NOTES

PULLING THE TRIGGER: AN ANALYSIS OF CIRCUIT COURT REVIEW OF THE "PERSECUTOR BAR"

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The Immigration and Nationality Act contains a provision, commonly referred to as the "persecutor bar" or "persecution of others bar," which prohibits granting asylum to an alien who, although otherwise meeting the criteria for asylum, is determined to have been a "persecutor" in her native country. Use of the persecutor bar by the Board of Immigration Appeals and circuit courts leads to situations of legal complexity because neither the judiciary nor the legislature has concretely defined "persecution." As applicants alleged to be persecutors are often themselves fleeing persecution, the lack of clarity in this area can have devastating consequences for those seeking refuge in the United States.

This Note explains how inconsistent implementation of the persecutor bar across circuit courts creates unequal treatment for asylum applicants. By identifying "triggering factors" that affect courts' persecutor bar analysis, this Note categorizes circuit court cases that review denials of asylum based on the bar. This Note argues that a proper analysis requires, first, a clarification of the definition of "persecution" and, second, a thorough, nuanced examination of triggering factors that emphasizes the relationship between the asylum applicant and the persecutory acts, rather than a strict application of the bar based on the commission of the acts alone. By looking at the history and underlying purpose of the persecutor bar, as well as international standards, this Note proposes that circuit courts use a contextual balancing test of multiple triggering and mitigating factors when reviewing the exercise of the persecutor bar.

INTRODUCTION

Ammar Cheikh Omar, a soldier conscripted into the Syrian army, described the first time he was ordered to shoot into a crowd of civilian protesters in Syria. Aiming his gun just above their heads, he "prayed to God not to make him a killer and pulled the trigger."[1] Omar and thousands like him were conscripted into the Syrian army under threat of death and deployed as soldiers for President Bashar Al-Assad's brutal

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1. Dan Bilefsky, Soldier Says Syrian Shootings and Torture Led Him to Defect, N.Y. Times, Feb. 2, 2012, at A4.

government regime, responsible for the deaths of over five thousand political protestors in 2011. Omar defected from this army to join the ranks of another—the Free Syrian Army, a growing opposition force.[2] In the months and years to come, many former soldiers-turned-rebel-fighters like Omar may seek refuge in foreign countries. The civil unrest of the Arab Spring[3] in Egypt, Libya, Tunisia, and Syria has led to increased asylum applications around the world,[4] causing the United Nations to note that "2011 has been a year of displacement crises unlike any other."[5]

The Immigration and Nationality Act[6] (INA) contains a provision, commonly referred to as the "persecutor bar" or "persecution of others bar," that would prohibit Omar, and individuals like him, from being granted asylum in the United States. The persecutor bar prohibits granting asylum to an alien[7] who, although otherwise meeting the criteria for asylum, is determined to have been a "persecutor" in her native country.[8]

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2. Id.

3. The Arab Spring is a period of protests and uprisings in Middle Eastern and North African countries that began in Tunisia in 2010, and quickly spread across the region. For a description of the protests from the perspective of Tunisian President Moncef Marzouki, see Moncef Marzouki, Op-Ed., The Arab Spring Still Booms, N.Y. Times, Sept. 27, 2012, at A35.

4. See Jason Dzubow, Asylum Applications Up in 2011; Arab Spring Has Modest Impact, Asylumist (Nov. 8, 2011), http://www.asylumist.com/2011/11/08/asylum-applications-up-in-2011-arab-spring-has-modest-impact/ (on file with the *Columbia Law Review*) (commenting on United Nations High Commissioner for Refugees (UNHCR) press release). The International Organization for Migration (IOM) estimates a million people have flooded out of Libya alone since the uprisings began. Sarah Edmonds, Special Report: Europe's Other Crisis, Reuters, June 22, 2011, http://www.reuters.com/article/2011/06/22/us-europe-refugees-idUSTRE75L2FK20110622 (on file with the *Columbia Law Review*).

5. Press Release, United Nations High Comm'r for Refugees, Asylum Applications in Industrialized Countries Jump 17 Per Cent in First-Half 2011 (Oct. 18, 2011), http://www.unhcr.org/4e9d42ed6.html (on file with the *Columbia Law Review*) (quoting António Guterres, head of UNHCR).

6. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (2006)).

7. "The term 'alien' means any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006). Asylum law is codified in 8 U.S.C. § 1158. The privileges of asylum status include remaining in the United States, authorization to work in the United States, and the ability to travel abroad and return to the United States. Id. § 1158(c)(1)(A)–(C). Asylum can be granted to an individual who meets the statutory definition of a refugee under the INA: an alien who cannot return to her native country out of a fear of persecution. See infra notes 27–29 and accompanying text (defining refugee).

8. The persecutor bar is defined in three provisions of the INA: §§ 101(a)(42), 208(b)(2)(A)(i), and 241(b)(3)(B)(i). By definition, "[t]he term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). The Attorney General may not grant asylum if "the alien ordered, incited, assisted, or

Omar's situation exemplifies the extreme legal complexity of the persecutor bar and the ways in which its use can potentially lead to perverse and unjust outcomes.[9] Yet neither the judiciary nor the legislature has concretely defined "persecution,"[10] leading to inconsistent implementation of the bar and reliance on divergent rationales. One commentator has gone so far as to say, "On no issue is the lack of bright-line distinctions more evident than the matter of what constitutes 'persecution' and the related question of what level of past conduct by a potential applicant constitutes 'persecution of others,' thus barring the application."[11] Because a showing of persecution or fear of persecution is heavily—almost entirely—fact-driven,[12] both asylum eligibility as a refugee and

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otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i). The Attorney General may not remove an alien to a country where the alien's life or freedom would be threatened except where the Attorney General has decided that the alien "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).

9. Another widely contested issue is the application of the persecutor bar to former child soldiers. See generally Mary-Hunter Morris, Note, Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers, 21 Harv. Hum. Rts. J. 281 (2008) (discussing problematic nature of applying persecutor bar to child soldiers); Kathryn White, Note, A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers, 43 Vand. J. Transnat'l L. 191 (2010) (same); Nina Bernstein, Taking the War Out of a Child Soldier: Fighting at 15 in Africa, and Now Starting Anew in New York, N.Y. Times, May 13, 2007, at A29 (describing experience of former child soldier navigating U.S. immigration system and asylum process).

10. See Ruiz v. Mukasey, 526 F.3d 31, 36 (1st Cir. 2008) ("The INA provides no specific definition of the term 'persecution.'"); H.R. Rep. No. 95-1452, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4701–02 ("Although our permanent immigration law has never expressly excluded from admission into the United States aliens who have participated in persecution, similar provisions have appeared in special legislative enactments providing for the admission of refugees and certain other displaced persons after World War II.").

11. Edward R. Grant, Persecution and Persecutors: No Bright Lines Here, Immigr. L. Advisor (Exec. Office for Immigration Review, U.S. Dep't of Justice, Washington, D.C.), Aug. 2007, at 6, 6, available at http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%20Vol%201/vol1no8.pdf (on file with the *Columbia Law Review*); see also Office of the U.N. High Comm'r for Refugees, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 51, U.N. Doc. HCR/1P/4/ENG/REV.3 (Dec. 2011) [hereinafter U.N. High Comm'r for Refugees, Handbook and Guidelines], available at http://www.unhcr.org/refworld/docid/4f33c8d92.html (on file with the *Columbia Law Review*) (noting there is no universally accepted definition of "persecution").

12. See, e.g., *Ruiz*, 526 F.3d at 36 ("[W]hat constitutes persecution is a question best answered on a case-by-case basis. Due to the 'nearly infinite diversity of factual circumstances in which asylum claims arise, it would be difficult to develop meaningful generalities that could easily be applied to a broad spectrum of cases.'" (quoting Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005), superseded by regulation, Voluntary Departure—Authority of the Executive Office for Immigration Review, 8 CFR § 1240.26

asylum ineligibility as a former persecutor turn on an adjudicator's mercurial understanding of what conduct constitutes persecution.[13]

As the last level of review, the federal circuit courts are best positioned to shape the contours of asylum law and the persecutor bar.[14] Although using the same legal text, circuits have, over the last ten years, developed different interpretations—from the Board of Immigration Appeals (BIA) and from each other—of what constitutes persecution sufficient to invoke the persecutor bar. This Note argues that the variation among federal circuit courts' use of the bar stems from disparate understandings of what level of intent and involvement with the persecutory act is required to trigger the bar under the INA.

By examining thirty-five cases decided between 2001 and 2011, this Note identifies "triggering factors" and "mitigating factors" analyzed by circuit courts reviewing asylum denials by the BIA. This Note argues that a proper analysis requires, first, a clarification of the definition of "persecution," and, second, a thorough, nuanced examination of triggering factors that emphasizes the *relationship* between the asylum applicant and the persecutory acts, rather than a strict application of the bar based on the *commission* of the acts alone. Part I examines the history and evolution of U.S. asylum law as it relates to the application of the persecutor bar. Part II identifies, categorizes, and analyzes circuit court cases that reviewed BIA decisions invoking the persecutor bar. Part III advances possible solutions to unify the interpretation of the persecutor bar, based on the Second and Ninth Circuits' methods and the United Nations

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(2006))); Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (stating "[a]n applicant for asylum must show that his fear of persecution is well-founded," which requires demonstrating "a subjective fear of persecution, and that the fear is grounded in objective facts" and "the fear is based on one of the grounds specified for asylum" (citing Gomez v. INS, 947 F.2d 660, 663 (2d Cir. 1991))).

13. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform 11 (2009) ("Asylum decisions . . . involve both a judgment about whether the applicant's story, if true, would render the applicant eligible for asylum under American law and an assessment as to whether the applicant is telling the truth about his or her personal experiences of actual or threatened persecution.").

14. The Board of Immigration Appeals is the highest administrative body responsible for the interpretation and application of immigration laws. BIA decisions are subject to judicial review by federal circuit courts. "As a practical matter, the last chance for an unsuccessful asylum applicant is to appeal an adverse Board decision to a U.S. court of appeals." Id. at 77. This Note focuses on circuit court review of BIA decisions because BIA opinions are often cursory. The circuit court cases provide more in-depth analysis of the merits of each case and are able to set a controlling standard for the immigration judges (IJs) and BIA within the circuit. This creates internal continuity within the circuit. Id. at 61–63 (describing scope of BIA jurisdiction and Attorney General's authorization of BIA "summary affirmances—decisions without any written analysis"). Furthermore, the persecutor bar arises infrequently, and the circuits are able to influence the decisionmaking process of the IJs and BIA. See infra Part I.B (discussing roles of IJ, BIA, and circuit courts, and relationship among them).

High Commissioner for Refugees' more nuanced, particularized approach to the bar.

I. HISTORY OF U.S. ASYLUM LAW AND THE EVOLUTION OF THE PERSECUTOR BAR

Part I provides an overview of the history and implementation of the persecutor bar in asylum law. Section A describes the naissance of U.S. asylum law against a background of emerging international asylum and refugee law in the wake of the Second World War.[15] Section B provides an overview of the historical evolution of the persecutor bar in the courts, focusing on the difficulties of defining "persecution." Section C describes the two most salient Supreme Court decisions involving the persecutor bar, *Fedorenko v. United States* and *Negusie v. Holder*, and their use by circuit courts and the BIA in adjudicating asylum claims.

A. *A Brief History of U.S. Asylum Law and the Creation of the Persecutor Bar*

Asylum law gives "statutory meaning to our national commitment to human rights and humanitarian concerns."[16] U.S. and international asylum law emerged in the wake of World War II to address the large waves of migration following the war.[17] The first piece of American legislation to confront the issue was the Displaced Persons Act of 1948 (DPA),[18] which granted specific quotas of visas to refugees from the occupied Allied territories.[19] The DPA also adopted an exclusionary principle to

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15. The persecutor bar emerged in response to the horrors of the Holocaust and embodied a specific legislative effort to prevent former Nazis from escaping accountability by passing as refugees. This strengthened the moral force behind the bar, but weakened courts' ability to apply it flexibly to changing circumstances. See infra Part I.A.

16. S. Rep. No. 96-256, at 1 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 141. See generally Regina Germain, American Immigration Lawyers Association's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure 23–25 (6th ed. 2010) (describing history and process of asylum law).

17. As individuals were uprooted by war, they fled to the American, British, and French military zones in occupied Germany. In response, between 1945 and 1950, the United States and other countries began to design and implement an immigration system to assist those dislocated by war and the expansion of communist regimes. See Gil Loescher & John A. Scanlan, Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present 1–2 (1986). The Allied armies faced over seven million displaced persons in the occupied territory who needed new homes. See Leonard Dinnerstein, America and the Survivors of the Holocaust 9 (1982).

18. Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009 (1948), amended by Immigration and Nationality Act, ch. 477, tit. IV, § 402(h), 66 Stat. 277 (1952).

19. See Dinnerstein, supra note 17, at 163–82 (describing legislative history and administration of DPA). The DPA was "a landmark in the history of American immigration policy" and reflected the ideological sentiment that "we do ourselves and our system of democracy a great deal of good by . . . show[ing] to all the world that we are in truth champions of freedom and that we shall aid all those who rally to our cause." Id. at 182 (quoting 94 Cong. Rec. 7872 (1948) (statement of Rep. John E. Fogarty)).

bar the entry of Nazi war criminals. The DPA prohibited individuals who "assisted the enemy in persecuting civil populations" or "voluntarily assisted enemy forces" from entering the United States.[20]

The INA,[21] enacted in 1952, is the basis of U.S. immigration and asylum law and is aligned with international law through the United Nations Convention Relating to the Status of Refugees (Convention).[22] The INA was amended through the Refugee Act of 1980 to deny asylum to applicants who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, national origin, or political opinion."[23] The INA later added "particular social group" as a protected class.[24] At the time, the contemplated persecutors were former Nazis.[25] In drafting the persecutor bar, Congress precluded from asylum a certain "class of undesirable alien—aliens who engaged or

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20. Constitution of the International Refugee Organization of the United Nations, Dec. 15, 1946, 18 U.N.T.S. 3, 20. Part II of the Constitution of the International Refugee Organization of the United Nations (IRO) limited who was to be assisted under the IRO, providing assistance only to "*bona fide* refugees and displaced persons." Id. at 17. The DPA incorporates the IRO definitions of "refugee" and "displaced person." DPA § 2(b).

21. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

22. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19.5 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter U.N. Convention], available at http://www.unhcr.org/3b66c2aa10.html (on file with the *Columbia Law Review*). The Convention was subsequently amended to remove geographic and temporal restrictions on refugee status through the 1967 Protocol. See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19.S U.S.T. 6224, 66 U.N.T.S. 267, available at http://treaties.un.org/doc/publication/UNTS/Volume%20606/v606.pdf (on file with the *Columbia Law Review*). The Convention and Protocol are based on Article 14 of the Universal Declaration of Human Rights, which states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 14, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at http://www.unhcr.org/refworld/docid/3ae6b3712c.html (on file with the *Columbia Law Review*).

23. Refugee Act of 1980, Pub. L. No. 96-212, §201(a), 94 Stat. 102, 102–03 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act was passed as a response to the belief that "the piecemeal approach of our Government in reacting to individual refugee crises as they occur is no longer tolerable." S. Comm. on the Judiciary, Refugee Act of 1980, S. Rep. No. 96-256, at 3 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 143; see also INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring [the United States] into conformance with the [Protocol], to which the U.S. acceded in 1968."). The language first suggesting a persecutor bar was adopted in 1978 to specifically exclude aliens who persecuted others under the direction of the Nazi government of Germany, yet were technically admissible under the 1952 Act. Act of Oct. 30, 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified as amended at 8 U.S.C. § 1182(a)(3)(E) (2006)). Referred to as the Holtzman Amendment, its passage "rendered [former Nazis] deportable, thereby eliminating an undesirable loophole in [then] current U.S. immigration law." H.R. Rep. No. 95-1452, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4702.

24. INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i).

25. See supra note 23 (describing amendments to INA allowing deportation of suspected Nazi war criminals).

assisted in the persecution of others."[26] Section B explains the INA's definition of "refugee" in relation to the persecutor bar.

B. *The Changing Definition of the Persecutor Bar: The DPA to the INA*

This Section explains the use of the persecutor bar in current INA case law and its lingering ties to the DPA. Subsection B.1 examines the persecutor bar under the INA. Subsection B.2 then explores the jurisdictional relationship between the BIA and the circuit courts.

1. *The Persecutor Bar Under the INA.* — The INA's definition of refugee applies to any alien who is unable or unwilling to return to her country of origin "because of persecution or a well-founded fear of persecution on account of [one of five protected grounds:] race, religion, nationality, membership in a particular social group, or political opinion."[27] If immigration officials determine that an individual meets the statutory definition of a "refugee," she may be granted asylum.[28] However, the INA specifically states that:

> The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.[29]

This provision of the INA is referred to as the "persecutor bar,"[30] and duplicates the language defining refugee. The phrase "on account of" requires a linkage between the act of persecution and the motivation for that persecution for purposes of granting asylum *and* barring asylum; this requirement is commonly referred to as the "nexus test."[31] Persecution must be "*because of* [one's] race, religion, nationality, membership in

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26. H.R. Rep. No. 95-1452, at 8 (letter from Patricia M. Wald, Assistant Att'y Gen., to Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

27. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

28. A person is a refugee because they meet the criteria, not because they are recognized by immigration officials as a refugee—recognition is not a precursor to being a refugee. Germain, supra note 16, at 4.

29. INA § 101(a)(42)(B), 8 U.S.C. § 1101 (a)(42)(B).

30. The persecutor bar is one of many restrictions on who can be granted asylum. Others include committing a particularly serious crime, an aggravated felony, a serious nonpolitical crime outside of the United States, and an act of terrorism. See Germain, supra note 16, at 119–33 (discussing mandatory bars to asylum and withholding of removal). On the other hand, some areas of asylum law have increased admittance to the United States. For example, "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for . . . resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion." INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

31. See Germain, supra note 16, at 41–44 (describing nexus test and providing examples).

a particular social group, or political opinion."[32] The bar, the protected categories, and the nexus test reflect a specific legislative motivation engendered by the heinous acts committed in World War II.[33] Although circumstances have changed, the intent behind the bar remains.

2. *The BIA and the Circuits: The Procedure of the Persecutor Bar.* — The BIA and circuit courts work cooperatively through a complicated review process of asylum claims. An asylum applicant has an initial hearing before an immigration judge (IJ) and, if denied asylum, can seek review before the BIA.[34] An applicant can then appeal an adverse BIA decision to the appropriate circuit court based on the location of the initial immigration court proceeding.[35] Applicants have no option to change forums, potentially subjecting them to an unfavorable outcome based on where their claim was heard.[36]

The BIA, as the administrative agency charged with adjudicating asylum claims nationally, is "'accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.'"[37] The BIA is bound to follow the circuit court's ruling *only* for cases arising in that circuit's jurisdiction,[38] making uniformity across circuits all the more important to create uniformity across the nation.[39] Circuit courts have jurisdiction to either grant a petition for

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32. Brigette L. Frantz, Note, Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms, 5 Ave Maria L. Rev. 499, 502 (2007) (emphasis added).

33. See supra note 23 and accompanying text (discussing legislative motivation to exclude Nazis from admission into United States).

34. Ramji-Nogales et al., supra note 13, at 61.

35. Id. at 77.

36. Id. (discussing lack of possibility of forum shopping and discrepancies in outcomes correlated with circuit). For example, an asylum applicant in the Fourth Circuit has a 1.9% chance of winning a remand after an initial unfavorable determination, while an applicant in the Seventh Circuit has a 36.1% chance of winning a remand. Id.

37. Negusie v. Holder, 555 U.S. 511, 516 (2009) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)) (internal quotation marks omitted) (explaining circuit courts are subject to BIA's interpretation of law under *Chevron* deference, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). "'The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" INS v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987) (quoting *Chevron*, 467 U.S. at 483 n.9). In the "process of filling '"any gap left, implicitly or explicitly, by Congress,"' [however,] the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." Id. at 448 (quoting *Chevron*, 467 U.S. at 843) (describing *Chevron* deference in context of defining "well-founded fear" in asylum cases).

38. Ramji-Nogales et al., supra note 13, at 61 (noting BIA hears cases nationwide and sets precedent for immigration courts, but is only bound by given circuit court's jurisprudence for appeals from immigration courts in that circuit court's own jurisdiction). See generally Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 281–84 (6th ed. 2008) (providing overview of BIA process).

39. See supra note 14 and accompanying text (describing how circuit courts may create unity among IJs and BIA).

review—and remand an erroneous decision to the BIA—or deny the petition, effectively upholding the BIA's decision.[40] The appellate court cannot grant asylum.[41] Despite this deferential relationship, case law reveals that circuit courts often promulgate their own interpretation of the persecutor bar and use this to deny or grant an asylum applicant's petition.[42]

C. *Competing Principles:* Fedorenko *and* Negusie

Circuit courts are faced with two competing principles with which to evaluate persecutor bar cases. One follows *Fedorenko v. United States*, which explicitly denounces a duress exception to the bar. The other follows *Negusie v. Holder*, a more recent Supreme Court decision that undermines *Fedorenko* and creates the possibility for a duress defense, potentially shifting the trajectory of persecutor bar jurisprudence.

1. *The* Fedorenko v. United States *Approach.* — Conflict surrounding what constitutes persecution predates the INA and can be traced back to the most prominent case interpreting the persecutor bar decided under the DPA, *Fedorenko v. United States*.[43] This case continues to serve as a guiding force for asylum cases decided under the INA.[44] Fedorenko was granted asylum and U.S. citizenship under the DPA, but was later found to have worked as a Nazi prison guard.[45] The Supreme Court held that

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40. See 8 U.S.C. § 1252(b)(4)(B) (2006) ("[T]he administrative findings of fact [of the BIA] are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."); INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam) (noting "law entrusts the agency to make the basic asylum eligibility decision" and "'appellate court[s] [cannot] intrude upon the domain which Congress has exclusively entrusted to an administrative agency'" (quoting SEC v. Chenery Corp., 318 U.S. 80, 88 (1943))); Ramji-Nogales et al., supra note 13, at 86 n.3 (noting courts of appeals should remand erroneous BIA decisions, even if applicant is eligible for asylum, because authority to grant or deny asylum is at discretion of Attorney General).

41. Ramji-Nogales et al., supra note 13, at 77.

42. See infra Part II (discussing different interpretations and applications of persecutor bar in circuit court cases).

43. 449 U.S. 490 (1981).

44. See White, supra note 9, at 196–97 (arguing due to lack of definition, cases, specifically *Fedorenko*, have substantial influence over interpretation of "persecution" by IJs, BIA, and federal courts); Brigette L. Frantz, Assistance in Persecution Under Duress: The Supreme Court's Decision in *Negusie v. Holder* and the Misplaced Reliance on *Fedorenko v. United States*, Immigr. L. Advisor (Exec. Office for Immigration Review, U.S. Dep't of Justice, Washington, D.C.), May 2009, at 1, 2, available at http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202009/vol3no5.pdf (on file with the *Columbia Law Review*) ("[I]mmigration courts, the Board of Immigration Appeals, and the Federal circuit courts . . . have . . . all relied extensively on . . . *Fedorenko* . . . ."); see also supra Part I.A (discussing similarities between DPA and INA and analogous history of persecutor bar in each).

45. Fedorenko worked at Treblinka, an infamous labor camp, but contended that he was forced to work as a guard against his will. He admitted to general knowledge of the activities of the camp and to shooting in the "general direction of escaping inmates" during an uprising, and conceded that he never tried to escape from the camp. *Fedorenko*, 449 U.S. at 494, 500.

Fedorenko's past actions rendered his citizenship revocable, despite his claim of duress.[46]

Using language analogous to that adopted by the INA, the governing provision of the DPA provided that "individuals who 'assisted the enemy in persecuting civil[ians]' were ineligible for visas."[47] The Supreme Court was "unable to find any basis for an 'involuntary assistance' exception in the language" of the DPA.[48] The Court emphasized that the evaluation of the case lies "in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians."[49]

The *Fedorenko* Court suggested that there is a continuum between persecutory and nonpersecutory actions,[50] shifting the analysis to the *objective effect* of the conduct and away from the willfulness or culpability of the persecutor. This Note deems this the "objective effect test."[51] However, the lack of a concrete understanding of what "persecution" entails led circuits to articulate varying standards in the nearly thirty years between *Fedorenko* and *Negusie*. Like the DPA, the INA does not contain an express voluntariness exception. However, it also does not expressly prohibit considering the intent or voluntary nature of the persecutory actions. *Negusie* directly addresses this ambiguity, but fails to provide a meaningful resolution.

2. Negusie v. Holder*: A New Interpretation of the Persecutor Bar.* — In 2009, the Supreme Court decided *Negusie v. Holder*, holding that the INA was ambiguous as to whether coercion or involuntariness was relevant to

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46. Id. at 518.

47. Id. at 510 (alteration in *Fedorenko*) (quoting DPA, ch. 647 § 2b, 62 Stat. 1009 (1948), amended by INA, ch. 477, tit. IV, § 402(h), 66 Stat. 277 (1952)); see also supra note 23 (discussing incorporation of persecutor bar into INA).

48. Id. at 512. The Court noted "[t]he plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" and "[u]nder traditional principles of statutory construction, the deliberate omission 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.

49. Id. at 512 n.34.

50. In its famous footnote thirty-four, the Court compared a prison barber to a prison guard:

> [A]n individual who did no more than cut the hair of female inmates . . . cannot be found to have assisted in the persecution of civilians. . . . [But] 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 . . . who admitted to shooting at escaping inmates . . . 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.

Id.

51. See, e.g., Fedorenko, 19 I. & N. Dec. 57, 69 (B.I.A. 1984) ("[A]n alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution . . . . [I]t is the objective effect of an alien's actions which is controlling.").

the application of the persecutor bar,[52] potentially drastically changing the adjudication of the persecutor bar.[53] The Court remanded the case to the BIA to construe the statute in the first instance.[54]

Negusie was conscripted into the Ethiopian army and forced to work as a prison guard where he prevented the escape of prisoners who he knew were being persecuted.[55] The IJ ruled that Negusie's actions constituted assisting persecution, and he was thus denied a grant of asylum. The BIA and the Fifth Circuit upheld this ruling. The Supreme Court, however, held that the BIA improperly relied on the standard set in *Fedorenko*, which did not allow for a duress exception.[56] The Court reasoned that, although analogous, the DPA was a distinct statute and was not the governing law for INA cases.[57] The BIA, therefore, was responsible for interpreting anew whether the INA persecutor bar definitively contains a duress exception.[58] The case is currently awaiting a decision by the BIA.

II. VARYING STANDARDS USED BY COURTS OF APPEALS TO REVIEW BIA APPLICATION OF THE PERSECUTOR BAR

The persecutor bar of the INA provides an exclusionary rule; however, the courts bear the burden of determining what factual circumstances and conduct trigger the bar. This Part examines all available circuit court decisions from 2001 to 2011 that reviewed an appeal from the BIA based on the persecutor bar, demonstrating the inconsistent implementation of the persecutor bar horizontally across circuits and vertically between the BIA and the circuit courts.

