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DENYING RELIEF TO THE PERSECUTOR: AN ARGUMENT IN FAVOR OF ADOPTING THE DISSENTING OPINION OF *NEGUSIE V. HOLDER*

TASHA WIESMAN*

I. INTRODUCTION

The evidence introduced at trial showed that the defendants filed numerous asylum applications containing fictitious stories of persecution that the clients had supposedly suffered in their home countries on ethnic, religious, or political grounds. The applications were often supported by doctor's letters, medical certificates, affidavits and other documents that were counterfeit or fraudulent. As a result, scores of . . . clients fraudulently obtained lawful status as asylees in the United States.¹

A. *Paying for Persecution*

When fraudulent asylum claims are granted, the integrity of the asylum system is jeopardized.² These individuals are allowed

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1. Press Release, Acting U.S. Attorney Lawrence G. Brown, Eastern District of California, Department of Justice, Three Attorneys and Two Interpreters Convicted in Long-Running Asylum Fraud Scheme (June 25, 2009). Three attorneys and two interpreters were convicted before a federal court jury in Sacramento after a three and a half month trial for filing hundreds of fraudulent asylum applications from 2000 to 2004. *Id.* The convictions were a result of an extensive investigation by the U.S. Immigration and Customs Enforcement. *Id.* Many of the documents submitted in support of these claims were purported to be notarized declarations or doctor statements, when in reality they were fictitious and based on the false asylum stories. *Id.* The lead prosecutor, Benjamin Wagner, described it as "an audacious scheme . . . [I]t was an assembly line fraud factory that turned out hundreds of false claims." Dennis Walsh, *Big Asylum Fraud Case is up to Jury*, THE SACRAMENTO BEE, June 20, 2009, at B1. The government has not decided whether it will seek to reopen these claims. Martha Neil, *3 Lawyers Guilty in 'Assembly-Line Fraud Factory' Calif. Asylum Scam*, A.B.A. JOURNAL, June 26, 2009, at 1, http://www.abajournal.com/news/3_lawyers_convicted_in_asylum_scam/.

2. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-935 U.S. ASYLUM

to remain in the United States and take advantage of benefits reserved for those who are lawfully present in this country.³ The use of false documents to enter the United States is especially concerning after the terrorist attacks of September 11th, which intensified fears that terrorists would enter the United States illegally and become “embedded” in the population.⁴

The Immigration and Nationality Act (INA) denies an alien asylum if he or she has persecuted others on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵ This is referred to as the “persecutor bar” because it bars those aliens from admission to the United States.⁶ In *Fedorenko v. United States*,⁷ the Supreme Court interpreted this statute and determined that it did not contain a duress exception: the statute applies to aliens regardless of whether the persecution was performed voluntarily or involuntarily (under duress).⁸

Part II of this Comment will give a brief history of the source of asylum law. This section will also include summaries of the portions of both the INA and the REAL ID Act that pertain to the persecutor bar. Part III will further discuss the *Fedorenko*⁹ case

SYSTEM: AGENCIES HAVE TAKEN ACTIONS TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 1 (2008) [hereinafter ACCOUNTABILITY OFFICE REPORT], available at <http://www.gao.gov/new.items/d08935.pdf>.

3. *Id.* The Accountability Office Report evaluates various aspects of the asylum system and the quality assurance mechanisms that have been implemented to ensure the integrity of asylum adjudications. *See generally id.* (recommending that the Asylum Division, “among other things, solicit information from officers on their training needs, develop a plan to implement quality reviews in all offices, and determine how much time is needed to adjudicate a case in a manner consistent with procedures and training.”).

4. *Id.* at 2. “In the worst case scenario, this could pose a threat to our national security or public safety. The 1993 bombing of the World Trade Center, the 1993 killings of CIA employees, and a plot to bomb New York landmarks were all undertaken by individuals who had applied for asylum.” *Id.* at 1-2. While these individuals were not granted asylum, these stories shed light on the fear that an inadequate asylum system can present a threat to the safety of the U.S. population.

5. 8 U.S.C. § 1158(b)(2)(A)(i) (2006). The statute specifically states that asylum shall not apply to an alien who “ordered, incited, assisted, or otherwise participated in the persecution” *Id.* The persecutor bar also applies to withholding of removal, which is another form of relief an alien can apply for. Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, 176 PLI/NY 305, 323 (2009).

6. *See* *Negusie v. Holder*, 129 S. Ct. 1159, 1162 (2009) (discussing the term “persecutor bar” and how it applies).

7. *Fedorenko v. United States*, 449 U.S. 490 (1981).

8. *Id.* at 512-13. The Supreme Court held that Congress was certainly capable of adopting a voluntariness limitation had it felt that one was necessary. *Id.* at 512.

9. *Fedorenko*, 449 U.S. at 490.

and the circuit court split that now exists on how to apply the resulting test. This section will analyze *Negusie v. Holder*¹⁰ and whether there should be an implied duress exception to the persecutor bar.

Part IV will propose that the dissenting opinion in *Negusie*,¹¹ which holds that the INA should not be read to contain a duress exception,¹² should be followed on remand. Funding, workforce, and training programs should be increased in order to allow asylum interviews to be conducted in the native country of the applicant. This would allow officers to conduct more thorough investigations and would also help combat asylum fraud.

II. BACKGROUND

As a result of the terrorist attacks of September 11, 2001, immigration law has taken center stage as the United States has tightened entrance requirements for aliens seeking legal status in the United States.¹³ Immigration law allows for aliens who enter this country, whether legally or illegally, to be granted protection in the form of asylum if they are able to demonstrate an inability to return to their native country because of a well-founded fear of persecution.¹⁴

A. Source of Asylum Law

Establishing a history of the INA helps to understand the asylum application process. After World War II, the International Refugee Organization (IRO) was established in response to the massive number of people displaced and in need of resettlement.¹⁵ The IRO was meant to be a temporary agency, but by 1950 it was

10. *Negusie*, 129 S. Ct. at 1159. In *Negusie*, the Supreme Court held that the persecutor bar contained in the INA was ambiguous as to whether distress or coercion are relevant in determining if an alien participated in persecution. *Id.* at 1164. This case was remanded to the BIA for further review. *Id.* at 1167.

11. *Negusie*, 129 S. Ct. at 1176-85 (Thomas, J., dissenting).

12. Doing so would increase the prevalence of asylum fraud, which is already rampant and difficult to detect. See ACCOUNTABILITY OFFICE REPORT, *supra* note 2, at 2 (stating that the United States offers economic incentives for a better life to aliens and, thus, makes filing fraudulent asylum applications an attractive option).

13. See Leah Durland, Comment, *Overcoming the Persecutor Bar: Applying a Purposeful Mens Rea Requirement to 8 U.S.C. § 1101(A)(42)*, 32 HAMLINE L. REV. 571, 574 (2009) (discussing the history of American Asylum Law).

