ASSISTING IN PERSECUTION: ANALYZING THE DECISION IN *NEGUSIE V. GONZALES*, 231 F. APP'X 325 (5TH CIR. 2007)

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I. INTRODUCTION

While serving as the Chief Prosecutor during the Nuremberg Trials, United States Supreme Court Justice Robert H. Jackson highlighted the importance of the proceedings by stating: "What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. They are living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power."[1] Justice Jackson's observation of the inhumanity of the human creature was a precursor to the execution of eleven Nazi officers for crimes committed during the Holocaust.[2] Ultimately, in an attempt to further punish those responsible for the atrocities articulated by Justice Jackson, and to assist those devastated by the "arrogance and cruelty of power," the United States enacted the Displaced Persons Act, intending to allow entrance into the United States for World War II refugees while at the same time barring entrance to those who assisted in the persecution of civilians during the war.[3]

More than sixty years after the end of the Nuremberg Trials and the enactment of the Displaced Persons Act, the United States is still grappling with the question of how to provide asylum to victims of persecution without inadvertently giving haven to their persecutors. However, as time has passed, the line between victim and victimizer has become blurred and distorted, making it difficult at times to determine what actions constitute persecution and when an individual should be considered a persecutor.

One case of determining persecutor status arose when an Eritrean citizen, who had been forced by his government to serve as a prison guard at a location

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1. Justice Robert H. Jackson, Opening Address to the Int'l Military Tribunal at the Nuremberg Trials (Nov. 10, 1945).
2. Robert Shnayerson, *Judgment at Nuremberg*, SMITHSONIAN, Oct. 1996, at 124.
3. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009.

where persecution occurred, attempted to seek asylum in the United States.[4] After both an immigration judge and the Board of Immigration Appeals (BIA) denied the petition for asylum, an appeal was brought before the Fifth Circuit Court of Appeals in *Negusie v. Gonzales*.[5] The court denied the petition for judicial review of the BIA decision, effectively affirming the rulings of the Immigration Judge and the BIA that denied asylum.[6]

The Fifth Circuit reached an incorrect result in *Negusie*, based on its interpretation of the Supreme Court's analysis of a "voluntary participation" standard in *Fedorenko v. United States*.[7] Under the *Fedorenko* decision, a court does not look at the alien's intentions, but rather focuses solely on whether the actions amounted to persecution.[8] The decision in *Fedorenko* has become the gold standard for the "Persecutor Exception" to asylum over the past twenty years, despite the fact that *Fedorenko* interpreted the now-expired Displaced Persons Act and not the current asylum statute.[9] Subsequently, the Supreme Court granted certiorari in *Negusie*, which gave the Court the opportunity not only to correct the error of the Fifth Circuit in the case at bar, but also to create a new standard for asylum law and for the Persecutor Exception.[10] The Supreme Court reversed the decision of the Fifth Circuit, holding that the persecutor bar was ambiguous as to intent, and remanded the case for the BIA to reconsider.[11] As a result, the BIA now has the chance to correct its initial mistake in *Negusie*. However, perhaps more importantly, the BIA has the chance to create a new test for asylum that would analyze not only the alien's actions but the totality of the circumstances surrounding their participation in persecution when applying the persecutor bar.

Section II of this casenote will examine the historical background of asylum denials on the basis of the Persecutor Exception. Section III will present an exposition of the original *Negusie* decision from the Fifth Circuit. Finally, Section IV will analyze (A) the *Negusie* decision in the context of the existing asylum caselaw history, (B) why the application of the *Fedorenko*

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4. Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).
5. *Id.*
6. *Id.*
7. Fedorenko v. United States, 449 U.S. 490, 512 (1981).
8. *Id.*
9. James Lockhart, Annotation, *Construction and Application of 8 U.S.C.A. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i), Predecessor Statutes, and Applicable Regulations, Providing that Alien is Disqualified from Refugee Status and Ineligible for Asylum or Withholding of Removal if Alien Ordered, Incited, Assisted, or Otherwise Participated in Persecution of Individuals Because of Individual's Race, Religion, Nationality, Membership in Particular Social Group, or Political Opinion,* 29 A.L.R. FED.2d 267, 314 (2008).
10. Negusie v. Mukasey, 128 S. Ct. 1695 (2008).
11. Negusie v. Holder, 129 S. Ct. 1159 (2009).