Part II identifies four "triggering factors" related to the asylum applicant's level of involvement in the ultimate persecutory conduct.[59]

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52. 555 U.S. 511, 517 (2009). The BIA's prior position was that there was not an involuntariness exception to the persecutor bar, and the objective effect of an applicant's behavior was the only relevant issue. See supra notes 47–51 and accompanying text (discussing "objective effect test" promulgated by *Fedorenko*).

53. Since the decision in 2009, *Negusie* has already been cited by seventeen cases for the proposition that the INA's persecutor bar may be ambiguous. See, e.g., Abdallahi v. Holder, 690 F.3d 467, 476 (6th Cir. 2012) (noting *Negusie* contemplates that "the voluntariness of an individual's actions is relevant to the question of whether the persecutor bar should apply").

54. *Negusie*, 555 U.S. at 524.

55. Id. at 514–15.

56. Id. at 516.

57. Id. at 518–20 (noting "*Fedorenko* . . . addressed a different statute enacted for a different purpose" and thus "[did] not control the persecutor bar").

58. Id. at 522–23.

59. The ultimate persecutory conduct is the actual act of violence or infringement of rights inflicted upon another person. The persecutor, however, does not have to physically commit this act to be deemed a "persecutor." For example, in the Chinese coercive population control cases, the forced abortion is the ultimate persecutory act. However, the doctor who performs the abortion, the nurse who monitors the patient, and the driver

These factors are: (1) direct, knowing commission of the act (the model cases); (2) direct involvement under duress; (3) peripheral or proximal involvement; and (4) nonparticipation in, but knowledge of, the eventual persecutory act. Sections A, B, C, and D examine each of these categories, respectively.

This categorization is situated within a framework of two competing methods of statutory interpretation. A narrow textual analysis of the INA emphasizes the absence of an explicit duress exception in the text. Referred to as the "objective effect test," this approach only considers the *commission* of a persecutory act, ignoring any extenuating factors when evaluating the facts of a case. A holistic analysis of the statute considers an implicit duress exception found in the nexus test and evaluates the relationship between the alleged persecutor, the persecutory act, and any extenuating circumstances. This Note names this the "contextual" or "totality-of-the-circumstances" approach.

A. *The Model Cases: Direct Persecutory Conduct*

The model cases exemplify the persecutor bar in its most straightforward application: excluding those who are deemed undeserving of asylum due to their prior conduct.[60] These cases also illustrate the alignment between the BIA and the circuit courts when the applicant clearly and directly participated in persecutory acts, admitted to doing so, and was denied asylum. In *Nguyen v. Holder*,[61] the applicant, a member of the South Vietnamese Army, admitted "it was our purpose and mission to hunt down the communists and interrogate them with methods that are considered to be torture[]."[62] The BIA summarily affirmed the IJ's decision to deny asylum on the basis of the persecutor bar, as did the Ninth Circuit.[63] In *Ahmed v. Gonzales*, the Ninth Circuit summarily approved the BIA's initial denial, finding that the applicant's "own account of his actions established that he assisted or otherwise participated in the persecution of persons on account of their political opinion."[64] In all cases it

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who escorts the patient to the hospital are all sufficiently linked to the abortion for each to potentially be considered persecutors. See infra Part II.C for discussion of forced abortion cases.

60. This Note refers to the most basic application of the persecutor bar, where there is admitted, direct persecution, as "model cases."

61. 336 F. App'x 680 (9th Cir. 2009).

62. Brief for Petitioner at 11, *Nguyen*, 336 F. App'x 680 (No. 05-73353), 2005 WL 3526956, at *11 (citations omitted). Nguyen later explained that by "we" he meant the group in general, and that he himself never "caught" a communist. Id. at 11–12. However, the IJ found this testimony not to be credible. Id. at 6–7.

63. The Ninth Circuit reasoned that Nguyen admitted to the persecution of others on account of their association with communism under oath and signed the asylum interview notes affirming his statements. *Nguyen*, 336 F. App'x at 682 (noting Nguyen admitted to persecution and possible torture).

64. Ahmed v. Gonzales, 221 F. App'x 595, 596 (9th Cir. 2007). Petitioner's brief states that Ahmed's activities were related to a coup and therefore not persecution; however, the

is important to identify the persecutory act and determine the applicant's relationship to that act. In the model cases, this relationship is direct and largely uncontroverted, leading to a clear application of the persecutor bar by the IJ, BIA, and circuit court.[65]

These cases demonstrate that there is little dispute among the deciding jurists that the persecutor bar should be applied when the applicant's relation to the persecutory act is admitted, direct, and personal. As the facts of these cases do not involve potential duress or other mitigating factors, courts can easily unify around the application of the persecutor bar. These cases also manifest the bar's purpose: to exclude those whose prior actions are antithetical to the purpose of asylum. The remaining cases do not involve such clear determinations. In evaluating the next set of cases, it is evident that courts struggle to properly define the bounds of persecutory conduct.

B. *The Voluntariness Cases: Direct Persecutory Conduct Under Duress or Coercion*

This section analyzes cases in which the asylum petitioner engaged in persecutory conduct under a threat of death or physical harm. Each subsection addresses the role of duress and volition in persecutor bar cases in the Fifth, Ninth, and Eighth Circuits, respectively.

1. *The Fifth Circuit.* — Several circuit courts have followed the holding of *Fedorenko*, ruling that there is not an "involuntary assistance" exception to the persecutor bar.[66] The Fifth Circuit has, until recently, strongly adhered to this principle, following the objective effect test in its interpretation of the statute.[67] In *Bah v. Ashcroft*, the petitioner participated in persecutory acts under threat of torture or death.[68] The court was presented with a potential case of duress, but still found that the petitioner's actions triggered the persecutor bar. Amadu Bah was forced to join the Revolutionary United Front (RUF), an insurgent group in Sierra Leone. Bah witnessed an RUF member kill a man before being given an

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circuit court does not reference this contention. See Brief for Petitioner at 15–16, *Ahmed*, 221 F. App'x 595 (No. 03-74603), 2005 WL 1791726, at *15–*16.

65. The BIA often summarily affirms the decision of the IJ. In these cases the circuit court will review the IJ's decision as if it is the BIA's. See, e.g., *Nguyen*, 336 F. App'x at 682 (referring specifically to IJ's decision as justified).

66. See supra notes 43–51 and accompanying text (describing holding and influence of *Fedorenko*).

67. The *Fedorenko* standard emerged in the Fifth Circuit. The district court initially found that Fedorenko did not share the persecutory motives of the Nazis, was a prisoner himself, and only shot at escapees under orders. Therefore, the court found that his citizenship should not be revoked because of conduct carried out under such extreme duress so as to be considered involuntary. See United States v. Fedorenko, 455 F. Supp. 893, 913–15 (S.D. Fla. 1978). The Fifth Circuit reversed, holding that there was not a voluntariness provision in the DPA, and the Supreme Court affirmed. United States v. Fedorenko, 597 F.2d 946, 947 (5th Cir. 1979), aff'd, 449 U.S. 490, 512 (1981).

68. 341 F.3d 348, 349 (5th Cir. 2003) (per curiam) (describing capture and forceful recruitment of Bah).

ultimatum: Bah could join the rebel group or be killed himself.[69] Believing that he would be killed, Bah agreed to join the RUF. Bah witnessed the RUF kill his father and rape and kill his sister. He tried to escape twice before reaching the United States. The BIA found that Bah was ineligible for asylum because he assisted in the persecution of others on account of political opinion.[70] Bah admitted that he "had been an active member of the RUF, he had murdered a female villager, and he had chopped off the limbs and heads of noncombatants."[71]

Although Bah admittedly committed heinous acts, this is a prime example in which the court could have raised a duress or involuntariness exception,[72] even if the court did not ultimately reach a favorable outcome for Bah. Bah's statements were found to be credible by the IJ;[73] Bah argued that, "given the fact of his forced recruitment, he did not engage in political persecution because he did not share the RUF's intent of political persecution."[74] The Fifth Circuit, however, rejected this argument, reasoning that "[t]he syntax of the statute suggests that the alien's personal motivation is not relevant."[75] The case does not explicitly mention "duress"; however, the court's use and rejection of the term "personal motivation" suggests the consideration of duress.[76]

The court avoided consideration of duress by engaging in a textual analysis of the persecutor bar. Like the Supreme Court in *Fedorenko*, the Fifth Circuit refused to consider Bah's lack of persecutory motive because the INA does not explicitly provide a duress exception.[77] Bah argued that his acts should not have triggered the persecutor bar because

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69. Brief for Petitioner at 4–7, *Bah*, 341 F.3d 348 (No. 02-61129), 2003 WL 22513749, at *4–*7 [hereinafter *Bah* Petitioner Brief].

70. *Bah*, 341 F.3d at 350 (noting IJ and BIA found Bah statutorily barred because he mutilated and killed civilians in order to "overcome any inclination that non-combatants may have had to support the government," thus persecuting others on account of their political opinion, a protected ground).

71. Id. at 351.

72. Bah's family members were killed, he twice tried to escape, and he presented photos of maimed and decapitated RUF members and evidence that a reward was available for his arrest, suggesting that he had little means of leaving the RUF. See id. at 349, 352.

73. *Bah* Petitioner Brief, supra note 69, at 3.

74. *Bah*, 341 F.3d at 351.

75. Id.

76. 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, 1884 (2007) (stating court "declined to phrase its holding in terms of the *involuntariness* of Bah's actions, instead finding that the alien's *personal motivation* is not relevant").

77. See Fedorenko v. United States, 449 U.S. 490, 512 (1981) ("Under traditional principles of statutory construction, the deliberate omission 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.").

"he did not share the RUF's intent of political persecution";[78] instead he acted out of fear for his life. The court, however, reasoned that the statute bars aliens that "ordered, incited, assisted, or otherwise participated in the persecution of an individual *because of* the individual's . . . political opinion."[79] This purely textual analysis reasons that if Congress had wanted courts to consider the alien's intent, "it could have enacted a statute that withheld removal only of an 'alien who, *because of* an individual's political opinion, ordered, incited, assisted, or otherwise participated in the persecution.'"[80]

However, the court distorted the nexus test. In determining whether an individual qualifies for asylum, courts must determine if there is a nexus between the persecutory acts and one of five qualifying characteristics, such as political opinion.[81] In the context of *seeking* asylum based on persecution in one's home country, the individual must show that the persecution was on account of a protected characteristic she possesses. Although the persecutor *bar* requires an analogous nexus test, linking the motives of the persecutor to the persecutory acts,[82] the Fifth Circuit did not apply a careful analysis.[83] Under the court's analysis, the persecutor's motives did not have to be linked to the persecutory act.[84] In this case, Bah was not acting on account of his victims' political opinions, but out of a legitimate and eminent fear for his own life. Although the statutory language to grant asylum exactly mirrors the language to deny asylum, the nexus requirement is not applied equally in both scenarios, causing inconsistent interpretations and outcomes.

2. *The Eighth Circuit.* — Faced with similar circumstances, the Eighth Circuit took a contextual, totality-of-the-circumstances approach in *Hernandez v. Reno*.[85] Much like Bah was conscripted into the RUF, Rolando Hernandez was conscripted into the Organization for People in Arms (ORPA), a guerilla group in Guatemala.[86] Hernandez joined the group after two men threatened to kill him if he did not. As an ORPA member, Hernandez was part of a firing squad that killed suspected

78. *Bah*, 341 F.3d at 351.

79. Id. (emphasis added).

80. Id. (emphasis added).

81. See supra note 32 and accompanying text (describing nexus requirement).

82. See supra notes 27–32 and accompanying text (defining persecution in relation to five categories of protection under INA).

83. See Lerescu, supra note 76, at 1884 (discussing Fifth Circuit's finding that Bah's subjective intent was immaterial and that only relevant factor was his objective participation).

84. *Bah*, 341 F.3d at 351 (stating "Bah participated in persecution, and the persecution occurred because of an individual's political opinions," without consideration of Bah's own opinions and motivations).

85. 258 F.3d 806, 814–15 (8th Cir. 2001) (noting BIA "should have examined all aspects of Hernandez's testimony when determining whether his conduct constituted assistance in persecution" and distinguishing case from *Fedorenko*).

86. Id. at 808–09.

informants.[87] The BIA held that Hernandez's participation was "adequate to indicate" that he assisted in persecution.[88] Like the Fifth Circuit, the BIA focused on Hernandez's participation in the firing squad rather than his motivation, citing *Fedorenko* for the proposition that "the participation or assistance of an alien in persecution need not be of his own volition to bar him from the relief of withholding of deportation and asylum."[89] However, the Eighth Circuit reversed, stating that the BIA should have "mention[ed] or analyz[ed] other significant evidence that was relevant to Hernandez's culpability."[90]

Reaching the opposite conclusion from the Fifth Circuit, the Eighth Circuit found that there was "no evidence that Hernandez's participation with ORPA was not at all times compelled by fear of death" while also finding that he did not "share[] [any] persecutory motives" with ORPA.[91] The Eighth Circuit implicitly considered the voluntariness of the alleged persecutor's actions and his personal motivations and culpability. The court articulated a new standard for applying the persecutor bar: Courts "should engage in a particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution."[92] The Eighth Circuit shifted the traditional *Fedorenko* analysis from the objective nature of the persecutory conduct to the subjective level of culpability based on the intent of the persecutor.[93]

In other words, where the Fifth Circuit undertook a narrow textual analysis of the statute, focusing on the absence of an explicit duress exception, the Eighth Circuit read a potential duress exception into the statute by interpreting the "on account of" nexus test to require measuring an individual's motive and culpability. The variation in statutory interpretation in turn influenced the judicial evaluation of the facts. The Fifth Circuit followed the objective effect test, rendering a decision based only on the persecutory conduct. The Eighth Circuit, developing a contextual evaluation, considered Hernandez's level of culpability and mitigating factors as weighed against his persecutory conduct. The Eighth Circuit recognized a need to consider nonpersecutory motiva-

87. Id. at 809 (noting Hernandez and others dynamited bridge, looted cars, and beat drivers, but Hernandez intentionally tried to aim away from victims and did not think he shot anyone, knowing his commander was watching to make sure he followed orders).

