THE CITY UNIVERSITY OF NEW YORK LAW REVIEW

City University of New York Law Review

Volume 13 | Issue 1

Winter 2009

Negusie v. Holder: The End of the Strict Liability Persecutor Bar?

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Recommended Citation

Karl Goodman, *Negusie v. Holder: The End of the Strict Liability Persecutor Bar?*, 13 N.Y. City L. Rev. 143 (2009).
Available at: 10.31641/clr130105

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Acknowledgements

Special thanks to Professor Hans Christian Linnartz for his guidance.

This article is available in City University of New York Law Review: https://academicworks.cuny.edu/clr/vol13/iss1/6

NEGUSIE v. HOLDER: THE END OF THE STRICT LIABILITY PERSECUTOR BAR?

*Karl Goodman**

INTRODUCTION

> *Every spot of the [ ] world is overrun with oppression. Freedom hath been hunted round the globe. Asia and Africa have long expelled her. Europe regards her like a stranger, and England hath given her a warning to depart. O! [R]eceive the fugitive, and prepare in time an asylum for mankind.*[1]

The purpose of American asylum law is to provide humanitarian relief to people displaced from their homelands.[2] This humanitarian goal often provokes difficult questions. For example, should asylum be available to those who have persecuted others? Clearly, allowing human-rights abusers to benefit from laws drafted to protect human rights would be perverse. As a result, refugees[3] who have persecuted others are ineligible for asylum in the United States.[4]

While the persecutor bar has likely kept many human-rights abusers from resettling in the United States, its reach may be too expansive. The broad language of the persecutor bar pertains even to those who have merely "participated" or "assisted" in persecution,[5] which sometimes includes behavior far removed from actual persecution. Making matters worse, the Board of Immigration Appeals ("BIA") mistakenly interpreted the persecutor bar using a U.S. Supreme Court decision that involved a much harsher statute, creating what was essentially a strict-liability persecutor bar.[6] Under this construction of the persecutor bar, a refugee who assisted in persecution, even under threat of death, would be barred

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* J.D. candidate, Duke University School of Law (2010). Special thanks to Professor Hans Christian Linnartz for his guidance.

1 1 THOMAS PAINE, *Common Sense*, *in* THE WRITINGS OF THOMAS PAINE 67, 100–01 (Moncure Daniel Conway ed., AMS Press, Inc. 1967) (1776).

2 *See* S. REP. NO. 96-256, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

3 Although, pursuant to 8 U.S.C. § 1101(a)(42)(B) (2006), "[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," for purposes of this Article the term is used also to refer to persecutors seeking refugee status in the United States.

4 *Id.*

5 *Id.*

6 *See* Negusie v. Holder, No. 07-499, slip op. at 10 (U.S. Mar. 3, 2009).

from resettlement.[7]

The Supreme Court cast the fate of the strict-liability persecutor into doubt when it decided *Negusie v. Holder* on March 3, 2009.[8] In *Negusie*, the Court reversed the Fifth Circuit Court of Appeals' decision to deny asylum to a refugee who was forced to persecute others against his will.[9] However, citing *Chevron v. Natural Resources Defense Council*,[10] the Court did not decide whether a strict-liability persecutor bar was permissible under the Immigration and Nationality Act and remanded to the BIA for further analysis.[11] The BIA must now decide whether to continue applying a strict-liability persecutor bar or to permit a duress defense.

This Note argues that the BIA should interpret the persecutor bar subject to a duress defense. Part I explains the evolution of the persecutor bar, tracking its growth from the Displaced Persons Act through *Negusie*. Part II discusses possible outcomes of the Court's remand to the BIA and advocates the permission of a duress defense.

I. The Evolution of the Persecutor Bar

A. Statutory Origins

Although the United States has a long history as a refuge for displaced people from around the world, the Displaced Persons Act of 1948 ("DPA") was the first elaborate statutory scheme enacted to encourage the settlement of refugees within the country.[12] The DPA lifted strict immigration quotas for European refugees displaced by World War II who met the definition of displaced persons.[13] Congress fulfilled the humanitarian mission of the DPA when it barred all potential refugees who had "assisted the enemy

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7 Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).

8 *See id.* (declaring *Fedorenko v. United States*, 449 U.S. 490 (1981), inapplicable to 8 U.S.C. § 1101(a)(42)).

9 *Id.* at 2.

10 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (requiring judicial deference to administrative interpretations of ambiguous statutes).

11 Negusie v. Holder, No. 07-499, slip op. at 11.

12 Heidi H. Boas, *The New Face of America's Refugees: African Refugee Resettlement to the United States*, 21 Geo. Immigr. L.J. 431, 435–37 (2007) ("The United States first began resettling refugees in 1948 after passage of the Displaced Persons Act."); 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, 230 (2007) (explaining that, along with the Refugee Relief Act of 1953, the Displaced Persons Act (DPA) led to the admission of nearly 400,000 refugees into the United States).

13 *See* Displaced Persons Act of 1948, Pub. L. No. 774, § 3, 62 Stat. 1009, 1010–11.

in persecuting civil[ians]" or had "*voluntarily* assisted the enemy forces . . . in their operations."[14] This exception targeted Nazis and their supporters and was meant to prevent those persecutors from seeking refuge in the United States.[15] The Immigration and Nationality Act of 1952 ("INA") furthered this goal by making revocable the naturalization of refugees who obtained citizenship by fraud or willful misrepresentation.[16] This meant that any individuals who applied for asylum under the DPA or the Refugee Relief Act ("RRA") and misled immigration officials about their involvement in the atrocities of World War II could have their certificates of naturalization cancelled and could thereafter be deported, even after gaining U.S. citizenship.[17]

Despite the DPA's clear prohibition of former Nazis and those who assisted them, tales of former concentration camp guards living happily in the United States, along with the difficulty of deporting those persecutors once they were spotted, led to the adoption of the Holtzman Amendment to the INA.[18] By the time the Amendment passed in 1978, Nazis and their supporters had been banned from becoming refugees in the United States for decades under the DPA.[19] However, some of those same persecutors were able to reside in the United States and could not be deported because they entered the country under other immigration laws and were not subject to the persecutor bar in the DPA and RRA.[20] The effort to deport persecutors was also becoming increasingly difficult because the victims and witnesses of the persecution were aging and often had trouble recalling events that occurred forty years earlier.[21]

The Holtzman Amendment addressed these challenges and provided new support for government lawyers attempting to de-

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14 Constitution of the International Refugee Organization annex I, Dec. 16, 1946, 62 Stat. 3037, 3051–52, 18 U.N.T.S. 3, 20 (emphasis added) (defining "displaced person"). The DPA's persecutor bar incorporated the definition of "displaced person" established in the Constitution of the International Refugee Organization. Displaced Persons Act of 1948 § 2(b).

15 *See* Constitution of the International Refugee Organization, *supra* note 14 (barring "war criminals, quislings[,] and traitors").

16 8 U.S.C. § 1451(a) (2006).

17 *See id.* (revoking citizenship if "procured by concealment" or "willful misrepresentation").

18 Walls, *supra* note 12, at 230; *see generally* Pub. L. No. 95-549, 92 Stat. 2065 (1978), codified at 8 U.S.C. § 1182(a)(3)(E)(i).

19 *See* Displaced Persons Act of 1948 § 13.