14. ACCOUNTABILITY OFFICE REPORT, *supra* note 2, at 1. “[A] ‘particularly high level’ of quality is demanded” of the asylum officers responsible for making adjudications to protect the integrity of the asylum system. *Id.* at 6. Moreover, there are serious consequences that can result if an applicant is returned to his country of persecution or if an applicant who poses a threat to the United States is allowed to stay. *Id.*

15. Durland, *supra* note 13, at 575.

recognized that the refugee problem was not temporary.¹⁶ The U.N. Office of the High Commissioner for Refugees was established as a permanent body in response to this need.¹⁷

Subsequently, the 1951 United Nations Convention Relating to the Status of Refugees (the "Convention") was enacted to establish a definition of "refugee" that would provide assistance to persons who lacked a home after World War II.¹⁸ The United States responded by enacting the INA in 1952.¹⁹ In 1967, the United Nations Protocol Relating to the Status of Refugees (the "Protocol") was enacted, and it incorporated key elements from the Convention.²⁰ The Protocol broadened the definition of "refugee" by eliminating the time and geographic limitations contained in the Convention.²¹ Assisting war torn Europe was no longer the focus; rather, protecting refugees from all over the world was now the primary goal.²²

The United States became a signatory to the Protocol in 1968.²³ In 1980, the United States enacted the Refugee Act that incorporated the provisions of the Protocol into its domestic law, including the definition of "refugee."²⁴ Whether an alien is considered a refugee is one of the threshold matters to be considered in the asylum process.

B. Applying for Asylum

Asylum is a discretionary form of relief and is based on an evaluation of all the facts and circumstances in the particular case.²⁵ An alien must be physically present in the United States to

16. *Id.*

17. *Id.*

18. *Id.* at 575-76.

19. *Id.* at 576.

20. Hughes, *supra* note 5, at 307. Both the Convention and the Protocol also included the principle of non-refoulement. *Id.* This principle prohibits the return of refugees to countries where they would face persecution. *Id.* Article I of the Convention Against Torture also allows for an alien to remain in the United States upon a showing that it is more likely than not that he or she would be tortured if removed. 8 C.F.R. § 208.16 (2009). Protection under the Convention Against Torture, like asylum, is a form of relief available to aliens in the United States. Hughes, *supra* note 5, at 308, 332, 335.

21. *Id.* at 307.

22. Durland, *supra* note 13, at 576.

23. See Nicole Lerescu, Note, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(A)(42) to Include a Duress Exception*, 60 VAND. L. REV. 1875, 1878 (2007) (noting the origins of asylum law in the United States).

24. Hughes, *supra* note 5, at 307.

25. *Id.* at 307, 313, 330. In contrast, withholding of removal is a mandatory form of relief if the alien meets the statutory standard. Mark von Sternberg, *Outline of United States Asylum Law: Substantive Criteria and Procedural Concerns*, 190 PLI/NY 39, 42 (2009). Withholding of removal is a much stricter standard because the alien must show a clear probability of persecution as

apply for asylum.²⁶ Once present, he must meet the definition of refugee to be eligible for asylum.²⁷ The INA defines a refugee as,

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion²⁸

In accordance with this definition, an alien must be able to demonstrate that he has suffered persecution or that he has a well-founded fear of being subjected to persecution if returned to his native country.²⁹ Past persecution and a well-founded fear of future persecution are independent bases for asylum.³⁰ The applicant has the burden of proving by a preponderance of the evidence that he qualifies as a refugee under the INA, and that his membership in one of the five protected classes will be the reason for his persecution.³¹

opposed to a well-founded fear as required for asylum. *Id.*

26. 8 U.S.C. § 1158(a)(1). "Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title." *Id.*

27. *Id.* § 1158(b)(1)(A). The INA gives the conditions for granting asylum: The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Id. See also Hughes, *supra* note 5, at 307 (stating that both asylum and withholding of removal require an alien to establish that he is a refugee); Matter of Acosta, 19 I. & N. Dec. 211, 213 (BIA 1985), *overruled in part by* Matter of Mogharrabi, 19 I. & N. Dec. 439, 439 (BIA 1990) (overruling *Acosta* in so far as it held that the clear probability of persecution standard and the well founded fear of persecution standard were not meaningfully different and, in practical application, converged), and *disapproved of by* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (holding that language used by Congress indicates that it meant for the standards for asylum and withholding of removal to differ from each other).

28. 8 U.S.C. § 1101(a)(42)(A) (2006).

29. Durland, *supra* note 13, at 577.

30. Hughes, *supra* note 5, at 311.

31. 8 U.S.C. § 1158(b)(1)(B)(i). "To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* See also Zhang Jian Xie v. INS, 434 F.3d 136, 139 (2d Cir. 2006) (stating that if evidence suggests that the applicant was a persecutor, then he will have the burden of proving by a preponderance of the evidence that he did

The INA does not contain a definition of “persecution,”³² nor is there a universally accepted definition.³³ The Board of Immigration Appeals (BIA) has defined persecution as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ . . . in a way regarded as offensive.”³⁴ It should be noted, however, that not all treatment qualifies as persecutory under the BIA.³⁵ The BIA has held that persecution does not include all treatment that our society might consider unfair, unjust, or even unlawful or unconstitutional.³⁶ Harsh conditions that are shared by many people will not satisfy the persecution requirement.³⁷ Furthermore, in order to be considered persecution, the conduct must rise above the level of simple harassment.³⁸

not commits acts of persecution).

32. Durland, *supra* note 13, at 577; Lerescu, *supra* note 23, at 1879.

33. UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 51 (1992 ed.), available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d58e13b4&query=handbook%20refugee%20statu>.

34. See *Acosta*, 19 I. & N. Dec. at 222 (holding that the definition of persecution prior to enactment of the Refugee Act of 1980 should be applied to the term as it appears in section 101(a)(42)(A) of the INA); see also *Matter of Maccaud*, 14 I. & N. Dec. 429, 434 (BIA 1973) (noting that “[w]hile there is no precise definition in the statute, [persecution] has been defined by the courts as ‘the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.’”); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (stating that “persecution’ is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience” and that the term persecution maintains its ordinarily conveyed meaning of “the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.”); *Pavlovich v. Gonzales*, 476 F.3d 613, 616 (8th Cir. 2007) (defining persecution as “the infliction or threat of death, torture, or injury to one’s person or freedom on account of a statutorily protected ground.”)

35. Lerescu, *supra* note 23, at 1880. It has generally been held that an asylum claim will not “succeed where a foreign sovereign is making a neutral application of its criminal statutes.” *Sternberg*, *supra* note 25, at 56.

36. *Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (quoting *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)). “If persecution were defined that expansively, a significant percentage of the world’s population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result.” *Fatin*, 12 F.3d at 1240.

37. *Fatin*, 12 F.3d at 1240 (quoting *Acosta*, 19 I. & N. Dec. at 222). In *Matter of Chang*, the court held that a respondent’s violation of the coercive family planning policies of China (namely the “One Child Policy”) would not give rise to a claim for asylum. 20 I. & N. Dec. 38, 47 (BIA 1989). This policy was not designed to punish individuals, but to deal with the overwhelming population crisis in that country. *Sternberg*, *supra* note 25, at 56. However, the refugee definition in the INA was later amended and the court held that this amendment overturned its decision in *Chang*. *In re X-P-T-*, 21 I. & N. Dec. 634 (BIA 1996).