88. Id. at 814.

89. Id. at 811 (citations omitted).

90. Id. at 814.

91. Id. at 815.

92. Id. at 813.

93. The court continued to use the prevailing *Fedorenko* standard, but found that, "[i]f the record is analyzed in accordance with the *Fedorenko* legal standard, Hernandez may be seen to have met his burden of proving that he did not assist or participate in the persecution of others" because his actions were carried out under threat of death. Id. at 815.

tions. This approach focused on the actor rather than simply the act. Since the asylum applicant who triggers the persecutor bar often is a victim of persecution herself, it is sensible to evaluate the case within its factual context with a flexible balancing test.

3. *The Ninth Circuit.* — The Ninth Circuit also utilized a balancing test in the unique case of self-defense. In *Vukmirovic v. Ashcroft*, the Ninth Circuit granted the petitioner's application for review.[94] Predrag Vukmirovic, a Bosnian Serb, joined a chekne, an anticommunist Serbian group, formed to defend his town from invading Bosnian Croats in former Yugoslavia.[95] He admitted to physically harming individuals in skirmishes with Croats. However, he was armed with only sticks and knives.[96] The IJ found that this conduct qualified as persecution of others on the basis of race and religion, thus barring Vukmirovic from asylum.[97] The IJ stated, "[M]y decision is not condemnation . . . . My hands are tied, however . . . ."[98] Despite the compelling nature of the petitioner's testimony and the IJ's clear sympathy for the petitioner, the IJ denied asylum on the basis of the persecutor bar. The IJ, following a strict textual interpretation, cited the BIA decision in *Matter of Fedorenko* for the rule that

> [T]here is no provision under the law that exempts acts of self-defense from qualifying as persecution since the state of mind of the individual is irrelevant. The objective effect of the Respondent's actions was to hurt and sometimes kill the Croats. These skirmishes and their motivations qualify as persecution under the law.[99]

This case exemplifies the unjust outcomes that arise from a strict construction of the statute absent consideration of contextual facts and a clear definition of the term "persecution." Because the text of the INA does not explicitly provide a duress exception, the IJ denied Vukmirovic's asylum petition. The Ninth Circuit granted review of the

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94. 362 F.3d 1247, 1252 (9th Cir. 2004) (stating it "agree[s] with the Eighth Circuit, that 'courts should engage in a particularized evaluation' to determine culpability" (quoting *Hernandez*, 258 F.3d at 813)).

95. Id. at 1249 (describing Croats entering his town to commit violent acts against Serbians, some of which resulted in death). In 1990, the Serbians were beginning to assert their independence in former Yugoslavia. The next decade was mired in wars and ethnic cleansing. See generally Emir Suljagic, Ethnic Cleansing: Politics, Policy, Violence: Serb Ethnic Cleansing Campaign in Former Yugoslavia (2010). However, Vukmirovic fled before war broke out in full scale. *Vukmirovic*, 362 F.3d at 1249.

96. *Vukmirovic*, 362 F.3d at 1249.

97. Id. at 1250 (noting IJ stated, "as a person who participated in the persecution of others you are precluded from claiming refugee status"). The decision of the IJ, rather than the BIA, is reviewed because the BIA adopted the decision of the IJ as the final determination in this case. See id. at 1251. Quotes are taken from the circuit court opinion because the IJ opinion is not publicly available.

98. Id. at 1250.

99. Id. at 1250 (citing Fedorenko, 19 I. & N. Dec. 57, 69 (B.I.A. 1984)).

case and articulated another version of the contextual approach that "individual accountability must be established."[100] The court held that, as a matter of textual interpretation, "holding that acts of true self-defense qualify as persecution would run afoul of the 'on account of' requirement in the provision. It would also be contrary to the purpose of the statute."[101] The "on account of" language in the statute allowed the Ninth Circuit to consider the totality of the circumstances, similar to the approach used by the Eighth Circuit. This approach invokes the spirit and intent of the law, rather than solely the letter of the law. Although technically any act of violence could fit the definition of the persecutor bar (the objective effect test takes this view), the Ninth Circuit acknowledged that in this circumstance the application of the persecutor bar would exceed its intended effect. The court continued by stating that examining only the objective actions of an applicant would "deny asylum to any victim of oppression who had the temerity to resist persecution by fighting back."[102] Although self-defense is not identical to duress, the Ninth Circuit engaged in an analysis of the "accountability" of the actor rather than the "objective effect" of his actions. Like the Eighth Circuit, the Ninth Circuit used a contextual approach in reviewing the IJ's decision.

However, presented with another duress case, the Ninth Circuit's holistic evaluation resulted in a denial of asylum. The applicant in *Mendoza-Lopez v. Gonzales* was a member of the Guatemalan army and "admitted to inflicting wounds on captured civilians and guerrillas."[103] The court noted that Mendoza-Lopez testified that he was tortured when he refused his superior's orders, suggesting an element of duress. The court was careful, however, to weigh this in light of the "totality of Mendoza-Lopez's relevant conduct."[104] Any element of duress was tempered because Mendoza-Lopez remained in the army beyond the required period of enlistment, received a good salary for his service, and was eventually promoted to second sergeant. The court weighed these elements in its consideration of the totality of conduct and upheld the

100. Id. at 1252. Interestingly, the Ninth Circuit derives this proposition from Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985). Decided just a few years after *Fedorenko*, *Laipenieks* was a Nazi deportation case in which the court held that the government was required to prove that an alien had personally participated in the persecution of individuals, and that willing membership in a movement is not sufficient to establish deportability. Id. at 1431. This standard is less stringent than that in the modern interpretation of *Fedorenko*.

101. *Vukmirovic*, 362 F.3d at 1252.

102. Id.

103. 205 F. App'x 630, 631 (9th Cir. 2006) (noting Mendoza-Lopez participated in shooting of civilian family and stood guard while civilians were tortured).

104. Id.

BIA's denial of Mendoza-Lopez's asylum application.[105] This case demonstrates that a contextual approach to the persecutor bar that considers voluntariness will not result in an automatic grant of asylum for alleged former persecutors. In this case, the defense of duress was undermined by the applicant's continued benefit from his involvement with the persecuting group. This suggests that unlike the applicants in the aforementioned cases, Mendoza-Lopez was not acting purely out of fear, but may have had other motives for his involvement with the army. The applicant's conduct should be examined in its entirety in relation to a persecutory motive or lack thereof.

4. *Summary of the Voluntariness Cases.* — The three cases just described, while distinct, each involve extenuating circumstances surrounding the applicant's involvement in the persecutory conduct that triggered the persecutor bar. In such cases, the circuit courts have an opportunity to import a duress exception into *Fedorenko*'s strict reading of the persecutor bar by undertaking a totality-of-the-circumstances analysis. Without mentioning "duress," the Eighth and Ninth Circuits' analyses of the facts focus on the culpability, intent, and circumstances of the persecutor. The courts look to factors evidencing a lack of persecutory motive, such as fear, coercion, resistance, and self-defense. Courts also consider factors that belie a finding of duress, such as compensation and complicity.

The voluntariness cases were decided before *Negusie*, under the *Fedorenko* standard. When the BIA rehears *Negusie*, the circuits may either be precluded from, or instructed to, read a duress exemption into the statute. However, because the courts avoid the language of "duress" or "voluntariness" in favor of the terms "particularized evaluation" and "individual accountability," this kind of analysis may continue even after the BIA definitively rules on the duress issue.[106] Although the term "duress" is arguably intentionally absent from the statute, a potential

105. Id. at 631–32 (finding "substantial evidence supports the IJ's finding that Mendoza-Lopez assisted or otherwise participated in persecution on account of a protected ground").

106. The Fifth Circuit recently remanded a case to the BIA for review once the BIA determines if there is a duress exception. See Ru Lian v. Holder, 326 F. App'x 315, 316 (5th Cir. 2009) (finding Ru Lian's right to asylum may be impacted by outcome of *Negusie* and remanding to BIA for proceedings in light of *Negusie* and its eventual ruling regarding duress). Ru Lian was a nurse in China who worked at a hospital's maternity ward that conducted forced abortions. Her role was to make sure that the aborted infants would suffocate or freeze to death by wrapping the umbilical cords around their necks or by placing them in a freezer. When Ru Lian let a woman escape, she was threatened with "detention for rehabilitation" and went into hiding. Her mother was taken into custody for a time, and public authorities continued to look for her before she escaped to the United States. See Brief for Petitioner, *Ru Lian*, 326 F. App'x 315 (No. 08-60589), 2008 WL 6970323; cf. Kennedy v. Holder, 392 F. App'x 960, 961–62 (3d Cir. 2010) (denying remand in light of *Negusie*).

duress exception is embedded in the "account of" nexus test, which requires courts to consider the applicant's motivation.

When evaluating asylum applications where the applicant alleges a fear of persecution, the BIA considers the intent of the persecutor to harm or punish the applicant because of a protected trait.[107] In this context, motivation is part of the definition of "persecution." This Note argues that the same consideration should apply in the reverse situation: when persecution is used to deny asylum.

C. *The Proximity Cases: Tangential Participation and Proximity to the Persecutory Act*

Another set of standards has evolved around the persecutor bar for actions that are tangential to, but necessary to, the actual persecutory act. These instances of proximal participation call into question the capaciousness of the bar. These cases address acts that are part of a chain of events leading to physical persecution or assistance in persecution, even if such acts would not constitute persecution in and of themselves. A review of cases reveals that there is inconsistency between circuits and internally within circuits regarding the proximity to persecutory conduct sufficient to trigger the persecutor bar. Subsection 1 addresses forced abortion cases in the Second Circuit, while subsection 2 analyzes other circumstances of tangential participation. Subsection 3 discusses witnessing, but not participating in, a persecutory act. Subsection 4 discusses membership in a persecutory group.

1. *The Second Circuit and Forced Abortion or Sterilization.* — The cases of forced abortion in the Second Circuit, which hears the majority of such cases, offer a continuum of conduct against which to evaluate the application of the persecutor bar. From 2006 to 2011, the Second Circuit reviewed seven cases[108] in which the applicant was involved in some form of forced abortion or sterilization in China.[109] The court ruled that direct

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107. The BIA articulated four elements needed to establish a well-founded fear of persecution: (1) possession by the applicant of a belief or characteristic sought to be overcome by the persecutor; (2) awareness or potential awareness by the persecutor that the applicant possesses this trait; (3) ability of the persecutor to punish the applicant; and (4) inclination of the persecutor to punish the applicant. Mogharrabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (citing Acosta, 19 I. & N. Dec. 211, 226 (B.I.A. 1985)).

108. See Zhi Geng Li v. Holder, 388 F. App'x 45 (2d Cir. 2010); Yan Yan Lin v. Holder, 584 F.3d 75 (2d Cir. 2009); Weng v. Holder, 562 F.3d 510 (2d Cir. 2009); Guo Liang Lin v. Keisler, 251 F. App'x 37 (2d Cir. 2007); Xing Jie Guan v. USCIS, 183 F. App'x 76 (2d Cir. 2006); Guang Yan Lin v. INS, 165 F. App'x 26 (2d Cir. 2006); Zhang Jian Xie v. INS, 434 F.3d 136 (2d Cir. 2006). These cases are discussed infra.

109. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended the INA to add forced abortion or sterilization as persecution on the grounds of a political opinion or belief, making victims of forced abortion eligible for asylum. The law now provides that involuntary sterilization and forced abortion are persecution per se. See, e.g., *Zhang Jian Xie,* 434 F.3d at 139 ("Under the INA, compulsory population control

participation in forced abortions or sterilization—carrying out the procedure—always qualified as persecution, while more tangential roles qualified in some cases but not others.

a. *Direct Participation in Forced Abortions.* — In *Guang Yan Lin v. INS*[110] and *Zhi Geng Li v. Holder*,[111] the Second Circuit held that participation in forced abortions placed the applicants within reach of the persecutor bar. Guang Yan Lin was a doctor in China who participated in forced abortions. In an oral opinion, the IJ found that Lin's testimony was not credible and that, even if it had been, Lin was ineligible for asylum because of the persecutor bar.[112] The BIA summarily affirmed the IJ's opinion[113] as did the Second Circuit.[114] Although Lin asserted that he helped two women escape abortions, the Second Circuit did not consider this a mitigating factor, taking a strict liability approach.[115] Although Lin did not necessarily agree with the political motivation behind the forced abortions, and therefore did not meet the nexus test linking his motivation to his actions, the court did not take this into consideration. The Second Circuit reached the same result in *Zhi Geng Li,* another forced abortion case with very similar facts.[116]

These cases were treated in a similar manner to the model cases. The individual admittedly, directly, and personally engaged in persecutory behavior—forced abortion. Factors that suggested remorse, such as allowing women to escape, were not sufficient to change the outcome of these cases. These individuals were performing their jobs, and arguably did not personally harbor a specific desire to harm women on account of a political opinion. However, forced abortion is a special category recognized as per se persecution, such that an applicant who is the victim of forced abortion is considered persecuted on account of political opinion.[117] The Second Circuit created the reverse category for persecutors, imposing a strict liability approach on those who carried out forced abortions.