20 H.R. REP. NO. 95-1452, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4702.

21 *See* Fedorenko v. United States, 449 U.S. 490, 531 nn.1–2 (1981) (detailing evidentiary problems that arose in Fedorenko's trial).

port persecutors.[22] Prior to the adoption of the Amendment, immigrants could be deported on the basis of their prior participation in persecuting others only if: (a) they entered the United States under the DPA or RRA, and (b) they would have been excludable at the point of admission because they used fraud or material misrepresentation in their applications for admission.[23] The Amendment expanded the scope of the persecutor bar to apply to any alien who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion."[24] If those persecutors already resided in the United States, they were now subject to deportation.[25] In addition, the new, broader scope of the prohibited behavior, which remained undefined under the label of "otherwise participated,"[26] meant that the evidentiary hurdle for deportation was now much lower than it was under the DPA, easing the burden on government lawyers.[27]

The impact of the Holtzman Amendment expanded significantly after Congress passed the Refugee Act of 1980.[28] The Act used the language of the Holtzman Amendment, which was explicitly limited to former Nazis, to craft a bar against all persecutors.[29] As a result, the ban on all those who "ordered, incited, assisted or otherwise participated" in persecution now appears in several parts of the INA and bars any refugee who falls within its scope.[30]

B. The Persecutor Bar in Action: Fedorenko v. United States

In 1980, the Supreme Court decided *Fedorenko v. United States*, a landmark case that declared that the DPA's persecutor bar applied to refugees who engaged in persecution involuntarily.[31] Feodor Fedorenko was a Ukraine-born soldier in the Russian Army

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22 *See* 8 U.S.C. § 1182(a)(3)(E)(i).

23 H.R. REP. NO. 95-1452, *supra* note 20.

24 8 U.S.C. § 1182(a)(3)(E)(i).

25 8 U.S.C. § 1227(a)(4)(D).

26 8 U.S.C. § 1182(a)(3)(E)(i) (banning those who merely *participated* in persecution).

27 *See* Constitution of the International Refugee Organization, *supra* note 14, 62 Stat. at 3051, 18 U.N.T.S. at 20 (banning those who *assisted* in persecution).

28 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

29 *See id.* § 201(a).

30 *See* 8 U.S.C. § 1101(a)(42) (precluding aliens who engaged in persecution from receiving refugee status); *see also* 8 U.S.C § 1158(b)(2)(A)(i) (declaring aliens who engaged in persecution ineligible for asylum); *see also* 8 U.S.C. § 1182(a)(3)(E) (classifying Nazis who engaged in persecutory acts as "inadmissible aliens"); *see also* 8 U.S.C. § 1231(b)(3)(B)(i) (disallowing withholding of removal for persecutors).

31 Fedorenko v. United States, 449 U.S. 490, 512 (1981).

during World War II.[32] Shortly after he was drafted, German troops captured Fedorenko and sent him to the Treblinka concentration camp where he worked as a guard until 1943.[33] While Fedorenko was at Treblinka, roughly 800,000 people lost their lives at the camp.[34] Fedorenko claimed that he was forced into service as a prisoner of war and had no involvement in the atrocities committed inside the camp.[35] Instead, Fedorenko explained that he was merely a perimeter guard and would have been executed if he tried to escape.[36] Like many other Russian prisoners of war who served as guards, Fedorenko wore a uniform, used a weapon, received a stipend, and was allowed to leave the camp periodically.[37] After a prisoner uprising, the Germans closed Treblinka and shipped Fedorenko to a labor camp where he continued to work as a guard.[38] In 1945, Fedorenko was working as a warehouse guard in Hamburg when British forces captured the city.[39] Fedorenko discarded his uniform and passed as a civilian for the next four years.[40]

In 1949, Fedorenko applied for admission to the United States as a displaced person, claiming that he had been a farmer in Poland until the Germans forced him to work in a factory during the war.[41] After the Displaced Persons Commission approved Fedorenko's application, he moved to Connecticut, where he lived quietly for nearly thirty years.[42] Seven years after being granted citizenship, it became known that Fedorenko lied about his service at Treblinka, and the U.S. government sought to revoke his citizenship.[43]

According to the plain language of the DPA, Fedorenko's citizenship was illegally procured because he concealed his involvement in "assisting the enemy in persecuting civilians."[44] However, both the district court and the Fifth Circuit Court of Appeals applied an "involuntary assistance" exception to the rule.[45] The dis-

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32 *Id.* at 494.
33 *Id.*
34 *Id.* at 494 n.2.
35 *Id.* at 500.
36 *See* Fedorenko v. United States, 449 U.S. at 500 n.17.
37 *Id.*
38 *Id.* at 494.
39 *Id.*
40 *Id.*
41 Fedorenko v. United States, 449 U.S. at 496.
42 *Id.* at 497.
43 *Id.* at 498.
44 *Id.* at 515.
45 *Id.* at 512.

trict court explained that failure to apply a voluntariness requirement would "bar every Jewish prisoner who survived Treblinka because each of them assisted the SS in the operation of the camp."[46] Nevertheless, the Supreme Court explained that if Congress had intended to apply a voluntariness requirement, it would have done so explicitly.[47] The Court compared § 2(a) and § 2(b) of the DPA.[48] Because § 2(b) uses the word "voluntarily" and § 2(a) does not, the Court concluded that the absence of the word in § 2(a) indicated Congress's intent to apply a strict ban on all those who assisted in the persecution of others, regardless of coercion.[49]

Accordingly, instead of examining Fedorenko's personal moral culpability as the district court suggested, the Court focused on the "objective effect[s]"[50] of the alleged persecution to determine whether it rose to the level banned under the statute.[51] In the now-famous footnote 34, the Court attempted to define a persecutor bar that did not consider moral culpability and duress.

> The solution to the problem perceived by the [d]istrict [c]ourt . . . lies, not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need only decide this case.[52]

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46 United States v. Fedorenko, 455 F. Supp. 893, 913 (D. Fla. 1978).

47 Fedorenko v. United States, 449 U.S. at 512.

48 *Id.*

49 *Id.* (applying the same rule as did the foreign-service officers who first interpreted the DPA). The testimony of a vice consul who administered the DPA in postwar Germany revealed that, in the years following World War II, the DPA barred all prison-camp guards from seeking refugee status, even those forced to serve against their will. *Id.*

50 *In re* Fedorenko, 19 I. & N. Dec. 57, 69 (1984) (explaining that *Fedorenko* required courts to look to the objective effects of the accused persecutor's actions, instead of his subjective intent).

51 Fedorenko v. United States, 449 U.S. at 512.

52 *Id.*

Thus, if a refugee's behavior is sufficiently persecutory, he will be barred from asylum regardless of the severity of the coercion under which he acted.