38. *Balazoski v. INS*, 932 F.2d 638, 642 (7th Cir. 1991); see also *Borca v. INS*, 77 F.3d 210, 215 (7th Cir. 1996) (holding that being interrogated twice,

While the definition of persecution varies throughout the circuit courts,³⁹ it must be on account of one of the five protected grounds enumerated in the statute: race, religion, nationality, membership in a particular social group, or political opinion.⁴⁰ The connection between the persecution and the applicant's membership in a protected class requires the applicant to provide some evidence of the persecutor's motivation.⁴¹ The applicant must show that the persecutor had some level of intent to cause harm that the applicant fears "in order that the persecutor may overcome a belief or characteristic of the applicant."⁴²

An applicant's testimony alone can be sufficient to establish his claim if his testimony is credible, persuasive, and refers to specific facts of his claim.⁴³ If the trier of fact determines that

having her dwelling searched twice, and receiving threatening phone calls were not sufficiently serious to rise beyond the level of harassment).

39. The Fifth Circuit stated in its definition of persecution that "[t]he harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life." *Matter of Laipenieks*, 18 I. & N. Dec. 433, 456-57 (BIA 1983) *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985) (quoting H.R. REP. NO. 95-1452, at 4704 (1978), *reprinted in* 1978 U.S.C.C.A.N. (92 Stat. 2065) 4700). The Ninth Circuit relies on the Board of Immigration Appeals (BIA) definition of persecution. *See, e.g., Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (deferring to the BIA's analysis of persecution). In the Seventh Circuit, persecution is defined as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995); *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993). Courts in the Eighth Circuit have interpreted persecution to mean: "the infliction or threat of death, torture, or injury to one's person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion." *Ngure v. Ashcroft*, 367 F.3d 975, 989-90 (8th Cir. 2004) (quoting *Regalado-Garcia v. INS*, 305 F.3d 784, 787 (8th Cir. 2002)).

40. 8 U.S.C. § 1158(b)(1)(B)(i). "To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* *See also Pavlovich*, 476 F.3d at 616 (holding that the persecution an applicant faced must be on account of a statutorily protected ground); *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (holding that the respondent failed to show that his forced recruitment into a guerilla organization in his native Guatemala was based on his political opinion).

41. *Durland*, *supra* note 13, at 578.

42. *See Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988) (holding that activities such as the drafting of child soldiers, prosecution of draft dodgers, and unofficial recruiting of soldiers by force are not considered persecution on account of a protected ground; rather, they are necessary means of achieving a political goal).

43. 8 U.S.C. § 1158(b)(2)(B)(ii). "The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* This is partly due to the fact that many

additional evidence is needed, he or she may request that an applicant provide evidence that substantiates the claim.⁴⁴ The REAL ID Act, enacted in 2005, codified a list of several factors the trier of fact can use in determining whether the applicant is credible.⁴⁵ Such factors include the applicant's demeanor, candor, responsiveness during testimony, plausibility of the applicant's claim, consistency between any oral and written statements, and any falsehoods in such statements.⁴⁶

If an alien is deemed credible, and can show either that he has suffered persecution or fears future persecution based on one of the five protected classes, then he must show that he is not subject to any statutory bars to the grant of asylum.⁴⁷ There are nine statutory bars to asylum,⁴⁸ but only the persecutor bar is

applicants may not be able to provide documentation if they fled the country where they were persecuted without these documents. ACCOUNTABILITY OFFICE REPORT, *supra* note 2, at 2. This lack of documentation requires the asylum officer to make decisions without any supporting documentation to either support or refute the claim of the applicant. *Id.* During a hearing, a judge may find an alien to be especially credible where his claims of persecution are supported by reports of the current country conditions. Sternberg, *supra* note 25, at 49. One could argue that this is an insufficient basis to determine credibility because the public has access to these reports on the State Department's website, and they could easily give an alien the foundation he or she needs to establish an asylum claim.

44. 8 U.S.C. § 1158(b)(1)(B)(ii).

45. REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat.231 (codified as amended in scattered sections of 8 U.S.C.). The provisions of the REAL ID Act regarding credibility determinations apply to applications for asylum, withholding of removal, and other relief from removal that were initially filed on or after May 11, 2005. *Id.*

46. 8 U.S.C. § 1158(b)(1)(B)(iii). A trier of fact can consider written or oral statements made by the applicant, whether or not they were made under oath, and may consider the circumstances in which they were made. *Id.* In addition, the inconsistencies, falsehoods, and inaccuracies do not need to go toward the heart of the applicant's claim in order to be considered. *Id.* There is no presumption of credibility; however, where an explicit adverse credibility finding is made, the applicant has a rebuttable presumption of credibility on appeal. *Id.* See also *Kaur v. Gonzales*, 418 F.3d 1061, 1066 (9th Cir. 2005) (stating that if an inconsistency is accompanied by other indications of dishonesty, an adverse credibility finding can be justified). For an interesting take on falsehoods in an applicant's claim, see *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 537 (7th Cir. 2005) (holding that false information given to immigration authorities by the applicant may be consistent with a fear of persecution).

47. Hughes, *supra* note 5, at 323-24.

48. These statutory bars include: (1) persecution of others; (2) conviction of a particularly serious crime and a determination that the alien constitutes a danger to the community of the United States; (3) commission of a serious nonpolitical crime outside of the United States; (4) if the alien is a danger to the security of the United States; (5) terrorism-related grounds; (6) firm resettlement in another country; (7) if removal to a safe third country is possible; (8) if the alien fails to file an application within one year of his arrival to the United States; (9) if the alien has had a previous asylum

relevant to this Comment.

C. *The Persecutor Bar*

The persecutor bar, which has its roots in the Constitution of the IRO, denied refugee status to those who assisted the enemy in persecuting civil populations or had helped the enemy forces voluntarily.⁴⁹ In 1948, the United States enacted the Displaced Persons Act (DPA) which included a similar provision as that of the IRO Constitution.⁵⁰ The Refugee Relief Act—enacted in 1953—barred status to anyone who had assisted in the persecution of another because of race, religion, or national origin.⁵¹ In 1978, the Holtzman Amendment added persecution based on political opinion to the INA.⁵² The 1980 amendments to the INA created the current language of the persecutor bar.⁵³

Pursuant to Section 208(b)(2)(A)(i) of the INA, asylum is not available as a means of relief for an alien who “[o]rdered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a

application denied. 8 U.S.C. § 1158(a)(2)(A)-(C), (b)(2)(A)(i)-(vi); Hughes, *supra* note 5, at 323-31.

49. IRO CONST. annex I, pt. II, 62 Stat. 3051-3052; Durland, *supra* note 13, at 579. The relevant provision of the IRO Constitution state that certain persons would not be recognized as refugees. *Id.* These include the following:

(1) War criminals, quislings, and traitors. (2) Any other persons who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Id. The IRO was ratified by the United States on December 16, 1946, and became effective August 20, 1948. *Fedorenko*, 449 U.S. at 496.

50. Displaced Persons Act, Pub. L. 80-774, 62 Stat. 1009 (codified as amended in scattered sections of 50 App. U.S.C.) [hereinafter DPA]; *Fedorenko*, 449 U.S. at 495 n.3.