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measures, such as forced abortions, constitute persecution."); see also supra note 30 (discussing amendment).

110. 165 F. App'x 26 (2d Cir. 2006).

111. 388 F. App'x 45 (2d Cir. 2010).

112. Brief for Respondent at 19–20, *Guang Yan Lin*, 165 F. App'x 26 (No. 02-4458), 2004 WL 5158619, at *19–*20 ("The respondent is a persecutor based upon his assistance and probably based on his own actions.").

113. Id. at 21.

114. *Guang Yan Lin*, 165 F. App'x at 27 (finding "Lin's testimony clearly establishes that he assisted in forced sterilization procedures").

115. Id. (finding helping two pregnant women avoid abortions does not negate participation in forced abortions).

116. See *Zhi Geng Li,* 388 F. App'x at 47–49 (raising similar issues to *Lin* and denying asylum). Li also raised issues of the retroactive application of the IIRIRA, which were dismissed and are not relevant to this Note.

117. See supra note 30 (discussing special category of asylum which considers forced abortion per se persecution on account of political opinion).

b. *Indirect Participation in Forced Abortions by Doctors and Nurses.* — Contrary to these cases, indirect participation in forced abortions yielded more varying results. For example, in *Xing Jie Guan v. USCIS*, the Second Circuit held that preparing women for forced abortion and aiding after the procedure constituted assisting in persecution.[118] These "actions, even if relatively minor, aided in the process of enforcement of China's coercive family planning policy . . . [and] placed [the applicant] within the purview of the statutory bar."[119]

However, similar hospital procedures in *Yan Yan Lin v. Holder* did not trigger the bar when

> the kinds of examinations in which [the alien] assisted . . . [were] given to all pregnant women, whether the pregnancy is scheduled to result in a live birth, a voluntary abortion, or a forced abortion. . . . [T]he examinations . . . "did not contribute to, or facilitate, the victims' forced abortions in any 'direct' or 'active' way" because they did not "cause[] the abortions, nor [did they make it] more likely that they would occur."[120]

In the first case, actions that always were followed by forced abortion amounted to persecution. In the second, even if some of these examinations did result in forced abortion, the petitioner was not held accountable for those acts. In both instances the petitioners did not actually perform the forced abortion, but were part of the preparatory process. One case however resulted in the application of the persecutor bar, while the other did not.[121]

These cases present a more tenuous relation to the actual persecutory act of the abortion. The court in these cases was more concerned with the ultimate outcome than the applicant's conduct. Although both conducted examinations that for some patients resulted in abortions, only those that always resulted in abortion triggered the persecutor bar. This application of the bar treats similar conduct differently. This illustrates that, at least in the specific context of forced abortion, the Second Circuit is primarily concerned with the persecutory act and its precursors, even if the antecedent acts are less overtly culpable. The court bases its analysis on the ultimate result, inconsistently barring applicants because of the abortion or sterilization that they did not personally commit.

c. *Indirect Participation in Forced Abortions by Guards and Other Individuals.* — Similar questions have arisen in other circumstances

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118. 183 F. App'x 76, 78 (2d Cir. 2006).

119. Id.

120. 584 F.3d 75, 81 (2d Cir. 2009) (quoting Weng v. Holder, 562 F.3d 510, 515 (2d Cir. 2009)).

121. Furthermore, helping a woman escape was considered a mitigating factor in *Yan Yan Lin*, 584 F.3d at 81–82 (noting Lin's case was "bolstered by . . . [a] redemptive act"). But see Guang Yan Lin v. INS, 165 F. App'x 26, 27 (2d Cir. 2006) (noting allowing women to escape did not mitigate persecutory conduct).

related to forced abortion in China. Witnessing women being arrested as violators of the family planning policy and serving as a guard were sufficient to trigger the persecutor bar in *Guo Liang Lin v. Keisler*.[122] Similarly, in *Zhang Jian Xie v. INS*, a driver who transported women to hospitals to undergo forced abortions was denied asylum under the persecutor bar.[123] In this case, the Second Circuit held that "[w]here the conduct was active and had direct consequences for the victims"—as opposed to conduct that "was tangential to the acts of oppression and passive in nature"—it qualified as "assist[ance] in persecution" under the persecutor bar.[124] Despite this explanation, the court has not drawn a clear line between active and passive participation, nor has it clearly framed the physical and temporal limits of a "persecutory act."

In *Weng v. Holder*, a nursing assistant, who for a short period of time guarded five women waiting to undergo forced abortions, was not subject to the bar.[125] The IJ found that Weng "played a role critical to the effect of enforcement of the coercive population control policy in China,"[126] and was statutorily barred as a persecutor. However, the Second Circuit looked "to her behavior as a whole" and noted "relevant decisions routinely have found abhorrent conduct to rise to the level of assistance in persecution, but have offered scant guidance on how to classify less overtly culpable conduct."[127] In this instance of reduced culpability, the court concluded Weng's actions "were, at most, tangential, passive accommodation of the conduct of others," and alone were not sufficient to trigger the bar.[128] In this case, Weng's actions were tangential to, but not in furtherance of, the ultimate persecutory act—the forced abortion—and therefore did not constitute assistance in persecution.[129]

In summary, the Second Circuit does not announce an exact process for determining the application of the persecutor bar, and the forced abortion cases highlight the variety of rules promulgated by the court. The court expands the conception of relevant persecutory conduct to include antecedent steps, focusing on the objective effect of the appli-

122. 251 F. App'x 37, 40 (2d Cir. 2007) (denying asylum where applicant was charged with ensuring women did not escape birth control facility).

123. 434 F.3d 136, 143–44 (2d Cir. 2006).

124. Id. at 143.

125. 562 F.3d at 515. The IJ and BIA originally denied Weng's application. Id.

126. Id. at 513.

127. Id. at 514–15 (citation omitted).

128. Id. at 515 (internal quotation marks omitted). The court acknowledged that the prohibited behavior was forced abortion. Weng's postsurgical care did not cause the abortions, was not a necessary precursor to the abortions, and did not make the abortions more likely to occur. Weng did not facilitate the forced abortions in any "direct" or "active" way. Id. The court further considered the mitigating factors that Weng only guarded the waiting room on one occasion for a ten-minute period of time, and helped a woman escape, for which she lost her job. Id.

129. Cf. Xie v. INS, 434 F.3d 136 (2d Cir. 2006) (finding Guang's role as driver minor but direct and denying appeal).

cant's actions rather than her subjective motivation. The differences in factual situations suggest that the court is primarily concerned with how essential the action was to the ultimate persecutory conduct. An applicant would most likely be granted asylum if she were the victim of a forced abortion or sterilization. However, tangential precursors to an abortion (being driven to a facility, being held in a waiting room, or undergoing a medical exam) would most likely not amount to persecution, in and of themselves, for purposes of granting asylum. Yet individuals responsible for such preliminary events are subject to the bar.[130] This demonstrates a lack of consistency in the use of the term "persecution." "Persecution" for purposes of denying asylum under the bar is much more capacious than "persecution" for purposes of granting asylum. Although the language is identical, the court makes the persecutor bar harder to overcome by recognizing "persecutory" conduct that would not qualify as persecution for purposes of granting asylum. This analysis makes the statute internally inconsistent and involves an ad hoc estimation of the proximity or necessity of the applicant's conduct to the ultimate act of persecution, rather than focusing on that ultimate act itself.

2. *Direct and Peripheral Participation in Other Circuits.* — The differences between direct, actual participation in persecutory acts and peripheral or tangential acts arise in other contexts and circuits as well. Courts have examined these cases on three distinct grounds. First, courts have evaluated whether the nonpersecutory conduct was a necessary predicate to or primary element of the ultimate persecutory act. Second, courts have looked to presence at the scene of a persecutory act. Third, courts have considered membership in a persecutory group.

a. *Analysis of Necessary Predicates.* — An Eleventh Circuit case regarding a guard at a forced abortion facility clearly explains the necessary predicate analysis. *Chen v. Attorney General* held that an applicant's actions must be viewed in their entirety.[131] The court found that "[d]etention of an individual—when the act of detention itself is not the persecution at issue—is often an *essential predicate* to performing the act of persecution."[132] The Eleventh Circuit denied Chen's petition for review based on a "particularized evaluation," or contextual evaluation, which demonstrated that his actions were neither "inconsequential" nor "peripheral."[133]

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130. The Second Circuit recently held that the forced insertion of an intrauterine device was not persecution without aggravating circumstances and remanded the case to the BIA to determine a test for what constitutes aggravating circumstances. See Mei Fun Wong v. Holder, 633 F.3d 64, 65–66 (2d Cir. 2011).

131. 513 F.3d 1255, 1259 (11th Cir. 2008).

132. Id. at 1260 (emphasis added).

133. Id. at 1258–59.

Several other courts use this standard. The Second Circuit, in *Boshtrakaj v. Holder*, found an individual to have committed persecutory acts by removing property from the homes of Albanians, because this was an important step in cleansing the area of ethnic Albanians and driving them from their homes.[134] In *Singh v. Gonzales*, the Seventh Circuit held that taking individuals into custody to later face police abuse constituted persecution even though the applicant did not engage in violence.[135] The court distinguished between "genuine assistance in persecution and inconsequential association with persecutors," finding Singh's conduct to be the former.[136] The Ninth Circuit, in *Miranda Alvarado v. Gonzales*, held that translating prisoner statements, knowing that the prisoners would later be tortured, also triggered the bar.[137] The Ninth Circuit also found that escorting a political prisoner to be beaten later was persecution in *Ghazaryan v. Gonzales*.[138] These acts, although not persecution in and of themselves, were determined to be sufficient to trigger the bar.

The necessary predicate analysis can be seen in each case and demonstrates an imbalance between the courts' reading of persecution for the purpose of granting asylum and persecution for the purpose of denying asylum. This analysis is both broad and narrow. The breadth of the bar extends its scope to an act that may or may not eventually be related to a future form of persecution. Yet the interpretation also looks to a narrow understanding of persecution and the potential objective effects of such an act. For example, *Boshtrakaj* teaches that, while being the victim of theft will not earn one asylum, removing property of another is tantamount to perpetrating an act of ethnic cleansing and will deprive one of asylum.[139] Although taking property may be part of a strategy of ethnic cleansing, the court failed to consider whether the applicant shared this motivation or even had contact with the specific individuals he was alleged to have persecuted. In each of the cases discussed in this section, the acts at issue, although part of a larger plan of persecution, were distinct from the ultimate persecutory act. Because the conduct at issue would not qualify as persecution for purposes of granting asylum, it should not qualify for purposes of denying asylum. The acts may qualify as assisting persecution for purposes of the bar, but the courts fail to define how close in time or conduct the act must be to qualify as a necessary predicate.

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134. 324 F. App'x 99, 101 (2d Cir. 2009) (remanding to BIA for decision in light of *Negusie*); see also Brief for Respondent at 25, *Boshtrakaj*, 324 F. App'x 99 (No. 08-1417-ag), 2008 WL 8088542, at *25 (stating process was necessary precursor to overall persecutory scheme against Albanians).

135. 417 F.3d 736, 740 (7th Cir. 2005).

136. Id. at 739.

137. 449 F.3d 915, 929–30 (9th Cir. 2006). See infra Part II.D for further discussion of the case.

138. 172 F. App'x 139, 140 (9th Cir. 2006).

139. See supra note 134 and accompanying text.

b. *Analysis of Presence at the Time of a Persecutory Act.* — Some courts have found that witnessing an act or being a member of a group that engages in persecutory acts triggers the bar, which raises the issue of an affirmative duty to prevent persecution. In *Shirvanyan v. Gonzales*, the Ninth Circuit upheld an IJ's denial of relief to a police officer whose compatriots physically assaulted Jehovah's Witnesses.[140] Even though the petitioner did not personally harm anyone, he carried on with his job knowing that these raiding parties would continue and that he would be expected to participate. This was sufficient to render him a persecutor.[141]

Similarly, the Fourth Circuit, in *Ntamack v. Holder*, held that the persecutor bar applied to an individual who was a member of the Cameroon gendarmerie.[142] Although the petitioner refrained from using violent interrogation techniques, the bar was triggered because of the petitioner's inaction as his unit committed persecutory acts. The court also stated that physical participation in persecution is not necessary and that subjective intent is irrelevant. Mere physical presence that makes a show of force and may impede the free movements of those subject to persecution, increasing their risk of harm, and "objectively further[ing] the persecution," is sufficient to trigger the bar.[143] These cases apply an objective effect test, considering only the ultimate outcome of the actions of the applicant's associates, not those of the applicant himself.

The Second Circuit rejected this line of argument in *Balachova v. Mukasey*, holding that a Russian guard who was present with his compatriots when they broke into a family's home and raped two girls was not a persecutor.[144] The court noted that failing to prevent persecution was not persecution, and Balachova's actions (or inaction) had no direct consequences for the victims.[145]

This group of cases suggests that some courts are imposing on asylum applicants an affirmative duty to prevent persecution. This duty is extratextual and judicially crafted. While courts, absent a clear administrative interpretation, have the leeway to craft the contours of what constitutes persecution, the failure to act is in no way contemplated by the text of the INA. These cases create precedent that imposes a duty to prevent persecutory acts and attributes the acts of the group to an individual. Such precedents are not uniformly recognized among the circuits. The Ninth Circuit, for instance, specifically states that membership in a persecutory group is not sufficient to trigger the bar.[146]

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140. 130 F. App'x 196, 197 (9th Cir. 2005).

141. Id.

142. 372 F. App'x 407, 411 (4th Cir. 2010).

143. Id.

144. 547 F.3d 374, 386 (2d Cir. 2008).