While the Court's examples may provide guideposts on a continuum of persecution, they do little to resolve the problem perceived by the district court. Justice Stevens, in his dissent, noted the confusion inherent in footnote 34's example. "[T]he Court would give the word 'persecution' some not[-]yet[-]defined[,] specially limiting reading. In my opinion, the term 'persecution' clearly applies to such conduct; indeed, it probably encompasses almost every aspect of life or death in a concentration camp."[53] Justice Stevens provided his own factual example to reveal the flaws in footnote 34's continuum of persecution:

> The Court's resolution of this issue is particularly unpersuasive when applied to the "kapos," the Jewish prisoners who supervised the Jewish workers at the camp. According to witnesses who survived Treblinka, the kapos were commanded by the SS to administer beatings to the prisoners, and they did so with just enough force to make the beating appear realistic yet avoid injury to the prisoner. Even if we assume that the kapos were completely successful in deceiving the SS guards and that the beatings caused no injury to other inmates, I believe their conduct would have to be characterized as assisting in the persecution of other prisoners. In my view, the reason that such conduct should not make the kapos ineligible for citizenship is that it surely was not voluntary.[54]

To Justice Stevens, the difficulty of applying a strict-liability persecutor bar, even with the help of footnote 34, was evidence of the Court's "strained" and incorrect interpretation of the statute.[55] Nevertheless, *Fedorenko* has not yet been overruled.

C. Fedorenko*'s Legacy*

For nearly thirty years, *Fedorenko* stood as a bar to refugees who participated in persecution, even if that persecution was performed at the point of a gun. The Court's prediction also proved true—difficult line-drawing problems arose in determining what sort of behavior could constitute persecution, leading to a circuit split.[56]

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[53] *Id.* at 534 (Stevens, J., dissenting).

[54] *Id.* at 534–35 (Stevens, J., dissenting) (citation omitted) (citing United States v. Fedorenko, 455 F. Supp. 893 (D. Fla. 1978)).

[55] *Id.*

[56] This circuit split arose over the interpretation of the Holtzman Amendment, which courts began applying subject to *Fedorenko*'s strict-liability, objective-effects test in 1983. *See In re* Laipenieks, 18 I. & N. Dec. 433, 464–65 (1983).

Some circuits interpreted the persecutor bar expansively and inferred "participation in persecution" from evidence showing membership in a group known to have persecuted others.[57] Other circuits read "otherwise participated" in conjunction with "assisted," which narrowed the reach of the persecutor bar to those who were personally involved in the persecution.[58] The Sixth Circuit Court of Appeals produced the narrowest interpretation of the persecutor bar by requiring more than mere assistance in persecution to qualify under the bar.[59]

While the federal appellate courts continued to disagree about which types of behavior qualified as persecution, the BIA quietly established precedent that applied the *Fedorenko* Court's objective-effects test to other immigration statutes. For example, in *In re Laipenieks*, the BIA applied *Fedorenko*'s interpretation of the DPA to the much broader Holtzman Amendment and found that, although it was a different statute, it also precluded the defense of duress.[60] According to the BIA, Congress's failure to include an explicit duress defense or the word "voluntary" meant that no such defense was relevant.[61] The BIA relied upon the plain language and legislative history of the Holtzman Amendment, as well as the construction of other immigration statutes, to conclude that the subjective intent of an alien accused of persecution was irrelevant.

> [T]he Holtzman Amendment contain[s] no reference whatsoever to an alien's motivations and intent behind his assistance or participation in the specified persecution. On the other hand, Congress has qualified certain other provisions of the Immigration and Nationality Act with an intent element. Moreover, the legislative history of the Holtzman Amendment . . . shows that Congress carefully examined prior statutes relating to persons who engaged in persecution. Among these, for example, was the DPA, in which Congress also showed that it was capable of incorporating or omitting an intent/voluntariness requirement as it deemed appropriate. This demonstrates that Congress also knew how to incorporate a motivation/intent requirement in the Holtzman Amendment, yet it chose not to do so.[62]

One year later, the BIA decided Feodor Fedorenko's deportation

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57 *See* United States v. Ciurinskas, 148 F.3d 729, 734 (7th Cir. 1998); *see also* United States v. Kowalchuk, 356 F.3d 456, 491 (3d Cir. 1985).

58 *See* Laipenieks v. INS, 750 F.2d 1427, 1431 (9th Cir. 1985); *see also* United States v. Sprogis, 763 F.2d 115, 122 (2d Cir. 1985).

59 Petkiewytsch v. INS, 945 F.2d 871, 879, 881 (6th Cir. 1991).

60 *In re* Laipenieks, 18 I. & N. Dec. at 464–65.

61 *Id.*

62 *Id.* at 464 (citation omitted).

appeal and applied the same test, reaffirming the application of the *Fedorenko* standard to the Holtzman Amendment.[63]

In 1988, the BIA dramatically expanded *Fedorenko*'s reach beyond the DPA and the Holtzman Amendment. In *In re Rodriguez-Majano*, the BIA applied *Fedorenko*'s objective-effects test to the persecutor bar contained in 8 U.S.C. § 1101(a)(42), which defines the class of people who may be treated as refugees.[64] While this statute uses the same language as the Holtzman Amendment, it was never targeted at former Nazis and applies instead to all refugees.[65] By attaching *Fedorenko*'s analysis of the DPA to the INA's definition of "refugee," the BIA barred every refugee who engaged in persecution, whether coerced or willing.[66] The BIA offered no explanation for this dramatic expansion of the objective-effects test to all refugees, possibly because the case dealt with the nature of persecution, not the intent of the persecutor. Nevertheless, *Rodriguez-Majano* created a strict-liability persecutor bar that lasted for the next twenty years.[67]

Rodriguez-Majano's application of *Fedorenko*'s strict standard to the expansive language of the persecutor bar in 8 U.S.C. § 1101(a)(42) produced widely disparate results when followed in later cases. Some circuits mechanically applied *Fedorenko*'s holding to the persecutor bar, ruling that any persecutory behavior, no matter how coerced, could bar aliens from eligibility for refugee status.[68] In contrast, the Eighth Circuit Court of Appeals used *Fedorenko*'s dicta to justify a more nuanced approach that considered each refugee's mental state.[69]

1. Following *Fedorenko*'s Holding: The Strict Standard

A prominent Fifth Circuit case, *Bah v. Ashcroft*, applied a strict standard derived from *Fedorenko*'s holding.[70] In 1995, the Revolutionary United Front ("RUF"), a rebel group intent on toppling Sierra Leone's government, kidnapped a teenager named Amadu

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63 *In re* Fedorenko, 19 I. & N. Dec. 57, 69 (1984).

64 *In re* Rodriguez-Majano, 19 I. & N. Dec. 811 (1988); *see* 8 U.S.C. § 1101(a)(42) (2006).

65 8 U.S.C. § 1101(a)(42).

66 *See* Negusie v. Holder, No. 07-499, slip op. at 10 (U.S. Mar. 3, 2009).

67 *See id.*

68 *See, e.g.*, Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).

69 *See* Hernandez v. Reno, 258 F.3d 806, 814–15 (8th Cir. 2001).

70 *Bah*, 341 F.3d at 351 (citing Maikovskis v. INS, 773 F.2d 435, 445 (2d Cir. 1985)) (using *Fedorenko*'s objective-effects test, and rejecting petitioner's reading of a subjective element, to interpret the Holtzman Amendment).

