonable and well-grounded.[400] In light of the *Contento-Pachon* court's analysis, Roberto has an excellent argument that the implied threats regarding his family—made by those men—are sufficient to qualify as immediate and in the nature of death or serious bodily injury.

The second element of the duress defense requires that Roberto not have recklessly or negligently placed himself in a situation in which he would be forced to commit a crime.[401] The facts presented in the hypothetical indicate that Roberto was walking home from work and had no previous contact with the men that threatened him. Roberto committed the crime two days after the initial threat. Therefore, because

394. *Id.* at 694 (citing R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949)).

395. *Id.*

396. *Id.*

397. *See id.* at 693–94 (detailing how the man who threatened the defendant "mentioned facts about Contento-Pachon's personal life, including private details which Contento-Pachon had never mentioned to" him).

398. *Id.* at 693.

399. *Supra*, Part II.

400. *See Contento-Pachon*, 72 F.2d at 695 (concluding the defendant offered credible evidence that he acted under immediate and well-grounded threats).

401. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).

the crime was committed after Roberto and his family had already been threatened, the second element would likely be met in Roberto's favor.

The third element requires that Roberto have had no reasonable legal alternative to violating the law.[402] The *Contento-Pachon* case is on point regarding this issue. In *Contento-Pachon*, the defendant received a threat and did not act for several weeks after the threat.[403] The district court observed that the defendant had plenty of time to alert the authorities or leave the area.[404] However, the court of appeals noted that the evidence offered was sufficient to create a fact issue regarding whether or not the defendant was able to go to the police since they were known for being corrupt.[405] Additionally, as discussed above, in a separate case, the First Circuit determined that a defendant was unable to claim a duress defense because he did not go to the police.[406] In *R.I. Recreation Center, Inc. v. Aetna Casualty & Surety Co.*, the court found that the police force was adequately staffed and equipped to take on the armed individuals that had threatened the defendant.[407] In Part II of this Comment,[408] however, the analysis led to the conclusion that the Mexican Government is not adequately staffed or equipped to take on the Mexican Cartels. As such, both *Contento-Pachon* and *R.I. Recreation Center, Inc.* provide support for Roberto's claim that he had no reasonable legal alternative to violating the law.

The fourth element requires that Roberto show an anticipated direct causal relationship between bringing the drugs into the United States and avoidance of his family's death.[409] As discussed in Part IV,[410] *United States v. Alston* focused on the imminence of the harm to determine if there was a direct causal relationship.[411] Therefore, because Roberto has a

402. *Id.*

403. *See Contento-Pachon*, 723 F.2d at 693 (indicating the defendant did not act immediately after the threats were made, but rather met with the man who threatened him on two subsequent occasions before carrying out the crime).

404. *Id.* at 694 ("The district court found that because Contento-Pachon was not physically restrained prior to the time he swallowed the balloons, he could have sought help from the police or fled.").

405. *Id.* at 693 ("Contento-Pachon testified that he did not contact the police because he believe[d] that the Bogota police [were] corrupt and that they [were] paid off by drug traffickers.").

406. R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605–06 (1st Cir. 1949).

407. *Id.* at 606.

408. *Supra*, Part II.

409. Dixon v. United States, 548 U.S. 1, 4 n.2 (2006).

410. *Supra*, Part IV.

411. United States v. Alston, 526 F.3d 91, 95–96 (3d Cir. 2008).

strong argument that he faced imminent harm and can provide testimony to that point, he meets the fourth required element of the duress defense.