145. Id. at 387.

146. See infra note 149 and accompanying text (discussing Hasan v. Ashcroft, 122 F. App'x 329 (9th Cir. 2005)).

Although there may be times when mere presence *does* act to further persecution, this evaluation should include an individualized assessment of shared persecutory intent.

c. *Analysis of Membership in a Persecutory Group.* — Contrary to the aforementioned cases, most circuits that have addressed the issue have found that mere membership in a group that conducts persecutory acts is insufficient to trigger the bar absent a finding of individual culpability or responsibility for specific persecutory acts. In *Aroyan v. Gonzales*, the applicant was a member of a paramilitary group known for human rights abuses in Armenia.[147] The Ninth Circuit held that mere membership in an organization that persecutes others was insufficient to support a finding that he persecuted others.[148] Similarly, in *Hasan v. Ashcroft*, the Ninth Circuit held that merely being a member in an organization that persecutes others does not render an applicant ineligible for asylum as a persecutor.[149] The court found that the IJ was wrong to impute the persecutory actions of the group as a whole to Hasan. However, the Ninth Circuit has also articulated a principle similar to the necessary predicate test: An individual is not merely a member of a persecuting group when her "acts were more than peripheral to the persecution . . . [and instead] performed a necessary role in facilitating persecution."[150] "Necessary," however, again remains undefined.

These cases approach the litmus test of the *Fedorenko* objective effect standard, "focusing on whether particular conduct can be considered assisting in the *persecution* of civilians."[151] *Fedorenko*, in a frequently cited footnote, suggested that while a Nazi barber did not further the function of the prison, a prison guard did.[152] Therefore, although both were technically cogs in the wheel of the Nazi machine, only the guard should have been considered a persecutor, because his actions were a necessary step in persecuting others. Similarly, modern circuit courts evaluate the essential nature of the applicant's role in the eventual persecution. By analogy to *Fedorenko* and the prison guard, a driver, translator, or escort serves an essential function in furtherance of the ultimate persecutory act. Courts have therefore been more willing to label these actors as "persecutors," even though their conduct was tangential to the actual persecutory act. Yet in other contexts, a nurse, a guard, and a soldier were not found to be persecutors. These cases demonstrate a problematic, inconsistent application of the law in the absence of a unifying,

147. 183 F. App'x 634, 635 (9th Cir. 2006).

148. Id. at 636.

149. 122 F. App'x at 330–31.

150. Ghazaryan v. Gonzales, 172 F. App'x 139, 140 (9th Cir. 2006).

151. Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981).

152. Id. ("[A]n individual who did no more than cut the hair of . . . inmates before they were executed cannot be found to have assisted in the persecution of civilians. . . . [A] guard . . . who admitted to shooting at escaping inmates . . . fits within the . . . language about . . . assist[ance] in the persecution of civilians.").

guiding principle. Although each case presents different factual circumstances, there is no clear measure to distinguish at what point conduct is more similar to that of a prison guard than that of a prison barber. Actions that are similarly distant in time or necessity from the ultimate persecutory act are treated disparately, in some instances triggering the bar and in others not triggering the bar.

D. *Knowledge of Future Persecution as Sufficient to Trigger the Persecutor Bar*

Some courts have applied the persecutor bar to situations in which the asylum applicant did not engage directly or indirectly in persecutory actions, but had knowledge that her conduct would eventually lead to the persecution of another person. Courts have varying analytical approaches concerning the role knowledge plays as an element in the application of the persecutor bar. The first approach is to evaluate the purposeful involvement prior to the persecutory act to establish individual culpability. The second approach is to evaluate the level of scienter with which the applicant acted.

1. *Purposeful Involvement but Nonparticipation in Persecutory Acts.* — In *Miranda Alvarado v. Gonzales*, the Ninth Circuit held that acting as an interpreter in the Peruvian Civil Guard for officers who interrogated Shining Path members constituted persecution.[153] Miranda testified that he witnessed, but did not personally participate in, abuse of the suspects while acting as an interpreter, and "had no power to do anything about it."[154] Miranda resigned after serving as an interpreter for six years and began to receive threats from the Shining Path before leaving for the United States.[155] The IJ determined that Miranda was a "necessary part of the interrogation."[156] The BIA adopted the opinion of the IJ and denied asylum; the Ninth Circuit reviewed the IJ's opinion.[157]

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153. 449 F.3d 915, 918 (9th Cir. 2006) (describing Miranda's initial activities of protecting government officials and banks and serving as community leader for Peruvian Civil Guard before being ordered to serve as translator). The Shining Path is a Peruvian guerrilla organization that commits terrorist attacks against the government and citizens. Id.

154. Id.

155. Id. at 918–19 (describing Miranda's work, resignation, and death threats from the Shining Path).

156. Id. at 919 (quoting IJ's denial of Miranda's application). The IJ reasoned that without his role as interpreter the interrogation could not proceed, but with his services it *could* proceed. Id. The IJ also attributed significance to the length of time Miranda served and noted the link between the persecutory acts and the political animus toward Shining Path members, thus meeting the nexus requirement. Id. at 920 (quoting IJ explaining that persecution and interrogation of Shining Path members was for no reason other than their membership in "highly ideological" Shining Path and, thus, on account of their political opinion).

157. Id. at 921 (explaining in streamlined case BIA issues order indicating IJ's determination is final agency determination and circuit reviews IJ's findings).

Acknowledging the INA's failure to define "persecution," the Ninth Circuit, on appeal, relied on its own definition of "persecution" to determine if Miranda's actions triggered the persecutor exception.[158] The court defined "persecution" as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[159] The court relied on footnote thirty-four of *Fedorenko*, emphasizing that "the *kind* of acts Fedorenko perpetrated were central to its analysis"[160] and finding *Fedorenko* created "a *continuum of conduct* against which an individual's actions must be evaluated so as to determine personal culpability."[161] The Ninth Circuit established a two-pronged test under which "'individual accountability must be established,'"[162] and the surrounding circumstances must be evaluated to determine if the applicant is a persecutor.[163] The court articulated a new standard whereby "determining whether a petitioner 'assisted in persecution' requires a particularized evaluation of both personal involvement and *purposeful* assistance in order to ascertain culpability."[164] The court confronted the issue of persecution through knowledge, noting that persecution "does not require actual 'trigger-pulling,'"[165] but requires more than mere membership in a group that engages in persecutory acts.[166] The court found it clear that Miranda had personal involvement beyond mere membership.[167] The court then offered a novel approach following the "continuum of conduct" standard of materiality. The court reasoned that "[w]hether Miranda's assistance was material is measured by examining the degree of relation his acts had to the persecution itself."[168] The court

158. Id. at 925.

159. Id. (quoting Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996)).

160. Id. at 925–26 (citing Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981)).

161. Id. at 926 (emphasis added).

162. Id. at 926 (quoting Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252 (9th Cir. 2004) (citing Laipenieks v. INS, 750 F.2d 1427 (9th Cir. 1985))).

163. Id. (citing *Vukmirovic,* 362 F.3d 1252–53). *Vukmirovic* is described in Part II.B.3, supra. The court also looked to Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003) and Hernandez v. Reno, 258 F.3d 806, 814 (8th Cir. 2001), discussed supra Part II.B.2, to create the standard of evaluation the court used in the present case for the persecutor exception. *Miranda Alvarado*, 449 F.3d at 926–27.

164. *Miranda Alvarado*, 449 F.3d at 927 (emphasis added).

165. Id. (citing A-H-, 23 I. & N. Dec. 774, 784 (B.I.A. 2005) (stating persecutor bar "do[es] not require direct personal involvement in the *acts* of persecution")).

166. Id. (citing *Vukmirovic,* 362 F.3d at 1252 (finding "[m]ere acquiescence or membership in an organization" not sufficient for persecutor bar)); Rodriguez-Majano, 19 I. & N. Dec. 811, 814–15 (B.I.A. 1988) (noting "mere membership in an organization, even one which engages in persecution, is not sufficient [alone] to bar one from relief," but is sufficient "if one's action or inaction furthers that persecution in some way"), abrogated by Negusie v. Holder, 555 U.S. 511 (2009).

167. *Miranda Alvarado*, 449 F.3d at 928–29 (concluding Miranda met requirement of personal involvement because his actions went beyond mere membership and he was regular part of interrogation teams who questioned Shining Path members).

168. Id. at 928.

examined the instrumentality and directness or remoteness of Miranda's actions to the ultimate persecution.[169] The court found that Miranda's actions were essential to and in furtherance of the ultimate torture of Shining Path members, thus making his assistance material.[170]

The Ninth Circuit is also unique in directly addressing the nexus or "on account of" requirement, which demands that persecution be related to a protected ground. The court found that Miranda's actions met the nexus requirement because the Shining Path members were not interrogated for any reason other than their affiliation with the group.[171] Interestingly, the court did not address Miranda's personal motivations with respect to his actions. That the Civil Guard interrogators acted "on account of" the Shining Path members' political opinions and affiliations was imputed to Miranda as an essential part of the persecution, making him a persecutor.

2. *Scienter and Prior Knowledge of Persecutory Acts.* — Similar issues were raised in *Gomez v. Gonzales*.[172] Gomez was a high-ranking military intelligence officer in Peru whose duties were to capture subversives and obtain information by any means necessary.[173] He communicated information about government opposition to his superiors, whom he knew would use that information to kidnap, torture, and murder people.[174] The BIA found Gomez ineligible for asylum because, although he was not directly involved, he knew that his intelligence had a role in the resulting persecutory acts.[175] The Ninth Circuit agreed with the BIA, relying on its prior decision in *Miranda Alvarado*, and concluded that Gomez "was ineligible for relief because his actions in providing intelligence to superiors while knowing that such intelligence was being used to commit acts of persecu-

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169. Id. (framing inquiry as question of "[h]ow instrumental to the persecutory end were those acts" and whether "the acts further[ed] the persecution, or were . . . tangential to it" and using *Fedorenko* distinction between cutting hair of death camp prisoners and shooting escapees).

170. Id. at 928–30 (reviewing and adopting IJ's reasoning that although Miranda (1) did not actively plan interrogations, (2) did not harm, arrest, or compel those interrogated, and (3) was not in position of authority, Miranda's assistance was material because he did little to avoid interrogations for six years and his service was integral to interrogations).

171. Id. at 930–32 (discussing how Miranda's actions met nexus requirement and noting his inability to disprove contention that his actions amounted to persecution on account of political opinion). The court discussed that Miranda could have counterargued that the interrogations "were part of legitimate criminal prosecutions" or "were part of generalized civil discord, rather than politically-motivated persecution," but there was no indication that the facts supported either claim. Id.

172. 182 F. App'x 634 (9th Cir. 2006).

173. Id. at 635 (describing Gomez's role as intelligence officer).

174. Id.

175. Id. (describing BIA's findings that Gomez passed on information identifying subversives, who were eventually killed by military, and such killings constituted persecution rendering Gomez ineligible for asylum as persecutor).

tion constituted assistance of persecution within the meaning of the statute."[176]

In *Ochoa v. Holder*, the Ninth Circuit again looked to the level of knowledge of the alleged persecutor.[177] Ochoa was a Guatemalan police officer who arrested guerrillas opposed to the government, knowing that they would be tortured, and recorded detainees' statements obtained by torture.[178] In a brief opinion, the court noted that Ochoa assisted in the persecution of others on account of their political opinion.[179] The court's opinion implied that Ochoa's involvement prior to and after prisoners were tortured was sufficient to trigger the bar, and the victims' membership in a guerrilla group satisfied the nexus test. Although Ochoa did not commit acts of torture, or necessarily share the beliefs of the torturers, his knowledge that these acts occurred as a result of his role as a police officer was sufficient to find that he assisted in persecution in violation of the bar.[180]

The Sixth Circuit reached a different outcome when reviewing a similar situation in *Diaz-Zanatta v. Holder* by taking into account the mitigating factors in the applicant's story.[181] Diaz-Zanatta worked as a military intelligence officer in Peru. The reports she generated were eventually used to commit human rights abuses by the military.[182] Diaz-Zanatta did not know of her role in these events and upon learning of the military's persecutory acts began leaking information to the press.[183] The court used a two-pronged test to evaluate Diaz-Zanatta's claim.[184] First, the alien must do more than associate with persecutors, i.e., there must be a nexus between the alien's actions and the persecution of others, such that the alien actually participates or assists in the persecution of others. Second, if there is such a nexus the alien must act with scienter, having some prior or contemporaneous knowledge of the ongoing persecution. The Sixth Circuit found that Diaz-Zanatta's involvement did not meet this test, and she was therefore not barred as a persecutor.[185]

The Sixth Circuit clarified this ruling in *Parlak v. Holder*.[186] Parlak "voluntarily and knowingly" funded the PKK, a Turkish terrorist organi-

176. Id. at 635–36 (following reasoning of *Miranda*). Additionally, the court noted that it might have reached a different outcome if it were deciding the case in the first instance, but did not further explain a possible alternative result. Id.

177. 340 F. App'x 420, 422 (9th Cir. 2009).

178. Id.

179. Id.

180. Id.

181. 558 F.3d 450, 458–60 (6th Cir. 2009).