Bah.[71] The RUF captured Bah's village and systematically raped and killed every villager not suited to military service.[72] The attack included the rape and murder of Bah's sister and the incineration of his father.[73] The RUF gave Bah the option of joining the RUF or suffering a similar fate.[74] Bah attempted to escape twice but was apprehended by government forces who thought he was a RUF rebel.[75] Both times he was in government custody, RUF forces recaptured the government outpost and "liberated" Bah back into RUF service.[76] Bah finally managed to escape long enough to steal some money and a passport and catch a flight to the United States where he applied for asylum.[77]

The immigration judge, the BIA, and the Fifth Circuit Court of Appeals uniformly denied Bah's asylum claim because he had assisted in the persecution of others.[78] Over Bah's objection that he was never a voluntary member of the RUF, the court mechanically used the objective-effects test created in *Fedorenko* and considered by the BIA in *Rodriguez-Majano* to interpret 8 U.S.C. § 1101(a)(42).[79] "The syntax of the statute suggests that the alien's personal motivation is not relevant."[80] Because Bah had committed violent acts as a nominal member of the RUF, the court of appeals denied his asylum claim.[81]

2. Following *Fedorenko*'s Dicta: The Nuanced Approach

As *Bah* reveals, the objective-effects test can be applied mechanically and without analysis of the refugee's motivation. Nevertheless, footnote 34 of *Fedorenko* kept some semblance of a duress defense alive.[82] In *Hernandez v. Reno*, an appeal from a BIA decision that mechanically applied the objective-effects test, the Eighth Circuit Court of Appeals found justification for a duress defense in its reading of *Fedorenko*.[83] Hernandez was a refugee from Guatemala who admitted to persecuting others, including serving

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71 *Id.* at 349.
72 *Id.*
73 *Id.*
74 *Id.*
75 *Bah*, 341 F.3d at 349–50.
76 *Id.* at 350.
77 *Id.*
78 *Id.* at 349.
79 *See In re* Rodriguez-Majano, 19 I. & N. Dec. 811, 814–15 (1988).
80 *Bah*, 341 F.3d at 351.
81 *Id.*
82 Fedorenko v. United States, 449 U.S. 490, 512 n.34 (1981).
83 *See* Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001).

on a firing squad that executed innocent civilians.[84] Under the objective-effects analysis used in *Bah*, Hernandez would certainly be ineligible for refugee status. However, the court of appeals used a different approach:

> In this case, the [BIA] omitted most of the facts in the record from its legal analysis. It did not consider Hernandez's uncontroverted testimony that his involvement with [the Organization for People in Arms, a rebel group active in Guatemala,] was at all times involuntary and compelled by threats of death and that he shared no persecutory motives with the guerrillas. . . . It focused only on his being part of the group that shot at the villagers.[85]

The court went on to contrast Hernandez's behavior with Fedorenko's, focusing on Hernandez's inability to flee and the fact that he was unpaid and vastly outnumbered.[86] While these factors are relevant to Hernandez's culpability in a moral sense, they are inapplicable to the question of whether Hernandez objectively assisted in persecution. Like the prototypical guard mentioned in footnote 34 of *Fedorenko*,[87] Hernandez served as an armed soldier and admitted to shooting at innocent civilians.[88] Hernandez's claim that he had intentionally aimed away from the victims of a firing squad massacre[89] was analogous to Fedorenko's claim that he had fired in the general direction of fleeing camp inmates without trying to hit them.[90] Despite Hernandez's similarities to Fedorenko—the epitome of a coerced persecutor—the court insisted that the BIA had incorrectly overlooked evidence of coercion and involuntary participation:

> If 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. Hernandez presented credible and uncontroverted testimony that he was unaware that [the Organization for People in Arms] was a violent guerilla organization and that he was forcibly recruited and compelled to join it under threats of death. He testified that he only participated in the action at Playa Grande [which included the massacre of fifteen civilians] be-

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84 *Id.* at 808, 809, 814.

85 *Id.* at 814.

86 *Id.*

87 Fedorenko v. United States, 449 U.S. at 512 n.34.

88 *Hernandez*, 258 F.3d at 809.

89 *Id.*

90 Fedorenko v. United States, 449 U.S. at 500.

> cause he knew he would be killed if he did not.[91]

Because the BIA had failed to consider Hernandez's claim that he persecuted others only under duress, the court remanded the case to the BIA to complete what it termed "a full *Fedorenko* analysis."[92]

While the Eighth Circuit Court of Appeals's interpretation of the objective-effects test appears flawed, it highlights the confusion inherent in the *Fedorenko* standard. This standard requires courts to apply a mechanical rule that forbids consideration of duress or coercion but simultaneously encourages inquiry into whether coerced behavior rises to the level of persecution. In footnote 34, the *Fedorenko* Court seems to engage in, perhaps even encourage, a *sub rosa* consideration of voluntariness.[93] On one side of the continuum, the Court places "an individual who did no more than cut the hair of female inmates before they were executed" as an example of behavior that does indeed "assist" or "otherwise participate" in persecution but nonetheless does not trigger the persecutor bar.[94] On the opposite end of that continuum exists a refugee who behaved much like Feodor Fedorenko:

> [T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit the nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.[95]

This confusion arises because footnote 34 actually does address the voluntariness of a persecutor's behavior.[96] Whether the guard was armed or had money and freedom to leave the concentration camp has little to do with the actual persecution in question. Instead, these facts are indicators of the guard's ability to resist or flee, and they speak to the guard's volition, rather than his objective participation in persecution. Of the applications of the *Fedorenko* standard that arose, the Eighth Circuit Court of Appeals's approach in *Hernandez* was perhaps the furthest from the mechanical standard required by the holding of *Fedorenko*, but closest to the nuanced, *sub rosa* approach suggested in dicta.[97]

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91 *Hernandez*, 258 F.3d at 815.
92 *Id.* at 815.
93 Fedorenko v. United States, 449 U.S. at 512.
94 *Id.* at 512 n.34.
95 *Id.* at 512–13 n.34.
96 *Id.* at 512 n.34.
97 *See id.*; *see also id.* at 517 (agreeing with the contention that "courts necessarily

D. Negusie v. Holder*: The End of the Strict-Liability Persecutor Bar?*

In 2009, the Supreme Court decided *Negusie v. Holder*, which examined the strict-liability persecutor bar that grew out of the BIA's application of *Fedorenko* to 8 U.S.C. § 1101(a)(42).[98] As in *Fedorenko*, the refugee affected by the persecutor bar was a prison-camp guard accused of persecuting others on protected grounds.[99] Despite this similarity, *Negusie* presents a more modern iteration of the dilemma of the persecuted persecutor.

Daniel Negusie lived in Ethiopia, his father's home country, until he was eighteen years old.[100] In 1994, he moved to Eritrea to visit his mother and to find work.[101] A few months after arriving, Negusie went to see a movie at his local theater.[102] While he was inside, Eritrean soldiers surrounded the theater and arrested the moviegoers as they left the building.[103] The soldiers fired upon anyone who attempted to flee and bound everyone with rope.[104]

After his capture, the Eritrean government sent Negusie to work in a salt mine.[105] Soldiers forced anyone who attempted to flee the mines to lie in the sun for three days without food or water, a potential death sentence.[106] After a month of laboring in the salt mines, Negusie underwent six months of mandatory military training and was conscripted into the Eritrean Navy.[107] However, when war reignited between Ethiopia and Eritrea in 1998, Negusie refused to fight against his father's homeland, Ethiopia.[108] Eritrean officials arrested Negusie and sent him to a prison camp.[109]

Throughout the war and continuing to the present, the Eritrean government has persecuted its subjects for their religious beliefs, singling out Protestant Christians in particular.[110] During his

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and properly exercise discretion in characterizing certain facts while determining whether an applicant for citizenship meets some of the requirements for naturalization") (citation omitted).