51. Refugee Relief Act of 1953, Pub. L. No. 751, 67 Stat. 400, § 14 (1953); Durland, *supra* note 13, at 581. “No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race religion or national origin.” *Id.*

52. 8 U.S.C. § 1182(a)(3)(E) (2006); Durland, *supra* note 13, at 581. The Holtzman Amendment of 1978 states,

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with (I) the Nazi government of Germany, (II) any government in any area occupied by the military forces of the Nazi government of Germany, (III) any government established with the assistance or cooperation of the Nazi government of Germany, or (IV) any government which was an ally of the Nazi government of Germany, ordered, incited assisted or otherwise participated in the persecution of any person because of race, religion, or national origin, or political opinion is inadmissible.

Id.

53. *Id.* § 1101(a)(42).

particular social group or political opinion.”⁵⁴ A court will most likely find that an alien participated in persecution if he or she actively participated in conduct that negatively impacted a victim.⁵⁵ Merely being associated with a group that participates in persecution, however, is not sufficient to raise the effects of the persecutor bar.⁵⁶ There must be a link between the alien’s actions and the persecution.⁵⁷ An alien is not required to prove that he or she did not participate in persecution unless there is evidence that

54. *Id.* § 1158(b)(2)(A)(i). This statutory bar also applies to the relief of withholding of removal. *Id.* § 1231(b)(3)(B)(i). The persecutor bar can also be found within the definition of refugee. *Id.* § 1101(a)(42).

55. *See Xie*, 434 F.3d at 143 (stating that by driving captive women to undergo forced abortions, the respondent assisted in persecution because his actions contributed directly to the persecution of the victims). The court in *Maiga v. Holder* considered four factors in determining whether the respondent’s actions triggered the persecutor bar:

- (1) whether the alien was involved in persecution, under the same definition used to define a refugee;
- (2) whether the persecution was on account of the victim’s protected status-i.e., whether a nexus [was] established;
- (3) whether the alien’s conduct “assisted” in the persecution . . . ; and
- (4) whether the alien had sufficient knowledge that his actions may have assisted in persecution.

Maiga v. Holder, 345 Fed. Appx. 634, 635 (2d Cir. 2009).

56. *Xu Sheng Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 99 (2d Cir. 2007); *see also Maikovskis v. INS*, 773 F.2d 435, 446 (2d Cir. 1985) (holding that an alien’s inactive membership in a group who persecuted others based on political opinion or his “tangential provision of services to such an organization” is insufficient to show that the alien assisted in the persecution as defined in the statute). The court in *Xu Sheng Gao* used as precedent the seminal case of *Fedorenko* in which the court stated,

[A]n individual who did no more than cut the hair of female inmates [in concentration camps] before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Fedorenko, 449 U.S. at 512 n.34. The Supreme Court held that the “solution to the problem” did not lie in reading a voluntariness requirement into the statute, but rather in focusing on whether the alien’s particular conduct can be considered assisting in the persecution of others. *Id.*

57. *See Xu Sheng Gao* 500 F.3d at 101-02 (holding that the link between the respondent’s actions and the persecution was too attenuated to find that he had assisted in the persecution). As an inspector for the Culture Management Bureau in China, the respondent in the case was responsible for confiscating books from book stores that were prohibited by the Chinese government. *Id.* at 95-97. There was no evidence that any of the book sellers were ever “arrested, detained, charged, prosecuted, or imprisoned” for violating the cultural laws and, thus, the respondent could not be held personally responsible for any acts of persecution. *Id.* at 100.

such persecution took place.⁵⁸ While it is difficult enough to define persecution, the analysis becomes even more difficult when determining whether duress should be allowed as an exception to the rule.

III. ANALYSIS

The difficulty in applying the persecutor bar arises when an alien claims that his participation in persecution was the result of duress. This section analyzes the current state of the law regarding the definition of duress and whether there is a duress exception to the persecutor bar. It will also discuss the various ideas that have been put forth to remedy the seemingly unequal application of the law.

In 1948, the DPA was enacted by Congress to allow the thousands of European refugees driven from their homes to immigrate to the United States.⁵⁹ However, persons found to have “assisted the enemy in persecuting civil populations” or who had “voluntarily assisted the enemy forces . . . in their operations” were excluded from the definition and, thus, denied a visa under the DPA.⁶⁰

A. United States v. Fedorenko⁶¹

In *Fedorenko v. United States*, Feodor Fedorenko, a member of the Russian army, was captured by the Germans and forced to serve as an armed guard for a Nazi concentration camp in Treblinka, Poland throughout 1942 and 1943.⁶² Feodor then applied for admission to the United States in 1949 under the DPA, but lied on his application about his wartime activities.⁶³ He indicated that he was a farmer in Sarny, Poland, and never mentioned serving as an armed guard at Treblinka.⁶⁴ Fedorenko also lied on his naturalization papers and in his testimony to

58. *Acosta*, 19 I. & N. Dec. at 218-19 n.4.

59. DPA; *Fedorenko*, 449 U.S. at 495. The DPA incorporated the definition of “displaced person” that was contained in the constitution of the IRO. DPA § 2(b). The IRO constitution describes a “displaced person” as a person who was deported from or forced to leave his country of nationality as a result of the actions of the authorities of the Nazi, fascist, and Falangist regimes. IRO CONST. annex I, pt. I, 62 Stat. 3037.

60. *Fedorenko*, 449 U.S. at 495 (quoting the IRO Constitution).

61. *Id.* at 490.

62. *Id.* at 494. It has been estimated that eight hundred thousand people were killed at the Treblinka concentration camp. *Id.* at 494 n.2. “It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead before nightfall.” *Id.*

63. *Id.* at 496.

64. *Id.* Fedorenko also lied about his nationality: stating he was born in Poland when he was actually born in the Ukraine. *Id.* at 496 n.8.

examiners when he became a citizen in 1970.⁶⁵

In 1979, the government brought an action to revoke his citizenship because he willfully misrepresented material facts on his visa and citizenship applications.⁶⁶ The district court declined to revoke his citizenship because it found his actions to be involuntary, and therefore, he should not be excluded from immigration.⁶⁷ The Fifth Circuit reversed the district court and the Supreme Court upheld the decision.⁶⁸ The Supreme Court held that Fedorenko's actions, whether voluntary or involuntary, made him ineligible for a visa.⁶⁹ The Court held that Congress was perfectly capable of inserting a "voluntariness" limitation into the statute where it felt one was necessary.⁷⁰ The district court was concerned that every Jewish prisoner would be excluded from immigration.⁷¹ The court's solution to this problem was to focus on whether the particular conduct assisted in the persecution of civilians, rather than interpret the statute to include a voluntariness requirement.⁷²

*Fedorenko*⁷³ has been the most discussed case in interpreting the persecutor bar of the INA.⁷⁴ The test of whether conduct assisted in the persecution of civilians has proven difficult to apply and has resulted in a split of the circuit courts.⁷⁵

65. *Id.* at 497.