The foregoing analysis supports a strong argument that Roberto would be able to present or proffer evidence sufficient to prove each element of a duress defense, thereby carrying his burden of production.[412] The determination of whether Roberto has carried this burden of production, however, will likely be made by the presiding judge prior to trial.[413] If the presiding judge rules that Roberto has carried the burden of production, *Dixon v. United States* then requires that Roberto carry the burden of persuasion.[414] The Sixth Circuit's decision in *United States v. Johnson*[415] provides guidance regarding at what point the defense must be presented to the jury: "Where a defendant claims an affirmative defense, and that 'defense finds some support in the evidence and in the law,' the defendant is entitled to have the claimed defense discussed in the jury instructions."[416] The *Johnson* court further noted that the burden is met "even when the supporting evidence is weak or of doubtful credibility[.]"[417] Therefore, it is likely that Roberto would be able to get a jury instruction that recognizes his assertion of a duress defense.

B. *Is a Necessity Defense Viable?*

In Part IV[418] it was indicated that the necessity defense has traditionally only been available when the coercion originated from a physical force of

412. In *United States v. Estrada-Monzon*, the Fifth Circuit Court of Appeals stated, "Because duress is an affirmative defense, a defendant must present evidence of each of the elements of the defense before it may be presented to the jury." No. 16-40542, 2017 WL 2813855, at *3 (5th Cir. June 28, 2017) (citing United States v. Posada-Rios, 158 F.3d 832, 873 (5th Cir. 1998)); *see also* United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985) ("In order to have [an affirmative] defense submitted to a jury, a defendant must first produce or proffer evidence sufficient to prove the essential elements of the defense." (quoting United States v. Bailey, 444 U.S. 394, 412 n.9 (1980))).

413. The Government is likely, pursuant to FED. R. CRIM. P. 12(b), to file a motion in limine to prohibit the presentation of the defense to the jury. If, during the hearing, Roberto is unable to prove each element of the defense, he will be unable to present the defense to the jury. *See* United States v. Johnson, 416 F.3d 464, 468 (6th Cir. 2005) ("When, as in this case, the issue is raised in a pretrial motion, the rule is to be applied just the same: if the defendant's proffered evidence is legally insufficient to support [an affirmative] defense, the trial judge should not allow its presentation to the jury." (quoting United States v. Villegas, 899 F.2d 1324, 1343 (2d Cir. 1990))).

414. *Dixon*, 548 U.S. at 17.

415. United States v. Johnson, 416 F.3d 464 (6th Cir. 2005).

416. *Id.* at 467 (citing United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976)).

417. *Id.* (quoting *Garner*, 529 F.2d at 970).

418. *Supra*, Part IV.

nature.[419] The elements of a necessity defense were also discussed and shown to mirror those of a duress defense with slight variances: (1) a choice of evils; (2) the actions were to prevent imminent harm; (3) reasonable anticipation of direct causal relationship between the acts and the harm to be avoided; and (4) no legal alternative to violating the law.[420] The defendant in *Contento-Pachon* argued that he violated 21 U.S.C. §841(a)(1) because he chose the evil of bringing drugs into the United States over the death of his family.[421] Once again the court's decision in *Contento-Pachon* provides insight as to whether or not Roberto has a viable necessity defense. The *Contento-Pachon* court did not address each element of the necessity defense in affirming the trial court's denial of the defendant's necessity argument.[422] Instead, the court denied the defendant's arguments on two grounds: (1) the defendant's acts were coerced by a human force instead of the requisite physical force of nature; and (2) the defendant was not acting in the interest of the general welfare.[423] In its analysis, the court recognized the traditional distinction that separates duress and necessity (human coercion vs. physical force of nature).[424] The court then observed that modern courts have "blur[red] the distinction between duress and necessity[,]" but ultimately determined that the traditional view was appropriate and decided that the defendant was precluded from using a necessity defense.[425] The court's holding in *Contento-Pachon* is directly on point with Roberto's case and forecloses an argument that a necessity defense is viable.[426]

C. *Arguments for Change*

This Comment has attempted to frame the effects that the Mexican Cartels have on the United States criminal justice system. The Cartel's ability to control areas of Mexico and force individuals to participate in

419. United States v. Oakland Cannabis Buyers Coop., 532 U.S. 483, 490 (2001) ("The [necessity] defense 'traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils'" (quoting United States v. Bailey, 444 U.S. 394, 410 (1980))).