98 Negusie v. Holder, No. 07-499, slip op. at 2 (U.S. Mar. 3, 2009).

99 *Id.*

100 *Id.*

101 *Id.*

102 Brief for Petitioner at 13, Negusie v. Mukasey, No. 07-499 (2009), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-499_Petitioner.pdf.

103 *Id.*

104 *Id.*

105 *Id.* at 14.

106 *Id.*

107 *See* Brief for Petitioner, *supra* note 102, at 14.

108 *Id.* .

109 Negusie v. Holder, No. 07-499, slip op. at 2 (U.S. Mar. 3, 2009).

110 Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Inter-

incarceration, Negusie converted to Protestant Christianity, which destined him for more severe persecution.[111] For the mere act of talking to fellow Christians while in prison, the guards forced Negusie to roll on the ground while being beaten with sticks everyday for two weeks.[112] After two years of such treatment, the prison camp's commanding officer ordered Negusie to work as a prison guard.[113] Negusie knew that he would be executed if he attempted to flee because two of his friends, also conscripted prison guards, had been killed in escape attempts.[114]

For the next four years, Negusie lived in the prison camp as a guard, although he was not permitted to leave.[115] He carried a gun, wore a uniform, and was responsible for preventing the escape of prisoners.[116] He also admitted that, under orders, he denied prisoners access to showers and fresh air and witnessed other guards force prisoners to roll on the ground in the hot sun, at least once to the point of death.[117] At the same time, Negusie refused to personally participate in such torture because it offended his beliefs as a Christian.[118] Although his superiors threatened him with execution for his disobedience, Negusie periodically allowed prisoners to take showers at night and secretly gave them food, water, and cigarettes.[119]

In 2004, after a decade of mistreatment by the Eritrean government, Negusie escaped the prison camp and hid himself aboard a ship bound for the United States.[120] He applied for asylum and withholding of removal soon after arriving in the United States. Although the immigration judge found no evidence that Negusie was a "malicious person or that he was an aggressive person who mistreated the prisoners," "the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in . . . persecution . . . and bar[red him] from relief."[121] On appeal, the BIA ex-

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NATIONAL RELIGIOUS FREEDOM REPORT 2007: ERITREA, http://www.state.gov/g/drl/rls/irf/2007/90096.htm (2007).

111 Brief for Petitioner, *supra* note 102, at 14.

112 *Id.*

113 *Id.* at 14–15.

114 *Id.* at 15.

115 *Id.*

116 *See* Brief of Petitioner, *supra* note 102, at 15.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 Brief for Petitioner, *supra* note 102, at 16.

plained, "[t]he fact that [Negusie] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial. . . . [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."[122]

The Fifth Circuit Court of Appeals upheld the BIA's decision under the standard set in *Bah* and *Fedorenko*.[123] "The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions. . . . Rather, the inquiry should focus "on whether particular conduct can be considered assisting in the *persecution* of civilians."[124] Although the court noted that "Negusie did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, did favors for prisoners, and was reprimanded for doing so," his role as a prison guard rendered him ineligible for asylum.[125]

In 2009, the Supreme Court decided Negusie's case and overturned two decades of lower courts' application of *Fedorenko* to 8 U.S.C. § 1101(a)(42).[126] The majority opinion, written by Justice Kennedy, held that the BIA mistakenly used *Fedorenko* to interpret the INA's definition of a refugee.[127] However, citing principles of *Chevron* deference, the Court remanded to the BIA to allow agency reinterpretation of 8 U.S.C. § 1101(a)(42), which the Court deemed ambiguous.[128]

The Court provided two reasons why *Fedorenko* was not controlling for 8 U.S.C. § 1101(a)(42). First, *Fedorenko* dealt with the DPA, which provided a voluntariness requirement in § 2(b) but not in § 2(a).[129] Using traditional rules of statutory construction, the *Fedorenko* Court interpreted the conspicuous absence of the word "voluntary" in the persecutor bar in § 2(a) as evidence of Congress's intent to preclude a duress defense. In the immigration statute, however, there is no similar use of the word "voluntary," "so its omission cannot carry the same significance."[130]

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122 *Id.* at 17.
123 Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).
124 *Id.* at 326.
125 *Id.*
126 *See* Negusie v. Holder, No. 07-499, slip op. at 2 (U.S. Mar. 3, 2009).
127 *Id.*
128 *Id.*
129 *Id.* at 7 (explaining the *Fedorenko* Court's interpretation of the DPA, Fedorenko v. United States, 449 U.S. 490, 512 (1981)).
130 *Id.*

Second, the Court compared the context of the statutory scheme at issue in *Fedorenko* to the context of the asylum statute.[131] The DPA, which dealt with the horrors of the Holocaust, contained no reference to culpability in its persecutor bar because "the crime against humanity that is involved in the concentration camp puts it into a different category."[132] Conversely, Congress enacted the persecutor bar applied against Negusie as part of the Refugee Act of 1980.[133] The Refugee Act, unlike the narrowly targeted DPA, provided guidelines for the treatment of all refugees, not just Europeans displaced by World War II.[134] In addition, Congress passed the Refugee Act "to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees," which did not prohibit a duress exception.[135]

The Court rejected the government's claim that even if the statute were ambiguous, the BIA's interpretation was reasonable and merited deference.[136] Because the BIA incorrectly assumed that *Fedorenko* controlled its interpretation of the persecutor bar in the Refugee Act, the Court found that the BIA had been prevented from fully considering the statutory question before it.[137] Instead of providing its own answer to the question of whether a duress exception can be applied, the Court found itself bound by the "ordinary remand rule," which required the agency to "bring its expertise to bear upon the matter" before the Court could interpret the statute.[138] As a result, the Court remanded Negusie's case to the BIA for reinterpretation.[139]

II. The Future of the Persecutor Bar

The fate of the persecutor bar now rests in the hands of the BIA. The majority opinion in *Negusie* gave little explicit guidance to the BIA and instead remanded to overcome what it considered a misapplication of *Fedorenko*.[140] The BIA now has two options. First, it could allow a duress defense to the persecutor bar, based on the Court's statement that *Fedorenko* improperly tainted the BIA's inter-

131 Negusie v. Holder, No. 07-499, slip op. at 7.
132 *Id.* at 8 (quoting Fedorenko v. United States, 449 U.S. at 511 n.32).
133 *Id.*
134 *Id.*
135 *Id.*
136 Negusie v. Holder, No. 07-499, slip op. at 8.
137 *Id.* at 8–9.
138 *Id.* at 11–12.
139 *Id.* at 11.
140 *See generally* Negusie v. Holder, No. 07-499, slip op. (majority opinion).

pretation of 8 U.S.C. § 1101(a)(42), thereby opening the door to a duress defense. Alternatively, the BIA might simply apply the same *Fedorenko* objective-effects standard but base it on different grounds.

The BIA should allow a duress defense to the persecutor bar at 8 U.S.C. § 1101(a)(42).[141] This Part presents four reasons why a duress defense is both necessary and preferable. It will conclude by providing counter-analysis to Justice Scalia's concurrence with the majority opinion in *Negusie*, in which he argued against a duress defense.[142]

A. Arguments in Support of a Duress Defense

1. Common-Sense Statutory Construction

Justice Stevens has consistently and compellingly insisted that all persecutor bars, even those dealing specifically with former Nazis, must be interpreted subject to a duress defense. In *Negusie*, he repeated the common-sense argument he made twenty-eight years prior in *Fedorenko*.[143] "The *Fedorenko* Court's construction of the DPA threatened to exclude from the United States concentration camp prisoners who were forced to assist the Nazis in the persecution of other prisoners. In my view, this construction was insupportable . . . . These prisoners were victims, not persecutors."[144] For the same reason, he argued that the persecutor bar in 8 U.S.C. § 1101(a)(42) must be applied subject to a duress defense.