66. *Id.* at 497-98. The representations were considered material because: the omissions would have made him ineligible to receive a visa under either § 2(a) or (b) of the DPA because he had assisted in the persecution of civilian populations, or under § 10 of the DPA because he had made a willful misrepresentation. DPA §§ 2(b), 10.

67. *United States v. Fedorenko*, 455 F. Supp. 893, 913 (S.D.Fla. 1978). The court noted that reading the statute to exclude persons who assisted in persecution involuntarily would exclude even the camp inmates forced to lead others to their death. *Id.*

68. *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979); *Fedorenko*, 449 U.S. at 490.

69. *Id.* at 512.

70. *Id.* Section 2(a) contains no reference to the action being voluntary or involuntary, while § 2(b) does. *Id.* "Under traditional principles of statutory construction, the deliberate omissions of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.*

71. *Id.* at 512 n.34.

72. *Id.*

73. *Id.* at 490.

74. *See Lerescu, supra* note 23, at 1882 (providing that all analyses of the persecutor bar under the INA include a discussion of *Fedorenko*). The BIA adopted the ruling of *Fedorenko* in the context of asylum cases in *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988). *Id.* at 1883. The reason for applying the *Fedorenko* analysis to the INA is that the DPA and the persecutor bar in the INA "seek to exclude the same people: persecutors." *Durland, supra* note 13, at 585.

75. *Durland, supra* note 13, at 585.

B. The Circuit Court Split

1. Considering the Applicant's Personal Culpability

The First Circuit has held that prior or contemporaneous knowledge of persecution is required even though an applicant may have objectively participated in persecution.⁷⁶ The court in *Castaneda-Castillo v. Gonzales* reasoned that although the statute contains no explicit reference to a scienter requirement, precedent as well as the definition of "persecution" imply both scienter and illicit motivation.⁷⁷ The court rejected the government's argument that the objective effect of the respondent's actions was dispositive.⁷⁸ It also held that in considering the "totality of the relevant conduct" the court must also consider the moral culpability of the applicant.⁷⁹

Similarly, in the Eighth Circuit, an applicant's personal culpability must be considered in determining whether he assisted in persecution.⁸⁰ The court in *Hernandez v. Reno* interpreted *Fedorenko*⁸¹ to mean that courts must scrutinize the entire record to establish whether the respondent should be held personally culpable for his or her conduct.⁸²

76. *Castaneda-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007). The respondent was a Peruvian military officer assigned to an antiterrorism unit, which was responsible for searching for members of the Shining Path. *Id.* at 19. During a search of a village in 1985, the respondent had to block escape routes as the other patrol searched for Shining Path members. *Id.* The search resulted in a massacre of innocent villagers, including many women and children. *Id.* The respondent claimed that while he was in contact with his commander, he did not know that the search resulted in such a massacre. *Id.*

77. *Id.* at 20.

78. *Id.* at 20-21.

79. *Id.* at 21. In *Castaneda-Castillo*, the court ultimately held that the persecutor bar did not apply if the respondent did not have any knowledge of the persecution. *Id.* at 22. The circuit court remanded the case to the BIA to determine whether the respondent had knowledge of the persecution. *Id.* at 22.

80. *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). The Guatemalan respondent in this case was a member of the Organization for People in Arms (ORPA). *Id.* at 808. Members of the group misrepresented the nature of the organization, and the respondent was forced to join after receiving death threats. *Id.* at 808-09. The members stated that the organization used non-violent activities to protest government injustices to improve the lives of citizens. *Id.* at 809. However, the ORPA was in fact a guerilla group that used "violent means in pursuit of its goal." *Id.* at 808. Hernandez testified that during a raid on a village, he was forced to shoot suspected government informants. *Id.* at 809. At one point, Hernandez asked to be let go, but the commander refused. *Id.* Hernandez managed to escape during a battle with government forces, but was shot in the leg as he was fleeing. *Id.* at 810.

81. *Fedorenko*, 449 U.S. at 490.

82. *Hernandez*, 258 F.3d at 814. The court held that the BIA omitted many of the facts from its legal analysis and, thus, failed to take into consideration the respondent's testimony that his participation was involuntary and that he

In considering the same issue, the Ninth Circuit in *Miranda Alvarado v. Gonzales* held that determining whether the respondent assisted in persecution “requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability.”⁸³ Specifically, this can be established by showing two requirements.⁸⁴ First, the respondent’s individual culpability must be established.⁸⁵ Second, surrounding circumstances must be evaluated “to determine whether the applicant had assisted or otherwise participated in persecution.”⁸⁶ The court held that while the statute does not require direct involvement in the persecution, a respondent’s membership in an organization does not itself amount to assisting in persecution; rather, there must be some act to further the persecutory goals.⁸⁷

The First, Eighth, and Ninth Circuits all interpreted *Fedorenko*⁸⁸ to include a particularized evaluation of the respondent’s conduct in determining whether he or she has assisted in persecution.⁸⁹ Other circuits have taken a different approach and interpreted the statute to preclude an analysis of the respondent’s personal motivation.⁹⁰

2. *Considering the Objective Effects of the Applicant’s Conduct and the Plain Language of the Statute*

The Second Circuit took the view that neither the relevant statutes nor case law allows for an “involuntariness” exception to the persecutor bar.⁹¹ The court did not consider if the person’s

participated in many of the actions out of fear for his life. *Id.*

83. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 (9th Cir. 2006). The applicant in this case was a citizen of Peru who joined the Peruvian Civil Guard in Lima. *Id.* at 918. He was responsible for protecting government officials and banks from attacks by guerilla organizations, which included the Shining Path. *Id.* His duties involved acting as an interpreter for other officers who interrogated suspected members of the Shining Path. *Id.* These persons were subjected to electric shock torture and also beaten with rubber batons. *Id.* The respondent interpreted these interrogations two to three times a month for seven years. *Id.* The court held that his actions constituted assistance in persecution because his acts were material to the interrogations. *Id.* at 932-33. In addition, the respondent was personally culpable because he did not perform the actions out of self-defense, nor were there any acts of noncompliance with the group or attempts to escape. *Id.* at 933.

84. *Id.* at 926.

85. *Id.*

86. *Id.*

87. *Id.* at 927.

88. *Fedorenko*, 449 U.S. at 490.

89. Durland, *supra* note 13, at 587.

90. See *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (stating that “[t]he syntax of the statute suggests that the alien’s personal motivation is not relevant”).

91. *Xie*, 434 F.3d at 140. The respondent in this case was a native of the People’s Republic of China and served as a driver for the Changle County

actions were voluntary, but instead looked to whether the conduct was active and had direct consequences for the victims.⁹² If the acts were merely passive in nature and “tangential to the acts of oppression” the respondent will not be found to have assisted in persecution.⁹³

Similarly, in *Bah v. Ashcroft*, the Fifth Circuit held that the plain language and sentence structure of the persecutor bar insinuate that the respondent’s personal motivation is not relevant in determining whether he assisted in persecution.⁹⁴ The court reasoned that Congress could have worded the statute in a way to allow for personal motivation to be a factor, but that it chose not to do so.⁹⁵ If the objective effects of a person’s actions amount to persecution, this is enough to bar them from relief under the INA.⁹⁶

The Seventh Circuit cited to the Fifth Circuit case *Bah v. Ashcroft* when it determined that it is necessary to draw a line between “genuine assistance in persecution and inconsequential association with persecutors.”⁹⁷ The court agreed with the Ninth

Department of Health. *Id.* at 137. In his capacity as a driver, the respondent was responsible for driving pregnant women in the back of his locked van to hospitals so that county officials could perform abortions. *Id.* at 138. The respondent maintained this job for purely economic reasons, but was free to leave at any time. *Id.* at 137. The court concluded that the respondent’s actions constituted “assistance in persecution.” *Id.* at 143.