420. United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001).

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

422. *See id.* (omitting any discussion of the elements of the defense).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 695–96 (holding the necessity defense was correctly excluded under facts similar to those at hand).

crime is one of the areas that affects the system.[427] Ordinary men and women live in constant fear of being co-opted into a life of crime with little to no recourse.[428] These men and women are unable to flee, or turn to authorities for help, leaving little choice but to accept the silver or take the lead.

The United States Supreme Court once asserted that, "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[429] The Mexican Cartel's evolution has affected the criminal justice system in more ways than one. This is the time to use the aforementioned tools to make some adjustments by reconsidering the law pertaining to the defenses of duress and necessity. Two solutions that would serve to *adjust the tension* are: (1) shifting the burden of persuasion to the government, and (2) redefining the necessity defense. Making either one of these changes would provide additional tools to assist a defendant that has been forced to participate in crime.

1. Shifting the Burden of Persuasion

The United States criminal justice system was developed with the goal of "safeguard[ing] men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."[430] In support of this goal, the United States Supreme Court has interpreted the Constitution as requiring prosecutors to prove "beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged."[431] In *Speiser v. Randall*,[432] the Court stated that in litigation there is a margin of error (represented by error in fact finding) that the defendant and the prosecution must take into account.[433] The Court first observed that the margin of error is reduced for the defendant by placing the burden of

427. *See* Burnett, *supra* note 91 (detailing the method by which traffickers have been forcibly recruiting illegal immigrants to backpack drugs into the United States).

428. *Id.* (describing how Mexican drug cartels force immigrants to smuggle drugs into the United States, and if they resist, kill them).

429. Powell v. Texas, 392 U.S. 514, 536 (1968).

430. *In re Winship*, 397 U.S. 358, 363 (1970).

431. *Id.* at 363–64.

432. Speiser v. Randall, 357 U.S. 513 (1958).

433. *Id.* at 525.

persuasion on the prosecution, resulting in increased protection of the defendant's liberty.[434] The Court then stated, "Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."[435] Although the Court did not address allocating the burden of persuasion to prove an affirmative defense, the concept is still relevant.

In *Dixon v. United States*, discussed at length in Part IV,[436] Justice Breyer wrote a dissent attacking the majority's decision as rigid and formalistic.[437] The Supreme Court's majority decision in *Dixon v. United States* places the burden of persuasion on the defendant when presenting a duress defense, thereby requiring him to convince the jury that he was forced to participate under threat of death or serious bodily harm.[438] The court's majority opinion explicitly found that there is no constitutional requirement that the burden of persuasion for a duress defense be allocated to the defendant or the prosecution,[439] and, as such, Congress has the prerogative to legislatively allocate the burden where it sees fit.[440] The majority decision then stated that because Congress had not exercised its prerogative, it was up to the Court to "effectuate the affirmative defense of duress as Congress 'may have contemplated' it . . . ."[441] Citing the "long-established common-law rule," the majority held that defendants are to bear the burden of proving duress defenses.[442]

In Justice Breyer's vigorous and lengthy dissent, he argues that the burden of persuasion pertaining to a duress defense should be borne by the prosecution.[443] Justice Breyer agrees with the majority that the Constitution does not require that the burden of persuasion be allocated to one party or the other, and that such may be allocated by Congress "as it

434. *Id.* at 525–26.

435. *Id.* at 526.

436. *Supra*, Part IV.

437. Dixon v. United States, 548 U.S. 1, 21 (2006) (Breyer, J., dissenting) ("To believe that Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness.").

438. *Id.* at 17.

439. *Id.* at 8.

440. *Id.* at 17.

441. *Id.* (quoting United States v. Oakland Cannabis Buyers' Coop., 532 us 483, 491 n.3 (2001)).