Apart from Justice Stevens's claim that it was bizarre to interpret the persecutor bar such that it precludes many of the people to whom the statute meant to grant asylum, he offered little support for his statutory interpretation argument. However, well-established canons of statutory interpretation validate this reasoning. For example, it is clear that the Court must avoid interpretations that would lead to "absurd or futile results."[145] Allowing a duress defense comports with this principle of statutory construction and

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141 This Article argues that a duress defense should also be applied to the other persecutor bars that used the language of the Holtzman Amendment. These persecutor bars serve essentially the same purpose. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1182(a)(3)(E), 1231(b)(3)(B)(i). This Part does not address the persecutor bar in the DPA or the original Holtzman Amendment because they serve a more specific purpose limited to World War II.

142 Negusie v. Holder, No. 07-499, slip op. (Scalia, J., concurring).

143 United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978).

144 Negusie v. Holder, No. 07-499, slip op. at 7–8 (Stevens, J., concurring in part and dissenting in part).

145 Perry v. Commerce Loan Co., 383 U.S. 392, 400 (1966).

common sense. In contrast, to deny the asylum claim of an arguably faultless refugee for actions that were beyond his control is cruel and arbitrary.

2. Comparisons to Other Nations' Persecutor Bars

The Refugee Act of 1980 implemented the United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees, both of which contain persecutor bars that turn on the word "crime."[146] Justice Stevens supported his common-sense argument by referring to these international predecessors of the Refugee Act. "The language of the Convention's exception is critical: we do not normally convict individuals of *crimes* when their actions are coerced or otherwise involuntary."[147] The high stakes of the persecutor bar and the nature of its international predecessors demonstrate that "'mitigating circumstances' must be considered in determining whether an alien's acts are of a 'criminal nature.'"[148] Duress is one such mitigating factor.[149]

Furthermore, other countries that implemented these treaties consistently limit the application of their persecutor bars to culpable, voluntary conduct. For example, Canada, Australia, and the United Kingdom have recently applied their versions of the persecutor bar subject to a duress defense.[150] This is notable because these countries' persecutor bars are based on the same international agreements that form the foundation of the American persecutor bar.[151] While the Court may be unimpressed by international precedent, this comparison should be especially compelling given the international nature of asylum law.

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146 Refugee Act of 1980, 8 U.S.C. § 1525 (2006); United Nations Convention Relating to the Status of Refugees art. I, para. F, *adopted* July 28, 1951, 189 U.N.T.S. 137, 156 (*entered into force* Apr. 22, 1954); *see* United Nations Protocol Relating to the Status of Refugees art. I, para. 2, *done* Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268 (*entered into force* Oct. 4, 1967) (incorporating the definition of "refugee" set forth in the preceding Convention, *id.*, and thereby its persecutor bar). The United States is not a state party to the Convention, but it is a state party to the Protocol. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION AND ITS 1967 PROTOCOL, http://www.unhcr.org/3b73b0d63.html (Oct. 1, 2008).

147 Negusie v. Holder, No. 07-499, slip op. at 9 (U.S. Mar. 3, 2009) (Stevens, J., concurring in part and dissenting in part).

148 *Id.*

149 18 U.S.C. § 3592(a)(12) (2006).

150 *See* Brief for Scholars of International Refugee Law as Amici Curiae in Support of Petitioner at 25–27, Negusie v. Holder, No. 07-499 (2009).

151 *See id.*

3. Evolution of Persecution

Since the drafting of the first refugee statutes in the wake of World War II, the nature of persecution has changed. When Congress drafted the DPA, persecution was generally more systematic and overt than it is today. The Holocaust is the best example of this, having led to the extermination of millions of innocent people.[152] The word "genocide"[153] and the legal concept of persecution[154] were created to deal with this unprecedented horror.[155] Against this backdrop, it is easy to understand why early constructions of refugee statutes adopted a strict-liability persecutor bar—no one who assisted the Nazis could claim to lack knowledge of the brutality that took place across Europe because it had been so extensive and overt. Similarly, because the persecution during the Holocaust was so extreme, and the risk of admitting a former SS officer or other mass murderer was so high, eliminating a duress defense seemed necessary. Finally, most of the world was in the midst of a refugee crisis.[156] Not every refugee could be guaranteed asylum in stable countries, so those who had assisted the enemy, whether voluntarily or not, were left behind.

With a number of gruesome exceptions, systematic persecution at the hands of centralized national governments has become less common.[157] Instead, much modern persecution is carried out by dissident groups and military dictatorships in the context of civil war.[158] This form of persecution has a double impact, as exemplified by the use of child soldiers. First, these children are separated from their families, tortured, drugged, and often killed without

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152 *See, e.g.*, Fedorenko v. United States, 449 U.S. 490, 494, 494 n.2 (1981) (noting that the Nazis slaughtered over 800,000 civilians at Treblinka alone, which the Court described as a "human abattoir").

153 United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

154 *See* Constitution of the International Refugee Organization, *supra* note 14, annex I, pt. II(2) (denying refugee status to those who assisted in persecution).

155 *See* Daphne Anayiotos, *The Cultural Genocide Debate: Should the U.N. Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon be Encompassed in a Separate International Treaty?*, 22 N.Y. INT'L L. REV. 99, 99 (2009).

156 *See* Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in other Anglo-American Legal Systems*, 29 CAL. W. INT'L L.J. 1, 13 (1998) (explaining that nearly eight million refugees became wards of the Allied Forces).

157 *See* Walls, *supra* note 12, at 236.

158 *See* The Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict,* para. 8–16, *delivered to the General Assembly*, U.N. Doc. A/61/275 (Aug. 17, 2006) (describing widespread kidnapping and coercion of children); *see also* Walls, *supra* note 12, at 236 (describing the chaotic civil strife that gives rise to modern persecution and lacks the clear boundaries of war between sovereign nations).

provocation.[159] Second, because the combination of guerrilla warfare tactics and lightweight weapons make children effective soldiers, child soldiers are persecuted once again when they are forced to fight opposing forces and slaughter innocent people.[160]

> K.S., for example, was nine years old and playing soccer after school in Sierra Leone when rebel soldiers from the Revolutionary United Front ([ ]RUF[ ]) seized him and his playmates around the same age. . . . About a month after his abduction, K.S. tried to escape, but was caught. The rebels held him down and branded his upper arm with a hot iron. . . . The rebels told K.S. that if he tried to escape again, they would cut off his arm. They later slashed his hands and chest with a razor . . . [and] burned K.S. with cigars for minor infractions, beat him over the head with their guns, kicked him, and hit him.
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> . . . The RUF deliberately used drugs to desensitize the children in their command, neutralize their terror, and increase their dependence. Under these conditions, K.S. was made to take part in what he and the government agree were atrocities.[161]

Ishmael Beah, a former child soldier, highlighted the widespread use of child soldiers in his testimony before Congress:

> [T]here are thousands of children from ages [eight] to [seventeen] in Burma, Sri Lanka, Congo, Uganda, Ivory Coast, Colombia, just to name a few places, that are being forced to fight and lose their childhoods and their families. They are maimed and they lose their humanity, and these are the fortunate ones.[162]

This form of persecution through coercion is certainly not limited to child soldiers. "[T]he majority of refugees in the world today are . . . fleeing from civil conflicts in which the distinction between oppressor and oppressed is often unclear."[163]

Unlike the concentration camps of World War II, which had the goal of bringing quick and efficient death to as many as possi-

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159 *See* Brief for Human Rights First et al. as Amici Curiae in Support of Petitioner at 21–24, Negusie v. Holder, No. 07-499 (2009), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-499_PetitionerAmCu4HumanRightsOrgs.pdf.