92. *Id.* at 142-43.

93. *Id.* at 143. See *Weng v. Holder*, 562 F.3d 510 (2d Cir. 2009) (stating that the respondent’s post-surgical care of women who were given forced abortions was “tangential” to the persecutory act and did not facilitate directly or in an active way to the persecution). The respondent also guarded a locked room where women were kept while waiting for their abortions, but the court found that while this conduct was closer to actual assistance, it only happened on one occasion and her conduct as a whole did not support a finding of assistance in persecution. *Id.* at 515. See also *Balachova v. Mukasey*, 547 F.3d 374 (2d Cir. 2008) (holding that while the respondent participated in the search of a house that resulted in two adolescent girls being kidnapped and raped, his failed attempt at apprehending them was not sufficient to amount to assisting in persecution).

94. 341 F.3d at 351. Bah’s family was killed after his hometown was attacked by the Revolutionary United Front (RUF) in Sierra Leone. *Id.* at 349. Bah was transported to another city and given the option of joining the RUF or being killed. *Id.* Bah was trained to use an AK-47 and shot a female prisoner when he was ordered to do so. *Id.* at 350. Bah also admitted that, as part of his duties, he had to cut the hands, legs, and heads off of innocent civilians. *Id.* Bah was able to escape after two failed attempts and arrived in the United States in November 1997. *Id.* The court held that Bah participated in persecution, and that the persecution occurred on account of political opinion. *Id.* at 351.

95. *Id.*

96. *Lerescu*, *supra* note 23, at 1884.

97. *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005). Singh was a member of the Punjab police department in Punjab, India. *Id.* at 737. As a head constable, Singh was present during the arrest, detainment, and torture

Circuit that being a member of an agency or organization that persecutes others does not, in and of itself, amount to assisting in persecution.⁹⁸ But the court also agreed with the Fifth Circuit that personal motivation does not play a role in determining what constitutes assistance in persecution.⁹⁹

The Second, Fifth, and Seventh Circuits precluded any consideration of the respondent's personal motivation in the persecutory acts and instead focused on the objective effect of the actions.

The circuit courts are anything but consistent in their application of the *Fedorenko*¹⁰⁰ standard for determining what constitutes assistance in persecution. The First, Eighth, and Ninth Circuits take the approach of considering all the facts and circumstances of the applicant's case and look for a level of personal culpability. The Second, Fifth, and Seventh Circuits, however, hold that consideration of the applicant's personal motivation is precluded by the plain language of the statute. This split in the circuit courts finally came to bear in the case of *Negusie v. Holder*.¹⁰¹

C. The Ambiguity of the Persecutor Bar

In *Negusie v. Holder*, the Supreme Court considered whether an alien who was forced to assist in persecution is eligible for relief.¹⁰² Daniel Negusie, a citizen of both Ethiopia and Eritrea, was conscripted into the Eritrean army.¹⁰³ For four years he was forced to work as a prison guard in a place where the prisoners were being persecuted on the basis of one of the five protected grounds.¹⁰⁴ He prevented their escape, guarded them to keep them

of suspected Sikh militants. *Id.* at 737-38. Singh was opposed to the actions of the police department, but continued working for financial reasons. *Id.* at 737. Eventually he fled India because he refused to participate in the torture of his cousin. *Id.* at 737-38. The court held that he was ineligible for relief because of his role in the conduct that lasted for a decade. *Id.* at 740. While the court acknowledged the respondent's protests to the conduct of the police department, he refused to quit or look for other employment because he wanted the steady paycheck. *Id.* This was a case of first impression for the court to determine what was considered "assisting" or "otherwise participating" in persecution. *Id.* The court distinguished *Fedorenko* by stating that unlike Nazi concentration camps whose entire existence was premised on the persecution of Jews, the Punjabi police department served "traditional, legitimate law enforcement purposes" and their primary purpose was not to persecute innocent Sikhs. *Id.* at 739.

98. *Id.* at 739-40.

99. *Id.* at 740.

100. *Fedorenko*, 449 U.S. at 490.

101. *Negusie*, 129 S. Ct. at 1159.

102. *Id.* at 1163.

103. *Id.* at 1162.

104. *Id.* These protected grounds include "race, religion, nationality,

in the sun, and kept them from taking showers.¹⁰⁵ The Immigration Judge held that Negusie's role as an armed guard in a place where he had reason to know persecution was taking place constituted as assistance in persecution.¹⁰⁶ Both the BIA and the Fifth Circuit upheld the immigration judge's decision.¹⁰⁷ The Supreme Court, however, disagreed.¹⁰⁸

The Supreme Court stated that the lower courts' reliance on the ruling of *Fedorenko* was misplaced because the statutory structure of the DPA, interpreted in *Fedorenko*,¹⁰⁹ is not the same as the INA, which contains the persecutor bar.¹¹⁰ The Court determined that rather than exercising its interpretive authority, the BIA relied on the rule in *Fedorenko*.¹¹¹ The Supreme Court held that the BIA must use its authority to interpret the statute in order to conclude whether the persecutor bar contains a duress exception.¹¹² The Court did not answer the question itself, but instead stressed the importance of the BIA's interpretation of the statute.¹¹³ Currently, the case is awaiting a decision from the BIA.

It has been suggested that a limited duress exception should be adopted and certain persecutory acts should be excused.¹¹⁴ Applicants who would otherwise be barred from asylum should be excused if their conduct was in response to threats of imminent death to themselves or family members.¹¹⁵ Proponents of this

membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(2)(A)(i). Prior to being forced into this position, Negusie was beaten and imprisoned for two years after he refused to fight against Ethiopia, one of his native countries. *Negusie*, 129 S. Ct. at 1162.

105. *Id.* at 1162-63.

106. *Id.* at 1163.

107. *Id.*

108. *Id.* at 1159.

109. *Fedorenko*, 449 U.S. at 518.

110. *Negusie*, 129 S. Ct. at 1166.

111. *Id.* at 1167; *Fedorenko*, 449 U.S. at 512.

112. *Negusie*, 129 S. Ct. at 1167. "The BIA is not bound to apply the *Fedorenko* rule that motive and intent are irrelevant to the persecutor bar at issue in this case. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency." *Id.* Because the BIA has not yet interpreted the statute, the Supreme Court concluded that the proper course of action was to remand the case in order to for additional investigation or explanation. *Id.*

113. *Id.* "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.'" *Id.* (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005)). The deference accorded to the BIA in interpreting ambiguous INA statutes is required under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

114. See *Lerescu*, *supra* note 23, at 1901 (suggesting that a limited duress exception may be applied if the situation meets the requisite circumstance).