442. *Id.*

443. *Id.* at 21 (Breyer, J., dissenting).

sees fit."[444] However, he argues that because there is no constitutional requirement to allocate the burden, and because Congress is silent on the issue (noting this is congressional norm), the Court is free to determine which side should carry the burden.[445] Justice Breyer argues that congressional silence is an invitation for the Court to allocate the burdens pertaining to affirmative defenses by "taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience."[446] Justice Breyer asserts that, unlike the majority, he does not believe that Congress intended the courts to apply a one-size-fits-all determination of how the burden of persuasion should be allocated.[447] Justice Breyer's statement aligns with the view that Congress intended the courts to allocate the burden of persuasion, not in a blanket fashion but, instead, always looking toward the protection of a defendant's liberty.

Justice Breyer continues his argument that the prosecution should bear the burden of persuasion for a duress defense based on multiple reasons: (1) the question of duress is similar to *mens rea*, which is always allocated to the prosecution to carry the burden of persuasion; (2) in the past, federal courts have allocated the burden of persuasion for affirmative defenses (including duress) to the government; and (3) in order to prevent juror confusion, the burden of persuasion for duress should be carried by the government, thereby treating it the same the defenses of *mens rea, actus reus,* mistake, and self-defense.[448] Of these three reasons, the most compelling argument the dissent offers—for the allocation of the burden of persuasion for affirmative defenses on the government—is based on precedent. The dissent notes that prior to the majority's decision in *Dixon*, most federal courts (for federal crimes) allocated the burden of persuasion

444. *Id.*

445. *Id.* at 21–22. The Supreme Court has previously acknowledged that legislatures may allocate the burden of persuasion for affirmative defenses. In *Patterson v. New York*, the Court held that the New York statute that required the defendant to carry the burden of persuasion for a common law heat of passion defense did not violate constitutional due process. Patterson v. New York, 432 U.S. 197, 205 (1977). The Court determined that legislatures have the prerogative to allocate the burden of persuasion as long as the statute does not offend a fundamental principle of justice. *Id.* at 201–02.

446. *Dixon*, 548 U.S. at 22. (Breyer, J., dissenting).

447. *See id.* (insisting that the determination should begin with common law and evolve through reason and experience).

448. *Id.* at 22–29.

to disprove a duress defense to the government.[449] Similarly, in *Mullaney v. Wilbur*, the United States Supreme Court also required that the government prove beyond a reasonable doubt that a defendant did not act in the heat of passion if the issue was presented.[450] In the Court's decision, it noted that the practical effect of its holding was the same as requiring the prosecution to disprove a defendant's claim of self-defense.[451] While the Court's holding in *Mullaney v. Wilbur* has never been directly overruled, when viewed through the lens of *Patterson v. New York*, the position that the government (as a matter of constitutional due process) should carry the burden of persuasion for a duress defense is diminished. The *Patterson* and *Mullaney* decisions do, however, determine that the burden of persuasion for a duress defense is a matter of legislative prerogative.[452] As previously noted, Congress has not legislatively allocated the burden of persuasion for a federal duress defense. This brings the argument back to Justice Breyer's main point: in the absence of congressional allocation, the Court is free to determine which side should carry the burden.[453] Justice Breyer's argument—that at one point most federal courts required the government to carry the burden of