160 *See id.* at 23–24.

161 *Id.* at 21–22 (explaining that when K.S.'s asylum case appeared before the immigration court, the Department of Homeland Security cited *Bah. v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), and *Fedorenko v. United States*, 449 U.S. 490 (1981), to support its claim that K.S. should be barred from seeking asylum because he engaged in the persecution of others).

162 *Casualties of War: Child Soldiers and the Law: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 7 (2007).

163 Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1131 (2002).

ble, many modern persecutors are intent only on achieving a form of psychological death.[164] These persecutors force their victims to commit atrocities and violate cultural taboos in order to break their spirits and ensure future cooperation or prevent dissent.[165]

The Piteşti "re-education" prison established by the Romanian Communist government exemplifies this psychological persecution through violation of the *forum internum*.[166]

> At Piteşti, prisoners were thus forced to participate in persecution of fellow believers in two distinct ways: (1) through physical torture of other prisoners and (2) through participation in ceremonies they and their fellow believers believed to be blasphemous. Moreover, both forms of forced participation in persecution had at least *two* victims; believers were the vehicles of persecution for both themselves and others.[167]

More recently, both pro-government and rebel forces in Côte d'Ivoire used sexual violence to subdue civilian populations and break the spirits of their victims.[168]

It is unlikely that the *Fedorenko* Court envisioned a nine-year-old child soldier or a torture victim fleeing religious persecution when it established a rule that barred any refugee who participated in persecution. In fact, in voicing its support for the Holtzman Amendment, the Department of State informed Congress that "with the passage of time, [the persecutor bar] will be applicable to an ever-decreasing number of aliens."[169] This means that the State Department either did not anticipate the use of the Holtzman Amendment's broad language in other asylum statutes or that it could not foresee the increasing prevalence of coerced persecutors. In either case, this prediction has proven false.

The persecutor bar impacts many refugees who have little in common with the Nazi war criminals whom the harsh language of the Holtzman Amendment intended to punish. As Justice Stevens stated most recently in *Negusie*, many refugees excluded by the persecutor bar have more in common with the *victims* of the Holocaust

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164 *See* Brief for the Becket Fund for Religious Liberty et al. as Amici Curiae in Support of Petitioner at 7–8, Negusie v. Holder, No. 07-499 (2009), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-499_PetitionerAmCuBecketFnd16RelsOrgs.pdf.

165 *See id.* at 7–11.

166 *See id.* at 8–11.

167 *Id.* at 10.

168 *See generally* HUMAN RIGHTS WATCH, MY HEART IS CUT: SEXUAL VIOLENCE BY REBELS AND PRO-GOVERNMENT FORCES IN CÔTE D'IVOIRE 21–85 (2007), *available at* http://www.hrw.org/sites/default/files/reports/cdi0807webwcover.pdf.

169 H.R. REP. NO. 95-1452, *supra* note 20, at 12.

than with willful persecutors.[170] The increase in coerced persecution will only exacerbate this problem unless a duress defense is permitted.

4. Policy Goals of the INA

Applying the persecutor bar without considering a refugee's moral culpability clashes with the purpose of the INA's refugee provisions. The Refugee Act of 1980, modifying the INA, defines the INA's purpose in broad and ideologically neutral terms—"to respond to the urgent needs of persons subject to persecution in their homelands."[171] This breadth ensures that refugees do not flee their homelands to escape persecution on account of their identity only to be denied asylum in the United States because of that same identity. Accordingly, the INA denies asylum to refugees because of their past behavior or identity only in narrowly defined situations. For example, besides the persecutor bar, the INA bars refugees who have serious criminal histories or present a threat to the security of the United States.[172] This Article suggests two possible rationales for denying asylum to these groups. First, and most obviously, it is against the interest of the United States to admit refugees who might commit crimes against U.S. citizens or present a threat to national security. Second, denying access to criminals and terrorists demonstrates disapproval of the actions of these groups and may act as a deterrent to bad behavior.

To some degree, these goals justify the persecutor bar as well.[173] First, barring refugees who have persecuted others protects U.S. citizens from potentially dangerous people. More convincingly, barring persecutors is a powerful symbolic condemnation of persecution. However, both rationales break down in the case of coerced persecution. Refugees who have persecuted others only because they were coerced to do so cannot be deemed as dangerous as people who willfully persecuted others. Even if these refu-

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170 *See* Negusie v. Holder, No. 07-499, slip op. at 8 (U.S. Mar. 3, 2009) (Stevens, J., concurring in part and dissenting in part).

171 Refugee Act of 1980, Pub. L. 96-212, § 101, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1521 (2006)); *see* Walls, *supra* note 12, at 231.

172 8 U.S.C. §1158(b)(2)(A) (2006) (barring persecutors, people convicted of serious crimes, people who pose a threat to national security, and people who supported terrorism).

173 Abbe L. Dienstag, Comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 147–62 (1982) (discussing utilitarian, retributive, and symbolic rationales for allowing a duress defense to the persecutor bar).

gees had persecuted others willfully, there is evidence that they would pose little threat to American citizens or national security:

> Far from adhering to radical[,] right-wing philosophies or participating in antidemocratic activities, most World War II Nazis who have taken refuge in this country have led the lives of model citizens. Society has little to fear from even such of these criminals who acted voluntarily. It should face no threat whatsoever from those whom it adjudges coerced.[174]

Justice Scalia, in his concurring opinion, compellingly pointed out that granting asylum to persecutors might result in persecutors and their victims meeting each other in the United States.[175] While there is no evidence that former persecutors have ever sought out or attacked their victims in America, it is obvious that even a brief encounter could be extremely traumatic for persecutors' victims. However, in the case of a coerced persecutor like Daniel Negusie, such a meeting would likely be much less traumatic. Indeed, because Negusie aided his "victims" "on various occasions,"[176] and because Negusie was himself a victim, it seems possible that the encounter could provoke a sense of solidarity with Negusie, rather than fear of him.

The symbolic disapproval and deterrence rationales also fail under closer scrutiny. First, harsh disapproval of coerced behavior sends a confusing message. Coerced behavior is rarely morally blameworthy.[177] Similarly, expressing disapproval of such behavior distracts from the disapproval that should go to the willful persecutor. In fact, punishing coerced persecutors may shift sympathy from the victim to the persecutor.[178] Furthermore, demonstrating disapproval of coerced behavior can have no deterrent effect. Coerced behavior is involuntary, so no amount of disapproval will prevent people from acting as persecutors while under duress. Saving disapproval for willful persecutors strengthens the symbolic power

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174 *Id.* at 162–63.