115. *Id.*

position make sure to explain that the exception should be limited so that only the most compelling cases would warrant excusing the persecution.¹¹⁶ Advocates on the other side of the issue feel that allowing a duress exception would only further complicate asylum cases.

Those opposed argue that the persecutor bar should not be read to include a duress exception because of the "undefined nature of the element of duress."¹¹⁷ The ambiguity in what constitutes duress would certainly ensure that the current lack of continuity in asylum cases would continue.¹¹⁸ Instead, courts should adopt the purposeful culpability standard that is contained in the Model Penal Code.¹¹⁹ The language of the statute itself as well as international law supports this conclusion.¹²⁰ This would require a focus on the applicant's intent, rather than on the actions of others—as a duress exception would allow.¹²¹

Undoubtedly the debate will continue until the BIA interprets the statute as directed by the Supreme Court.

IV. PROPOSAL

Efforts by the appellate courts to weigh the voluntariness of person's conduct by way of a "particularized evaluation" are

116. *Id.* "To be excused, persecutory acts must be (1) in response to credible threats (2) of imminent death or severe bodily injury (3) to oneself or another." *Id.* Alleging simple disagreement with other persecutors' intent will not satisfy the test; the applicant needs to show that the threats made against him or her entailed infliction of severe bodily harm. *Id.* It is argued that requiring both a subjective and objective element be proven will ensure that the exception is applied in only the most extreme cases of physical or psychological coercion. *Id.*

117. Durland, *supra* note 13, at 596.

118. *Id.* The lack of uniformity would result from the varied interpretations of how immediate the duress situation needs to be in order to constitute a defense. *Id.* Some courts hold that the person must be held at gunpoint the entire time while others hold that a threat to kill family members would be sufficient. *Id.*

119. Durland, *supra* note 13, at 598. *But see Negusie*, 129 S. Ct. at 1182 (Thomas, J., dissenting) (stating that "the decision to admit an alien is a matter of legislative grace, for which judicial review has been 'consistently classified' as civil in nature."). The dissent in *Negusie* finds it unnecessary to read a criminal law requirement into a statute that is "nonpunitive in purpose and effect." *Id.*

120. Durland, *supra* note 13, at 598.

121. *Id.* at 600.

Reading a purposeful mens rea into the statute is distinguishable from reading in the term "voluntary," or in other words allowing a duress defense, because a purposeful mens rea focuses solely on the intent of the applicant. In contrast, "voluntariness" and duress consider the actions of others which may have compelled an applicant to act.

Id.

misguided.¹²² Creating a generally applicable rule and allowing the judge wide discretion to consider the facts of each case will only result in continued unequal application of the law.¹²³ The BIA should follow the dissent in *Negusie*¹²⁴ because it concludes that the persecutor bar should not include a duress exception.¹²⁵ Attention should be focused on changing the asylum application process to require that asylum interviews be conducted overseas. This would ultimately help reduce the prevalence of asylum fraud in the United States.

A. Statutory Interpretation

1. Congressional Intent

The statute does not contain any reference to the term “voluntary,” nor does it include any exception for involuntary or coerced conduct.¹²⁶ As the dissent in *Negusie*¹²⁷ correctly noted: the ordinary meaning of the words “assist” and “participate” do not suggest voluntariness.¹²⁸ These terms only require that an individual take part in some way and even if participation or assistance is coerced, “it remains participation or assistance just the same.”¹²⁹

122. *Lerescu*, *supra* note 23, at 1898. By applying this kind of a test, applicants, such as Hernandez, would be found not to have persecuted anyone when he or she lined up innocent villagers and shot at them. *Id.* at 1899; *see supra* note 75 and accompanying text (discussing the BIA and its adoption of *Fedorenko*).

123. *See supra* note 75 and accompanying text (discussing the BIA and its adoption of *Fedorenko*).

124. *See Negusie*, 129 S. Ct. at 1176 (Thomas, J., dissenting) (explaining why the persecutor bar does not and should not contain a duress exception).

125. The majority determined that the BIA did not exercise its interpretive authority, but instead relied on the decision of *Fedorenko*. *Id.* (majority opinion). The dissent puts forth several reasons, other than the decision in *Fedorenko*, for not allowing a duress exception to the persecutor bar. *Id.* at 1176-85 (Thomas, J., dissenting). The majority states whether other reasoning supports this conclusion of the statute is something the BIA must determine in the first instance. *Id.* at 1167 (majority opinion). By adopting the dissenting opinion, the BIA would be precluding a duress exception to the persecutor bar without relying on *Fedorenko*.

126. *Id.* at 1178-79 (Thomas, J., dissenting). The relevant portion of the statute is codified at 8 U.S.C. § 1158(b)(2)(A)(i). This point is also acknowledged by the majority opinion. *Id.* at 1164-65 (majority opinion).

127. *Id.* at 1159.

128. *Id.* at 1179 (Thomas, J., dissenting opinion). “Assist” is defined: “to give support or aid” or “to help.” *Id.* (quoting WEBSTERS NINTH COLLEGIATE DICTIONARY 877 (1991) and OXFORD AMERICAN DICTIONARY 36 (1980)). “Participate” means “to take part” or “to have a share, to take part in something.” *Id.* (quoting WEBSTER’S NINTH COLLEGIATE DICTIONARY 858 and OXFORD AMERICAN DICTIONARY 487).

129. *Id.* In addition, the term “persecute” contains no intrinsic mens rea. *Id.* “Persecute” means “to harass in a manner designed to injure, grieve, or

In addition, the structure of the INA itself gives great weight to the conclusion that the persecutor bar should apply regardless of whether the conduct was voluntary or not.¹³⁰ Specifically, other provisions of the INA require voluntary conduct and exclude involuntary conduct.¹³¹

For instance, totalitarian party members were barred from the United States unless their membership was involuntary.¹³² In another section, the INA also provides that termination of asylum is allowed if the applicant “voluntarily availed himself” of another country’s protections.¹³³ Where Congress has included a specific term in one part of a statute and has not included it elsewhere in the same act, it is generally presumed that Congress acted intentionally and purposely to include or exclude the particular language.¹³⁴ Congress intentionally excluded involuntary conduct as an exception to the persecutor bar and the court should not read one into it now.¹³⁵

2. Forgetting the Persecutor’s Victims

To allow a persecutor to claim that he or she lacked the motive to persecute others, or did so involuntarily, would diminish the pain and suffering inflicted upon his or her victims.¹³⁶ Those who would allow for an applicant to claim a limited duress exception where there is a threat of imminent death or severe bodily harm to oneself or another¹³⁷ do not account for the difficulty of disproving such claims. Overseas investigations into

afflict.” *Id.* (quoting WEBSTER’S NINTH COLLEGIATE DICTIONARY 877). The dissent goes on to state that the majority made no attempt to apply the traditional tools of statutory interpretation before determining that the statute was ambiguous. *Id.* at 1183.

130. *Id.*

131. *Id.*

132. See 8 U.S.C. § 1182(a)(3)(D)(ii) (2006) (stating that “clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa . . . that the membership or affiliation is or was involuntary . . .”).