449. *Id.* at 24–27. Prior to the *Dixon* Court's decision, most federal circuit courts placed the burden on the government to disprove an affirmative defense. *See* United States v. Arthurs, 73 F.3d 444, 448 (1st Cir. 1996) ("When a predicate warranting a duress instruction has been laid, the government is saddled with the additional burden of showing beyond a reasonable doubt that a defendant's criminal acts were not the product of duress."); United States v. Talbot, 78 F.3d 1183, 1186 (7th Cir. 1996) (asserting, unless a statute dictates otherwise, that "the burden of proof remains on the government to negate beyond a reasonable doubt the affirmative defenses properly raised by the defendant"); United States v. Simpson, 979 F.2d 1282, 1287 (8th Cir. 1992) (holding the government responsible for disproving a defense beyond a reasonable doubt once a defendant meets the burden of production for a coercion defense); United States v. Falcon, 766 F.2d 1469, 1477 (10th Cir. 1985) ("Coercion is an affirmative defense which the government must disprove beyond a reasonable doubt only after the issue has been raised."); United States v. Mitchell, 725 F.2d 832, 836 (2d Cir. 1983) (stating "general federal practice" requires the prosecution to disprove a duress defense beyond a reasonable doubt); United States v. Campbell, 675 F.2d 815, 821 (6th Cir. 1982) (recognizing the prosecution must disprove coercion beyond a reasonable doubt if the defendant meets the burden of production); Johnson v. United States, 291 F.2d 150, 157 (8th Cir. 1961) (determining the Government has the burden to prove all elements of the crime and, if the defendant was coerced into committing the crime, then the criminal intent required to convict would be insufficient).

450. Mullaney v. Wilbur, 421 U.S. 684, 702–04 (1975).

451. *Id.* at 702.

452. *See Dixon*, 548 U.S. at 21 (Breyer, J., dissenting) ("Where Congress speaks about burdens of proof, we must, of course, follow what it says.").

453. *Id.* at 22.

persuasion—is a powerful argument that weighs in favor of the Court allocating the burden of persuasion for defenses of duress.

Commentators have stated that theories of justification have evolved over time and that today the theory requires the state to "justly punish only those individuals whose violation of the law is morally blameworthy."[454] The majority's rigid and formalistic decision in *Dixon* does not comport with an "increased protection of a defendant's liberty," nor does it protect an individual like Roberto that is arguably morally blameworthy. By shifting the burden of persuasion to disprove a defendant's duress defense to the government, the margin of error will be reduced, resulting in an increased protection of the defendant's liberty.

2. Allowing the Necessity Defense

When an individual is forced to participate in a crime by a cartel, courts should allow a defense of necessity to be argued, thereby providing another avenue of defense for the defendant. As previously discussed, the court in *United States v. Contento-Pachon* denied the defendant's use of a necessity defense, thus limiting the defendant to a defense of duress.[455] Citing the traditional definition of necessity as requiring the criminal acts to be coerced by physical forces, the court found that the defendant could not argue the necessity defense.[456] The court, however, noted that modern courts have blurred the distinction between necessity and duress.[457]

In *United States v. Bailey,* the United States Supreme Court reinforced the notion that modern cases have blurred the distinction between the defenses of necessity and duress.[458] The facts of the *Bailey* case indicate that the defendants fled a prison because of the horrible conditions (i.e., beatings, lack of medical care, and sexual attacks) that they faced inside the prison.[459] The defendants attempted to argue both duress and necessity at trial, but the judge denied the defenses because the defendants did not immediately turn themselves in to authorities after they had escaped the

454. George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-Of-Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 888 (1968).

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

456. *Id.*

457. *Id.*

458. United States v. Bailey, 444 U.S. 394, 410 (1980).

459. *Id.* at 398.

prison.[460] The appeals court reversed the trial court's decision because the defendants had not been allowed to argue duress and necessity.[461] The *Bailey* Court, in its review of the appeals court's decision, commented that the lower court had "discarded the labels of 'duress' and 'necessity'" in its analysis of the defense.[462] The Court noted that the appeals court had instead focused on whether the defendants had been faced with a choice of evils.[463] The Court then stated that neither the duress nor the necessity defense could be used "if there was a reasonable, legal alternative to violating the law."[464] Consequently, the Court reversed the appeals court's decision because it determined that the defendants had not adduced evidence to support the argument that escape was the only legal alternative.[465] The Court then observed that the focus of the appeals court was not on whether the coercion was caused by a human or natural force of nature, but rather on whether the defendants had been forced to make a choice between evils.[466] The *Bailey* Court had every opportunity to disallow the defendants' necessity argument based on lack of a "natural force" requirement. The Court, however, refused to restrict the necessity defense to the traditional definition, thereby implying that the necessity defense would be available in a prison escape case.[467] Justice Blackmun, writing for the dissent, stated that the majority implicitly recognized that duress and necessity were available as defenses for the crime of prison escape.[468] The Court failed to preclude the defendants in *Bailey* from making a necessity defense even though they did not face a natural force.[469] The *Bailey* Court's implicit recognition that a defendant could

460. *Id.* at 399–400.