175 Negusie v. Holder, No. 07-499, slip op. at 3 (U.S. Mar. 3, 2009) (Scalia, J., concurring) .

176 *Id.* at 3 (majority opinion).

177 *See* MODEL PENAL CODE § 2.09 (1962) (detailing elements of duress defense in the criminal context); Steven J. Mulroy, *The Duress Defense's Uncharted Terrain: Applying it to Murder, Felony Murder, and the Mentally Retarded Defendant*, 43 SAN DIEGO L. REV. 159, 173 (2006) ("[V]irtually all civil[-]law nations permit duress as a complete defense to all crimes, including homicide, while virtually all common-law jurisdictions preclude the defense as it relates to the killing of innocent persons."). Even though U.S. federal courts do not permit the defense of duress to a charge of homicide, some individual states within the country do. *Id.* at 172–73.

178 *See* Dienstag, *supra* note 173, at 166.

of the exclusion and avoids punishing people who could be considered morally blameless.

Finally, the application of a volitional element would bring the persecutor bar into conformity with other provisions in the INA. Maintaining a strict-liability persecutor bar when other analogous provisions of the INA contain both explicit and implicit duress defenses creates a confusing inconsistency.[179] The BIA could solve this problem simply by adding a volitional element to the persecutor bar.

B. Scalia's Concurrence: In Support of the Fedorenko *Standard*

Despite disavowing a preference for any particular outcome, Justice Scalia provided the most compelling argument for maintaining the *Fedorenko* objective-effects standard. Justice Scalia, joined by Justice Alito, concurred with the Court's decision but noted that he would not have agreed to remand if the BIA did not have the option of leaving its interpretation of the statute unchanged.[180] Although Justice Scalia agreed that *Fedorenko* did not apply to 8 U.S.C. § 1101(a)(42), he provided three reasons why the BIA should continue to apply the objective-effects test that grew out of that decision.[181]

Justice Scalia first noted that the BIA is under no obligation to apply a rule that in any way considers a refugee's culpability for acts committed under duress.[182] Invoking the Nuremberg trials, he explained that duress is not a complete defense, and that it is inapplicable in the case of intentional killing or certain war crimes.[183] "[T]hose who are coerced to commit wrong are at least *sometimes* 'culpable' enough to be treated as criminals."[184] Furthermore, immigration and asylum are not criminal in nature and do not require application of the same standards. "Asylum is a benefit accorded by grace, not by entitlement, and withholding that benefit from all who have intentionally harmed others—whether under coercion or not—is not unreasonable."[185]

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179 *See* 8 U.S.C. § 1182(a)(3)(D)(ii) (2006) (declaring that membership in a totalitarian party will not render a refugee inadmissible if that membership was involuntary); *see also* 8 U.S.C. § 1182(a)(2)(H)(i) (barring human traffickers subject to an explicit mens rea requirement).

180 Negusie v. Holder, No. 07-499, slip op. at 1 (Scalia, J., concurring).

181 *Id.* at 2–3.

182 *Id.* at 3.

183 *Id.* at 2.

184 *Id.*

185 Negusie v. Holder, No. 07-499, slip op. at 3 (Scalia, J., concurring).

Second, Scalia argued that, "in the context of immigration law, 'culpability' as a relevant factor in determining admissibility is only one facet of a more general consideration: desirability."[186] Because only a limited number of refugees can be granted asylum, the BIA must have some means of choosing who may be admitted. Those who engage in persecution, whether under duress or of their own free will, may be considered less desirable than refugees who never participated in persecuting others. "If, for example, the asylum laws grant entry to those who suffered the persecution, might it not be imprudent to also grant entry to the coerced persecutor, who may end up living in the same community as one of his victims?"[187]

Finally, Justice Scalia claimed that a bright-line rule barring all persecutors, whether coerced or not, might still be the best means of reaching the statute's goals.[188] For example, a bright-line rule would minimize the administrative burden inherent in asylum cases. "Immigration judges already face the overwhelming task of attempting to recreate, by a limited number of witnesses speaking through (often poor quality) translation, events that took place years ago in foreign, usually impoverished countries."[189] Adding claims of duress would further complicate an already complicated process and increase the risk of admitting the un-coerced persecutors the statute intends to bar.

While Justice Scalia's argument presents valid concerns, it overlooks several key factors. First, he argued that the duress defense does not excuse extreme behavior like murder, even in the criminal law context.[190] However, this does not mean that a duress defense would not protect a substantial number of refugees who, like Negusie, persecuted others but never committed an extreme crime like murder. The persecutor bar uses the extremely broad language of the Holtzman Amendment and applies to people who have merely participated in persecution. As Justice Stevens noted, participation in persecution could be inherent to "almost every aspect of life or death in a concentration camp."[191] As a result, a duress defense would primarily benefit people who fall under the persecutor bar only because they *nominally* assisted in the persecution of others.

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186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*
190 Negusie v. Holder, No. 07-499, slip op. at 2 (Scalia, J., concurring).
191 Fedorenko v. United States, 449 U.S. 490, 534 (1981).

Justice Scalia's next argument, that a coerced persecutor might be "undesirable" as a refugee and should therefore be barred from resettlement in the United States,[192] overlooks the fact that coerced behavior says nothing about a person's inner character. Declaring refugees "undesirable" because they were forced to persecute others makes American asylum law seem arbitrary. Those who had the poor fortune of being forced to persecute others should not have to bear the label of "undesirable" once they make it to safety.

Finally, Justice Scalia incorrectly argued that a bright-line rule would be justified because it might avoid mistakes and prevent increasing the administrative burden on the BIA.[193] The burden of proof in asylum cases is already on the refugee.[194] This means that any refugee accused of persecuting others would have to prove that he did so under duress. While Justice Scalia correctly notes that immigration judges often face the difficult task of recreating events that occurred years in the past and in a foreign country, he overestimates the increased risk and cost of any error that might result. Even without a duress defense, refugees must convince judges that they satisfy the high standard set for traditional refugees. It is unlikely that an un-coerced persecutor could overcome the burden of proof to show both that he was persecuted *and* that the persecution he engaged in was under duress. In terms of preventing human suffering, the cost of letting a few such persecutors slip through would not be as great as barring hundreds or thousands of refugees from asylum with a bright-line rule.

If the BIA were to add a duress defense to the persecutor bar, the actual outcome would not result in any dramatic change to the broader structure of asylum law. For example, because "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion,"[195] the government would not be forced to admit more refugees if a duress defense applied. A duress defense would simply free immigration judges to admit coerced persecutors if they deemed it appropriate. Adding a duress defense will not allow a flood of new asylees into the United States. Instead, judges will no longer be forced to deny the asylum claims of those who persecuted others while under duress.

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192 Negusie v. Holder, No. 07-499, slip op. at 3 (Scalia, J., concurring).

193 *Id.*

194 8 U.S.C. § 1158(b)(1)(B)(i) (2006).

195 INS v. Aguirre-Aguirre, 526 U.S. 415, 420 (1999).

Conclusion

The BIA now has the freedom to craft a persecutor bar that recognizes the defense of duress. Because the goal of asylum law is ultimately humanitarian, the BIA should leave the harsh, objective-effects test of *Fedorenko* in the past. Allowing refugees who assisted in persecution under duress to distinguish themselves from *their* persecutors would preserve America's status as a refuge of sanity in an increasingly confusing and dangerous world.