133. *Id.* § 1158(c)(2)(D).

134. *Negusie*, 129 S. Ct. at 1180 (Thomas, J., dissenting) (quoting *Russello v. United States*, 464 U.S. 16, 21-23 (1983)).

135. “If the text of a statute governing agency action ‘directly address[es] the precise question at issue, then that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Negusie*, 129 S. Ct. at 1178 (Thomas, J., dissenting) (quoting Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 664 (2007)).

136. See *Lerescu*, *supra* note 23, at 1899 (stating that such an approach would be “morally repugnant” when considering the victims of such persecution).

137. See *id.* at 1899-1901 (advancing the argument that a limited duress exception would increase the predictability and ultimately the legitimacy of the asylum system).

claims made by an applicant are difficult to conduct because of the confidentiality issues associated with asylum.¹³⁸ Rather than insert a duress exception into the statute, there should be a reformation of the asylum system and the way asylum interviews are conducted.

B. Protection under the Convention Against Torture

Under the Convention Against Torture (CAT), it is the “policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture”¹³⁹ Deferral of removal (under CAT) is available even to those who would be inadmissible because of the persecutor bar.¹⁴⁰ Federal law has clearly provided relief for those applicants who have participated in persecution and a form of relief that has intentionally been omitted should not be read into the INA.¹⁴¹ Interpreting the INA to include a duress exception would conflict with the present form of relief available under the CAT.¹⁴²

Furthermore, public policy decisions “pertaining to the entry of aliens and their right to remain in the United States” are exclusively entrusted to Congress and codified in the INA.¹⁴³ It is the responsibility of the courts to enforce the immigration policy

138. See 8 C.F.R. § 208.6 (2009) (providing that “information contained in or pertaining to any asylum application” is confidential and can only be released to third parties under limited circumstances). Information may not be disclosed to a foreign government if the information would allow the third party

[T]o link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2) specific facts or allegations pertaining to the individual asylum claim contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum.

Interoffice Memorandum from the U.S. Citizenship and Immigration Services to Asylum Office Directors (June 15, 2005) (on file with author) [hereinafter Interoffice Memorandum].

139. United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Pub. L. No. 105-277, 112 Stat. 2681-822, 8 U.S.C. § 1231 (1998).

140. *Negusie*, 129 S. Ct. at 1162 (stating that the persecutor bar applies to those seeking asylum or withholding of removal, but it does not disqualify an alien from seeking deferral of removal under the CAT). Deferral of removal was created to comply with Congress’ direction and is a less permanent form of relief. *Id.* at 1178 (Thomas, J., dissenting). This form of relief is more quickly and easily terminated if removal becomes possible consisted with the CAT. *Id.* at 1178 n.1.

141. *Id.*

142. *Id.*

143. *Id.* at 1180 n.2.

decisions of Congress that have been set forth in the INA.¹⁴⁴ The majority opinion in *Negusie*¹⁴⁵ admitted that the Attorney General's decision about whether to exclude an alien who has persecuted others is of special importance.¹⁴⁶ These decisions may affect the nation's relationships with foreign countries, and the judiciary is not well positioned to bear the responsibility of such decisions.¹⁴⁷ The majority, however, stated that the BIA did not properly address the "ambiguous statutory terms"¹⁴⁸ and glossed over the highly relevant policy decisions considered by Congress when it enacted the persecutor bar of the INA.

C. Reformation of the Asylum System

The asylum process should be reformed to mirror that of the refugee resettlement process. The Refugee Resettlement Program requires refugees to go through fingerprinting, background checks, and interviews before they are allowed to leave for their new country.¹⁴⁹ The affirmative asylum process conducts these same procedures after the alien has arrived in the U.S.¹⁵⁰ If all aliens who wish to seek the protection of the United States were interviewed in their native country, several issues currently facing the asylum system would be addressed.

One such issue is the inability to investigate an alien's allegations of persecution. Overseas investigations into such

144. *Id.* These decisions must be enforced even if "Congress has chosen to forbid the entrance of foreigners within its dominions altogether." *Id.* (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)). "Where Congress has made a judgment about which persons to admit and exclude from the country, it is not for this Court to question the wisdom of that choice." *Id.*

145. *Negusie*, 129 S. Ct. at 1162-68.

146. *Id.* at 1164. The Attorney General has been charged by Congress administer the INA. *Id.* at 1163.

147. *Id.* at 1164. "Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Id.*

148. *Id.* The Court implies that the BIA did not address the ambiguous statutory terms and the ordinary rule of the court is to remand the issue back to the BIA in order to give it the opportunity to address the matter in the first instance. *Id.* The remand rule exists partially because filling statutory gaps in statutes within the agency's jurisdiction are better handled by the agency itself than by the court. *Id.* at 1167.

149. Erin Patrick, *The US Refugee Resettlement Program*, *Migration Info. Source*, June 2004, <http://www.migrationinformation.org/Feature/display.cfm?ID=229#1>. The U.S. works closely with the United Nations High Commissioner of Refugees in resettling refugees. *Id.* Resettlement is one of three of the UNHCR's "durable solutions" for refugees. *Id.*

150. The Affirmative Asylum Process, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Aug. 23, 2010), <http://www.uscis.gov/portal/site/uscis> (search "the affirmative asylum process;" then follow the hyperlink: "The Affirmative Asylum Process"). Aliens have one year to file their asylum applications once they arrive in the U.S. Sternberg, *supra* note 25, at 52.

allegations are difficult to conduct because once an alien has arrived in the United States and applied for asylum, confidentiality restrictions apply and must be followed.¹⁵¹ This severely limits the government's capabilities in conducting an investigation because information can only be disclosed under very limited circumstances.¹⁵² If interviews were done overseas, officers could obtain information firsthand rather than going through foreign officials. This would directly address the difficulties faced in conducting overseas investigations. Interviews done overseas by trained officers would maintain confidentiality and would also produce a more thorough and complete record.

Moreover, more thorough investigations would reduce unsubstantiated claims and help combat fraud currently present in the asylum system. Officers who are trained in the conditions of the respective countries would be better suited to determine what claims are false from those that are valid. A reformation of the asylum system, rather than implying a duress exception, should be the focus of legislators and courts alike.

V. CONCLUSION

Immigration law is anything but settled. Courts have consistently struggled with the interpretation and application of the persecutor bar contained in the INA. While some courts believe a particularized evaluation of the alien's conduct is necessary, other courts preclude any consideration of the alien's personal motivation. As stated in the dissenting opinion in *Negusie*,¹⁵³ the plain language of the statute does not allow for a duress exception. Moreover, the INA already provides a form of relief for those aliens who have participated in persecution. Therefore, time and effort should be focused on a reformation of the asylum system

151. 8 C.F.R. § 208.6. See also Interoffice Memorandum, *supra* note 138 (providing an outline of the regulation and the situations in which information can and cannot be released).

152. See 8 C.F.R. § 208.6(c)(1)-(2) (stating under what circumstances information contained in or pertaining to an asylum application can be disclosed).

153. *Negusie*, 129 S. Ct. at 1176 (Thomas, J., dissenting).