182. Id. at 452–53.

183. Id. at 453.

184. Id. at 455.

185. Id.

186. 578 F.3d 457 (6th Cir. 2009).

zation, and transported weapons for its use.[187] Where the BIA denied Parlak's asylum based on a vague test of "further[ing] persecution in *some* way,"[188] the Sixth Circuit was emphatic in stating that Parlak's knowing actions were "an order of magnitude greater than the harshest assessment . . . about Diaz-Zanatta," and his actions clearly constituted assistance in persecution.[189]

The First Circuit in *Castañeda-Castillo v. Gonzales* held that "the persecutor bar should be read not to apply to Castañeda if" he lacked "prior or contemporaneous knowledge" of the persecutory acts.[190] Castañeda's military unit was stationed outside of a village. Castañeda's blocking of escape routes had the objective effect of aiding in the massacre of the villagers, but he did not know when the attack had occurred or that it had turned into a massacre of civilians.[191] Because of his lack of prior or contemporaneous knowledge, the court held that the persecutor bar did not apply.[192]

These cases taken together suggest that where the applicant did not directly engage in conduct constituting persecution, the courts look to the nexus between the applicant's knowing conduct and the ultimate persecutory act. In these cases, knowledge, the degree of connection or remoteness, and the nature of the relationship are the deciding factors. Knowledge acts as a signal of intent and complicity in the persecutory acts. Therefore, without an indication of duress or ignorance, the applicants are presumed to have shared the persecutory motivation and acted in furtherance of that motivation, thus satisfying the nexus test and triggering the bar.

III. SETTING A CONSISTENT STANDARD FOR TRIGGERING THE PERSECUTOR BAR

The persecutor bar is raised in three contexts: (1) when the asylum applicant has directly committed persecutory acts, under duress or not; (2) when the applicant has committed acts peripheral but necessary to the persecution; and (3) when the applicant has not committed any directly persecutory actions, but has knowledge that her actions will result in the persecution of others. The case law reviewed in Part II illustrates that the circuit courts examine several factors, including the length of time the individual was involved, her expression of opposition, her direct or indirect relation to the acts, and the nexus between the perse-

187. Id. at 467.

188. Id. at 468 (emphasis added).

189. Id. at 470 (finding Parlak acted knowingly, nexus existed between Parlak's actions and persecution of others, and Parlak's actions met plain dictionary meaning of "persecution").

190. 488 F.3d 17, 20, 22 (1st Cir. 2007).

191. Id. at 19.

192. Id. at 20–22.

cutory acts and the victim's membership in one of the five protected categories, that is, the personal motivation, or lack thereof, behind the acts. This Note suggests that the discrepancies among circuits in addressing and implementing the persecutor bar stem from a lack of definition of "persecution"[193] and inconsistent standards for determining who is a persecutor. The contextual approach and the objective effect approach rival as standards for triggering the persecutor bar and are implemented in individual cases with great variety.[194]

This Note suggests a solution may be found in redefining "persecution" and implementing the contextual approach based on a totality-of-the-circumstances review of the case. Section A suggests a new definition of "persecution" considering the original purpose of the persecutor bar. Section B calls for the end of the "objective effect test" in favor of a duress defense and a totality-of-the-circumstances analysis. Section C recommends looking to the United Nations for guidance on the application of the bar.

A. *Redefining "Persecution"*

To make the INA internally consistent, courts should apply the same definition of "persecution" for the persecutor bar as they do for granting refugee status.[195] However, "persecution" is not statutorily defined by the INA, leading the BIA and circuit courts to create their own varying definitions.[196] As the analysis in Part II shows, courts use vastly different

193. See supra Part I.B (discussing lack of universal definition of persecution).

194. See supra Part II (discussing what triggers persecutor bar in various circuit cases).

195. See supra note 10 and accompanying text (describing lack of definition of persecution); see also Jiang v. Bureau of Citizenship & Immigration Serv., 520 F.3d 132, 135 (2d Cir. 2008) ("[W]e urge the BIA to apply consistently the standard for what conduct constitutes 'persecution' for purposes of establishing refugee status, and for purposes of determining whether an individual who 'ordered, incited, assisted, or otherwise participated in' that conduct would be subject to the persecutor bar." (citation omitted)).

196. The 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." Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985). The BIA also has described persecution as the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. See Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (holding female genital mutilation is form of persecution). There is also a subjective element, requiring "some degree of intent on the part of the persecutor to produce the harm that the applicant fears." Rodriguez-Majano, 19 I. & N. Dec. 811, 815 (B.I.A. 1988). Circuit courts also have varying understandings of persecution. The Seventh Circuit has defined persecution as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" Bace v. Ashcroft, 352 F.3d 1133, 1137 (7th Cir. 2003) (quoting Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000)) (finding actions must rise above level of mere harassment to constitute persecution). The Eighth Circuit has defined persecution as "'the infliction or threat of death, torture or injury to one's person or

concepts of persecution when granting and denying asylum review.

The United Nations High Commissioner for Refugees (UNHCR) suggests that persecution is "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group."[197] However, this definition is further complicated in the context of asylum law, because the persecution must cause *subjective* fear in the applicant,[198] must be beyond general strife or warfare in the country,[199] and must be based on one of the five protected grounds. One scholar suggests the concept of persecution should not focus on the specific cause and motivation of persecution (i.e., the relationship to the five grounds), but rather on what will happen when the applicant returns home.[200]

The issue of persecution includes both a normative, qualitative judgment about the degree of and reason for the persecution and a consideration of whether the victim will face further persecution if returned to her home country.[201] A definition that granted asylum based solely on a subjective fear of persecution would ignore the concept that general strife is not a ground of persecution, and could be overly broad so as to include harassment or minor inconveniences. Persecution, correctly understood, involves highly severe harm or risk of harm, sufficient to merit the finding that the applicant is unable or reasonably unwilling to return.[202] Furthermore, the definition must take into account the source

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freedom.'" 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)). The Ninth Circuit has stated that "persecution does not require bodily harm," Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998), and may include the "'deliberate imposition of substantial economic disadvantage'" or a deprivation of the essentials of life. Gormley v. Ashcroft, 364 F.3d 1172, 1177 (9th Cir. 2004) (quoting Chand v. INS, 222 F.3d 1066, 1074 (9th Cir. 2000)). The First Circuit has noted that "an alien's experiences must add up to more than mere discomfiture, unpleasantness, harassment, or unfair treatment." Ruiz v. Mukasey, 526 F.3d 31, 36 (1st Cir. 2008). The Third Circuit has stated that persecution involves extreme conduct and cannot broadly include any conduct that our society would determine to be unjust, unfair, unlawful, or unconstitutional. Fatin v. INS, 12 F.3d 1233, 1240 & n.10 (3d Cir. 1993).

197. U.N. High Comm'r for Refugees, Handbook and Guidelines, supra note 11, at ¶ 51.

198. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992).

199. See, e.g., Sanchez, 19 I. & N. Dec. 276, 284–85 (B.I.A. 1985) ("[T]he tragic and widespread savage violence affecting all Salvadorans as the result of civil strife and anarchy is not persecution.").

200. See generally T. Alexander Aleinikoff, The Meaning of 'Persecution' in United States Asylum Law, 3 Int'l J. Refugee L. 5 (1991) [hereinafter Aleinikoff, Meaning of 'Persecution'] (proposing shift in adjudicatory approach to asylum cases to emphasize focus on potential harm caused by returning asylum applicant to home country).

201. Id. at 27 (describing two critical factors in asylum adjudication).

202. See Guy S. Goodwin-Gill, The Refugee in International Law 77 (2d ed. 1996) ("Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the State faced with determining a claim to asylum or refugee status.").

of the persecution—the government or someone the government cannot or will not control[203]—and the reason for persecution, that is, persecution on account of one or more of the five protected categories.[204] If the definition and interpretation of "persecution" by courts did not focus on the nexus between the persecuted and a protected characteristic, there would be little room for a duress claim when used in the context of the persecutor bar. However, a greater focus on the harm the applicant will suffer if returned home may encourage courts to keep in mind that the "persecutor" is also often "persecuted."[205]

The purpose behind asylum law informs the definition of "persecution" that should apply in both contexts of granting asylum and preventing former persecutors from taking advantage of asylum. The term "persecution" serves as both an entry point and a gatekeeper. For those seeking asylum, a valid claim of fear of persecution is essential. On the other hand, a finding of past persecutory conduct by the applicant will bar her admission. As indicated by the cases discussed in Part II, the unsettled definition of "persecution" has led some courts to apply a wider persecutor bar to persecutors than to victims of persecution, thus harshly and unfairly limiting applicants' access to asylum protection. This Note argues that "persecution" in both circumstances should require a nexus test linking the intent of the persecutor to a protected trait of the persecuted. Asylum law was designed to protect "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not [be required to change]."[206] Conduct that does not prejudicially target such traits should not be defined as "persecution" without a more thorough analysis of the

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203. Nat'l Immigrant Justice Ctr., Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings 10 (2011), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20Asylum%20Manual%20November%202011.pdf (on file with the *Columbia Law Review*).

204. The history of the Convention which first implemented the five categories that were incorporated into the INA suggests that there was not much discussion of the specific kinds of persecution that should yield refugee status. The intent was nonexclusionary, meant to offer broad coverage for the refugees of World War II. See generally Aleinikoff, Meaning of 'Persecution,' supra note 200, at 10–12 (discussing debates prior to adoption of Convention).

205. See U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 6th Sess., 16th mtg. at 6, U.N. Doc. A/CONF.2/SR.16 (Nov. 23, 1951), available at http://www.unhcr.org/refworld/docid/3ae68cdc14.html (on file with the *Columbia Law Review*) (discussing addition of nonrefoulement provision to Article 28, whereby applicant cannot be returned to country where she will be persecuted). It is important to keep in mind that asylum is not the only means of withholding removal because of a fear of persecution. The Convention Against Torture (CAT) also prohibits sending an individual to a country where she will likely be tortured. Some denied asylum petitioners are allowed to remain in the United States under the CAT. See, e.g., Miranda Alvarado v. Gonzales, 449 F.3d 915, 925 n.7 (9th Cir. 2006) (alluding to possibility of deferring removal under CAT despite denial of asylum).

206. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

circumstances of the case. Furthermore, actions that in and of themselves would not be considered persecutory in the context of an affirmative application for asylum should not be so considered in the context of an asylum denial. Although it is within the purpose of the INA to deny asylum to individuals who acted to further or assist persecution, a wide spectrum of activity is currently under consideration by courts. Rather than reviewing acts with a minimal effect on the ultimate persecution, courts should consider only acts that directly and immediately result in persecution, in combination with an analysis of the intent of the persecutor. The following section describes why the intent analysis is needed.

B. *The End of the Objective Effect Test and New Alternatives*

The objective effect test, employed in *Fedorenko*, is outdated and no longer represents the nature of asylum claims. The *Fedorenko* test and the statute that spawned it, the DPA, emerged in a binary world where the persecutor/persecuted dichotomy was established specifically along the Nazi/Jewish dividing line.[207] The world contemplated by the *Fedorenko* Court was one in which a prison barber played a drastically different, and drastically less culpable, role than a prison guard at a concentration camp. The rationale employed in *Fedorenko*, therefore, was meant to shield the barber, but preclude the guard from seeking sanctuary under the DPA. The Supreme Court called for an objective measure of the effect of the alleged persecutor's actions.[208] Whether the act was constitutive of persecution depended on whether the conduct objectively furthered the ultimate persecution, without consideration of willfulness or intent. However, the cases examined in this Note reveal that the bright line divide between persecutor and persecuted has blurred in the half century following World War II, and the objective effect test is no longer appropriate. Consideration of the Arab Spring and child soldiers brings to the forefront the reality of this outdated modality.[209] Two ways in

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207. The primary purpose of the exclusion clauses is to "deprive the perpetrators of heinous acts, and serious common crimes, of such protection." U.N. High Comm'r for Refugees, The Exclusion Clauses: Guidelines on Their Application ¶ 6 (Dec. 2, 1996) [hereinafter Exclusion Clause Guidelines], http://www.unhcr.org/refworld/docid/3ae6b31d9f.html (on file with the *Columbia Law Review*). These underlying purposes should be kept in mind when applying the exclusion clauses. Id. The U.N. Convention reflects the era in which it was enacted, a time of great need for the victims of the Nazi regime and an unequivocal desire to punish their persecutors.

208. Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981) (arguing courts should "focus[] on whether particular conduct can be considered assisting in the *persecution* of civilians").

209. The backdrop upon which the persecutor bar is based is one of "black-and-white moral simplicity," where the Nazis were the persecutors, and the Jews the persecuted. Peter Novick, The Holocaust in American Life 10 (1999). However, this no longer reflects the current state of conflict in the world. See U.N. Secretary-General, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, ¶ 11, U.N. Doc. A/61/275 (Aug. 17, 2006) (recognizing over thirty ongoing conflicts around

which the jurisprudence can be aligned with modern implications of the persecutor bar are the adoption of a specific duress defense and/or the advancement of an individualized holistic review process.

1. *A Duress Defense.* — The concept of duress has contributed to courts' struggle to define a bright line rule. The Fifth Circuit, a strict adherent to the objective effect test, is increasingly outnumbered by circuits that have opted for a more individualized evaluation.[210] The cases in Part II demonstrate that many more courts are using a version of contextual evaluation to decide to grant or deny a petition for review. A duress defense is clearly in line with an understanding of persecution that considers motivation as a central element. As discussed above, for the text of the INA to be internally consistent, the definition of "persecution" must include a nexus test that evaluates the relationship between the persecutory conduct and the protected trait.[211] A showing of duress would directly undermine this relationship. Although duress should not be seen as a guarantee of asylum, it should be considered as one of many factors. As the applicant is attesting to a fear of persecution, duress may be a critical part of her own narrative for seeking asylum.