"intent irrelevance" doctrine is erroneous in *Negusie*, (C) why the Supreme Court was correct in refusing to affirm the denial of asylum on the basis of the persecutor bar in *Negusie*, and (D) the necessity and benefit of the creation of a new *Negusie* test for asylum that looks to the totality of circumstances in applying the bar. While the review of *Negusie* could grant justice in the current case, a new base line for asylum cases still needs to be established to re-draw the distinction between the victims and the persecutors.

II. BACKGROUND

The Persecutor Exception traces its origins to the post-World War II period. In the war's aftermath, the United States and the newly created United Nations struggled to find the best policy for assisting the copious amount of refugees left by the war, while punishing the persecutors that were responsible for the atrocities. Out of this chaos came the definitions of refugees and persecutors that laid the ground work for what would eventually become modern-day asylum law. This section will examine (A) the development of the statutory guidelines for the Persecutor Exception, (B) the creation of the "intent irrelevance" doctrine, and (C) Persecutor Exception caselaw.

A. Statutory Guidelines for the Persecutor Exception

In order to understand the current state of statutory asylum law and the Persecutor Exception, it is vital to trace the pedigree of such legislation. Shortly after World War II and after the League of Nations gave way to the United Nations (UN), the UN created the International Refugee Organization, or IRO, which later became the United Nations High Commissioner for Refugees in 1951.[12] A resolution from the UN created the IRO on February 12, 1946 and the organization was formally accepted by the United States on July 3, 1947.[13] The IRO developed from the "necessity of clearly distinguishing between genuine refugees and displaced persons on one hand, and the war criminals, quislings and traitors . . . on the other."[14] The IRO had various definitions for "refugee," including "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war" and "persons who were considered refugees before the outbreak of the second

12. U.N. Office at Geneva, http://www.unog.ch/ (follow "League of Nations" quicklink, then follow "History" hyperlink; then follow the "Technical Activities" hyperlink) (last visited Mar. 25, 2010).
13. *Id.*
14. Const. of the Int'l Refugee Org. Annex III, Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3..

world war, for reasons of race, religion, nationality, or political question."[15] The Organization explicitly said that "war criminals, quislings, and traitors" along with "any other persons who can be shown (a) to have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations" were not their concern and would not receive the benefits of the Organization.[16] However, acts that were "the mere continuance of normal and peaceful duties" or "acts of general humanity" performed in enemy occupied territory were not considered to be voluntary aid within the meaning of the exclusion definitions.[17]

Following the UN's example, the United States enacted a national plan for dealing with refugees when it enacted the Displaced Persons Act (DPA) of 1948.[18] The Act created a system for admitting World War II refugees into the United States that established levels of priority for displaced persons and re-worked the immigration quotas that were in place at the time.[19] The DPA borrowed heavily from the IRO Constitution, so much so that the only definition it gave for "displaced person" was "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization," referencing the language of the IRO Constitution that barred aid to those who had assisted in persecution.[20]

The DPA was not without controversy. Upon signing the act into law, President Harry S. Truman complained that Congress had waited eighteen months to create the DPA after Truman had called for immediate action to assist war refugees.[21] Truman further chastised Congress for having waited until the end of the session to pass such important legislation, and he referred to the compromise that created the final draft of the act as "combining the worst features of both the Senate and the House bills."[22] The President insisted that his signing of the bill hinged entirely on his inability to wait for the new session of Congress to generate a better act, stating "If the Congress were still