461. *Id.* at 394.

462. *Id.* at 410.

463. *See id.* (describing the decisions of lower courts and the common law view of the necessity defense as a "choice of evils" argument).

464. *Id.*

465. *Id.* at 417.

466. *Id.* at 410.

467. *See id.* at 409–14 (discussing the traditional definition of necessity as a defense and analyzing the issue of escape from a prison where inmates are fleeing adverse additional conditions, as opposed to the confinement itself).

468. *See id.* at 425 (Blackmun, J., dissenting) ("Although the Court declines to address the issue, it at least implies that it would recognize the common-law defenses of duress and necessity to the federal crime of prison escape, if the appropriate prerequisites for assertion of either defense were met.").

469. *See id.* at 435 ("The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions.").

utilize a necessity defense in the context of a prison escape lends support to the argument that an individual being threatened by the cartels could also make the same argument.[470] Courts today should eschew the traditional application of the necessity defense and embrace the *Bailey* Court's implicit recognition that a crime can be committed out of necessity even if no forces of nature are present.

Broadening the scope of when the necessity defense would be applicable provides the defendant with an additional avenue of defense that may increase his chances of achieving a just result. Admittedly, this change may not result in substantial benefits to a defendant; however, proving the first element of necessity—as opposed to the first element of duress—could provide enough of a nuance to allow the defendant to succeed. An argument that the defendant committed the crime after choosing the lesser of two evils is likely less burdensome to make than proving the crime was committed due to imminent threat of death or serious bodily injury. As previously discussed in the case of Roberto, and for defendants in similar circumstances, a defense of duress would require proof that he was acting under threat of serious bodily injury or death; whereas a necessity defense would allow an argument that he chose the lesser of two evils (i.e. brought the drugs into the United States to save his wife and child from dying). It is reasonable to acknowledge that a juror would be more likely to find that Roberto chose the lesser of two evils.

An individual who commits a crime because he or his family will be killed by the cartels has a similar or better "choice of evils" argument than someone escaping prison to escape a beating or substandard medical care. Courts should allow defendants who, like Roberto, are forced to commit crimes out of necessity to use the defense of necessity.

VI. CONCLUSION

Mexican Cartels have had an effect on the United States criminal justice system for many years. The effect has become more substantial as the cartels have transitioned from operating mainly inside of Mexico to becoming transnational criminal organizations. As the TCOs have become more powerful and more diverse, the United States criminal justice system has become burdened with an overwhelming number of cases and prisoners that are connected with the cartels. Defendants with

470. *See id.* at 412–13 (analyzing the necessity defense in the context of inmates escaping from prison to avoid additional adverse conditions).

cartel ties that are arrested and brought into the criminal justice system have been shown to work voluntarily and, unfortunately, involuntarily for the cartels. Since the inception of our nation, the United States criminal justice system has evolved and continues to evolve in order to ensure that each defendant's life and liberty are protected. The system's evolution also serves to efficiently prosecute and punish defendants that break the laws of the United States. Current law does not properly take into account the extreme business model that the Mexican TCOs use to ensure that their business is successful. Individuals that fall under the *Plata o Plomo* choice are forced to choose between participating in crime or losing their life. The current state of the law pertaining to duress and necessity needs to be changed to ensure that each and every defendant's liberty is protected and justice is available for everyone. In 1868, the Supreme Court chose to use "common sense" when implying a necessity argument. Federal courts should now choose "common sense" in the application of duress and necessity defenses for individuals that really have no choice at all.