Because of disparities between the circuits, an applicant with a compelling duress defense is more likely to succeed in a circuit that does not follow the objective effect test.[212] Because circuits have jurisdiction over asylum cases based on geographic location, the applicant has no option to select a more favorable circuit and may face an unjust outcome.[213] If the BIA, in rehearing *Negusie*, decides that there is a duress exception to the persecutor bar, this will signal the end of the Fifth Circuit's use of the objective effect test. However, a final determination that there is not a duress exception could limit other circuits' flexibility in deciding not to apply the bar in situations of duress.[214]

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world in which more than 250,000 young people have been coerced into violent armed conflict, blurring line between persecuted and persecutors); Lori K. Walls, The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern "Persecution" in the Case of Forced Abortion and Female Genital Cutting, 16 Pac. Rim L. & Pol'y J. 227, 235–36 (2007) (suggesting persecutor/persecuted dichotomy is oversimplified for today's cases).

210. See supra Part II.B (discussing Fifth Circuit's strict denial of duress defense and Eighth and Ninth Circuits' consideration and application of duress defense).

211. See supra notes 31–32 and accompanying text (defining nexus test).

212. See supra Part II.B.1 (discussing divergent outcomes in *Bah v. Ashcroft* and *Hernandez v. Reno* due to application of objective effect test by Fifth Circuit).

213. See supra notes 14, 34–36 and accompanying text (discussing jurisdiction of circuit courts).

214. Courts may have room to maneuver around this outcome by considering mitigating factors in a holistic review, such as intent, escape attempts, and disobeying orders.

Although many commentators call for reform of the persecutor bar in favor of a specific duress defense,[215] the majority of cases do not revolve around duress. Only four of the cases discussed in Part II directly involved situations of duress or coercion—cases where the applicant directly committed an arguably persecutory act, but did so only under fear of death or severe harm or in self-defense.[216] Although duress remains an important factor that should be considered by courts, it alone does not fully capture the complexities of the persecutor bar cases.

2. *A Totality-of-the-Circumstances Contextual Review.* — The remainder of the cases are situated around the applicant's peripheral, but at times necessary, role in the persecutory act. In these cases the applicant, acting absent duress and usually in the course of her employment, became tangentially involved in persecutory actions.[217] The court must discern whether the tenuous relationship between the applicant and the persecutory act is sufficient to constitute persecution in and of itself. In these cases the courts should rely on a multifactor test to assess the applicant's relationship to the ultimately persecutory acts, considering mitigating factors and the applicant's intention or motivation in addition to the objective act in question.

Many courts are already taking into account the nature of the relationship between the actor and the act of persecution. The Second Circuit's four-part test, in conjunction with the Ninth Circuit's accountability evaluation, offers the best solution. In *Balachova v. Mukasey*, the Second Circuit devised a four-part test identifying factors underlying the persecutor bar:

> First, the alien must have been involved in acts of persecution . . . [, using] the same definition of persecution in the persecutor-bar context as . . . in defining who is a refugee. Second, withholding and asylum statutes require that the persecution that bars relief occurred "because of," 8 U.S.C. § 1231(b)(3), or "on account of," 8 U.S.C. § 1101(a)(42), the victim's protected status. Therefore, a nexus must be shown between the persecution and the victim's race, religion,

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215. See generally Karl Goodman, Comment, *Negusie v. Holder*: The End of the Strict Liability Persecutor Bar, 13 N.Y. City L. Rev. 143 (2009) (arguing BIA should interpret persecutor bar to contain duress exception).

216. See Bah v. Ashcroft, 341 F.3d 348, 351–52 (5th Cir. 2009) (per curiam) (noting applicant's contention that he acted under duress, but denying petition for review); Mendoza-Lopez v. Gonzales, 205 F. App'x 630, 631–32 (9th Cir. 2006) (same); Vukmirovic v. Ashcroft, 362 F.3d 1247, 1253 (9th Cir. 2004) (granting petition for review based on self-defense argument); Hernandez v. Reno, 258 F.3d 806, 815 (8th Cir. 2001) (granting petition for review based on elements of duress); supra Part II.B (discussing duress, objective effect test, and particularized review).

217. For example, in the Chinese forced abortion cases, the persecutory act—the forced abortion—arose out of the routine performance of the asylum applicants' jobs. The court had to decide whether the performance of a job as a nurse, doctor, driver, or guard constituted persecution. See supra Part II.C.1 (discussing forced abortion cases).

> nationality, membership in a particular social group, or political opinion. Third, the alien's conduct, if she did not incite, order, or actively carry out the persecutory acts, must have "assisted" the persecution. . . . Finally, notwithstanding the fact that the persecutor bar does not include a voluntariness requirement, the alien must have sufficient knowledge that her actions may assist in persecution to make those actions culpable.[218]

The Second Circuit, guided by *Fedorenko* and footnote thirty-four, defined "assistance in persecution" as active conduct having direct consequences for the victims, not passive conduct tangential to the actual acts of oppression.[219] The court utilized a knowledge requirement, thus protecting from the persecutor bar those individuals whose actions have unknown consequences. This test also captures the nexus requirement: the actor's motivation for the persecutory conduct must have been based on the victim's membership in one of the five protected categories. This could potentially protect individuals peripherally involved with oppressive or violent groups, who do not share the group's animus toward the persecuted individual. This approach allows courts to evaluate the totality of the circumstances surrounding the applicant's involvement in the persecution of another person.

The Ninth Circuit approach also inquires into the culpability of the applicant. The Ninth Circuit suggested that "individual accountability must be established"[220] and that the court should look to the "totality of [an applicant's] conduct."[221] The element of personal culpability is important in passing the nexus test. Furthermore, personal and moral culpability is the undercurrent of the persecutor bar and its historic origins. Accountability should not be overlooked, particularly in cases where the moral impetus is less clear. Where the persecutor is also a victim of persecution and acted at a distance from the proscribed conduct, her moral culpability is less apparent.

Asylum cases are better reviewed not under a bright line rule, but under a totality-of-the-circumstances analysis. Currently, courts are inconsistently applying the persecutor bar, leading to potentially devastating effects for individual applicants. The proposed test requires courts to take into account a multitude of factors. This allows the courts to retain flexibility in light of differing fact patterns, while ensuring that all relevant factors are taken into account. Instead of privileging the ultimate conduct as the sole determining factor for asylum, using the Second Circuit's four-part test, courts must at a minimum consider extenuating factors and the intent behind the applicant's actions. This test will not result in uniform outcomes, but will ensure that the persecu-

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218. 547 F.3d 374, 384–85 (2d Cir. 2008) (citations omitted).

219. Id. (describing reliance on *Fedorenko* as guiding standard).

220. *Vukmirovic*, 362 F.3d at 1252.

221. *Mendoza-Lopez*, 205 F. App'x at 631.

tor bar is applied uniformly across circuits. The test adheres to the original purpose of the persecutor bar by allowing courts to evaluate the nature of the actions and the moral culpability of the actor.

3. *The Legacy of* Fedorenko *and* Negusie. — Despite the passage of time, circuit courts should continue to look to *Fedorenko* as setting the moral and legal outer bounds of persecutory behavior. Although in *Negusie* the Supreme Court distinguished *Fedorenko* as nonbinding on the BIA and circuit courts because it was decided under the DPA rather than the INA, *Fedorenko* still provides direction on the kind of conduct that rises to the level of persecution and the kind of conduct that, while related, is not persecution in and of itself. As one court has noted, *Negusie* "does not prevent all analogizing between *Fedorenko* and INA cases."[222] The *Fedorenko* "analysis of what constitutes persecution remains instructive where voluntariness is not an issue."[223]

Fedorenko continues to provide a comparative framework for courts to utilize. It illustrates that the original purpose behind the persecutor bar, later incorporated into the INA, recognized a spectrum of behavior. A prison barber in 1948 may be analogous to a nurse in a forced abortion clinic today. Both are part of an overall policy that is at odds with the protections of asylum. Yet both are engaged in the course of their employment. Both are indirectly related to the ultimate acts of persecution. Both may not feel animus toward the persecuted group. Both may be victims of persecution themselves. There is legal and moral ambiguity as to the culpability of the individual and factual ambiguity as to how necessary the individual was to the ultimate act of persecution. *Fedorenko*'s sensitivity to culpability and complexity should not be lost on courts today.

Negusie gives the BIA the opportunity to conclusively decide whether the INA persecutor bar has an implied, or perhaps explicit, duress or voluntariness exception. However, circuit courts are already engaging in this evaluation through a contextual *Fedorenko* analysis. While the BIA remains silent on the voluntariness issue, circuit courts remain free to exercise their discretion in weighing all of the possible triggering and mitigating factors.

C. *Looking to the United Nations for Guidance*

U.S. asylum law developed in tandem with and in response to the United Nations Protocol and Convention on Refugees. As such, U.S.

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222. Parlak v. Holder, 578 F.3d 457, 469 (6th Cir. 2009).

223. Id. Cases decided after *Negusie* have continued to rely on *Fedorenko*. See Nguyen v. Holder, 336 F. App'x 680, 682 n.1 (9th Cir. 2009) ("*Negusie* does not affect our reliance on *Fedorenko* to understand what kind of conduct constitutes persecution or assistance in persecution."); Weng v. Holder, 562 F.3d 510, 514 n.1 (2d Cir. 2009) ("Despite [the] . . . differences between the statutes, we find instructive—but do not consider ourselves bound by—*Fedorenko*'s and its progeny's interpretations of the DPA's persecutor bar.").

courts might take lessons from the United Nations' policy surrounding asylum and persecution.[224] The UNHCR has provided guidelines for the application of the exclusionary clauses in the United Nations' definition of "refugee."[225] These guidelines note that "certain acts are so grave as to render the perpetrators undeserving of international protection as refugees . . . [which] must be borne in mind in interpreting the applicability of the exclusion clauses."[226] But the guidelines caution that the exclusion clauses need to be applied restrictively, as they result in the "most extreme sanction": a denial of asylum.[227] The guidelines emphasize the complexity of this class of cases and the gravity of the consequences for the applicant if denied asylum.[228] This is reflected in their suggested proportionality test, whereby elements of the accused's conduct and the feared persecution are examined holistically.[229] The circuit courts do not look to the potential negative ramifications of their denial of review as part of the persecutor bar analysis or at any point in their review of asylum cases.[230] Incorporating a consideration of the possible outcome of the case would remind the court that the individual "persecutor" is also a victim of persecution.

This line of reasoning is further developed in the UNHCR guidelines' emphasis on individual culpability. Drawing on the history of the persecutor bar, the guidelines quote the Nuremburg Tribunal: "The criterion for criminal responsibility . . . lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused."[231] This calls for a consideration of choice, and therefore duress, and *personal* accountability for the action. The guidelines also distinguish between individual action and group action, and knowing and unknowing involvement. The UNHCR guidelines directly address the precise

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224. The persecutor bar, like much of U.S. asylum law, parallels the UN Convention. Article I.F of the Convention states that the Convention does not apply to a person who "has committed a crime against peace, a war crime, or a crime against humanity . . . ; a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; [or] has been guilty of acts contrary to the purposes and principles of the United Nations." U.N. Convention, supra note 22, at art. I.F.

225. Exclusion Clause Guidelines, supra note 207, at ¶ 4.

226. Id. at ¶ 6.

227. Id. at ¶ 8 (noting restrictive interpretation and application is warranted in light of "serious possible consequences of exclusion for the applicant").

228. Id. at ¶ 9 (noting that "cases of exclusion are often inherently complex, requiring an evaluation of the nature of the crime and the applicant's role in it [compared to] the gravity of the persecution feared" if asylum is denied).

229. Id.

230. This issue may arise in deciding whether or not the applicant has a legitimate fear of persecution or was persecuted, and thus qualifies for asylum under the definition of refugee or for relief under the CAT. However it is not taken into account when evaluating the applicant's persecutory conduct. See supra note 205 (discussing CAT).

231. Exclusion Clause Guidelines, supra note 207, at ¶ 38 (quoting Nancy Weisman, Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law, 8 Int'l J. Refugee L. 111, 132 n.124 (1996)).

terms that courts continue to struggle to define: duress and accountability, direct involvement, individual and group conduct, and knowledge. The guidelines, like the analysis proposed by the Second and Ninth Circuits, provide flexibility, but also call for uniformity in applying the law. Although the guidelines do not purport to value any one factor above others, it is crucial to note that each is relevant, and the guidelines echo the approach articulated by the Second and Ninth Circuits and suggested by this Note.

The asylum provisions of the INA were directly crafted from the UN Convention and Protocol, and courts should look to these sources for guidance. They propose a holistic approach centered on culpability and accountability. The initial purpose of the persecutor bar was to retrospectively punish past behavior and deny sanctuary to those who had violated the rights of others. Yet, the guidelines also suggest that courts not be swayed by the abhorrent nature of the ultimate persecutory act, but remain mindful of the particular individual's role in that act.[232] These guidelines reflect much of what the circuit courts struggle to articulate and can offer guidance on how best to evaluate persecutor bar cases in light of the fact that the persecutors may also be persecuted, vulnerable, and equally in need of asylum.

CONCLUSION

In the majority of persecutor bar cases reviewed by this Note, the circuit court denied the petition for review and upheld the decision of the BIA. However, for those cases that are erroneously decided by the BIA, the circuit courts serve a vital purpose as, functionally, the last forum in which an applicant can be granted asylum.[233] This Note has illustrated the inconsistencies that exist horizontally across circuits and vertically between the BIA and circuits in the treatment of the persecutor bar. It has also provided a framework with which to analyze and categorize the approaches taken by various courts. Circuit courts should employ a particularized approach that evaluates both the culpability of the applicant and the connection between the applicant and the ultimately persecutory act. The models devised by the Second and Ninth Circuits and the UNHCR guidelines can help courts develop a more uniform understanding of what actions merit the denial of asylum by triggering the persecutor bar.

232. Id. at ¶ 38–39.

233. The Supreme Court rarely reviews asylum appeals; therefore the circuit courts often operate as the last, best chance for an asylum applicant.

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