15. Const. of the Int'l Refugee Org., *supra* note 14, Part I, § A.
16. *Id.* Part II.
17. *Id.*
18. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).
19. *Id.* at 1012.
20. *Id.* at 1009.
21. Statement by the President Upon Signing the Displaced Persons Act, 4 PUB. PAPERS 382 (June 25, 1948).
22. *Id.* at 383.

in session, I would return this bill without my approval and urge that a fairer, more humane bill be passed."[23]

With the fallout of World War II long since resolved, the current Persecutor Exception is codified under the asylum subsection of the immigration statute at 8 U.S.C. § 1158.[24] Under the current statutory language, an asylum candidate must show "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecut[ion]."[25] The specific language that creates the Persecutor Exception states that asylum does not apply if the applicant "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."[26]

B. Birth of the "Intent Irrelevance" Doctrine

Neither the Constitution of the International Refugee Organization, the Displaced Persons Act of 1948, nor the current asylum statute contains language that addresses involuntary assistance in persecution, nor is there any mention of the intent of the refugee. This omission created a possible problem that was ultimately dealt with by the Supreme Court, perhaps unintentionally, in *Fedorenko v. United States*, with the creation of the "Intent Irrelevance" doctrine.[27]

In *Fedorenko*, the Government brought an action to denaturalize Feodor Fedorenko, a Ukrainian-born, naturalized U.S. citizen who had worked as an armed guard at a concentration camp during World War II.[28] Fedorenko came to the United States after the war under the Displaced Persons Act of 1948, escaping the Persecutor Exception by lying about his activities during the war.[29] While the bulk of the Supreme Court's decision centered on the legality of revoking Fedorenko's citizenship, the Court also looked at whether Fedorenko would have been eligible for entrance into the United States under the DPA, a question which it answered in the negative.[30]

Previously, the District Court for the Southern District of Florida had held that Fedorenko would not have been barred by the Persecutor Exception

23. *Id.* at 382.
24. 8 U.S.C. § 1158 (2000).
25. *Id.*
26. *Id.*
27. Fedorenko v. United States, 449 U.S. 490 (1981).
28. *Id.* at 493.
29. *Id.* at 507.
30. *Id.* at 513.

in the DPA because he had been forced into his guard position by the Nazis after he had been captured in the Ukraine.[31] Through this ruling, the district court imposed a voluntariness standard on participation in persecution.[32] The court was fearful that a literal interpretation of the DPA would bar assistance to any prisoner who was forced to cut hair or was forced to lead other prisoners to the location where they would be executed.[33] It explained that it would be "absurd to deem their conduct 'assistance or acquiescence' inasmuch as it was involuntary–even though the word 'voluntarily' was omitted from the definition."[34]

The Supreme Court rejected this reasoning, explaining that to imply a requirement of voluntariness where it was not included in the language would be not "to construe the Act but to amend it."[35] As a solution to the fears expressed by the district court, the Supreme Court said that the focus should not be on a fictitious "voluntary" standard, but rather on "whether particular conduct can be considered assisting in the persecution of civilians."[36] Under this test, someone who was forced to cut hair would not be a persecutor, but someone like Fedorenko "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" would meet the persecutor definition laid out in the DPA.[37] Ultimately, the Supreme Court found that Fedorenko's citizenship had to be revoked.[38]

In a dissenting opinion, Justice Stevens rejected the majority's test for whether an action was persecution in favor of the voluntarily-assisted test that had been created by the district court.[39] He pointed out that the majority attempted to apply a very limited reading of "persecution" so as to not include acts such as cutting the hair of female prisoners, even though such acts clearly fall under the definition of "persecution."[40] Justice Stevens went on to note that the appellate court accepted the district court's inclusion of the voluntary standard, and that the Government had not challenged that notion in their appeal.[41] Calling the majority's ruling a "strained reading" of the statute,

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31. *Id*. at 511.
32. *Id.*
33. *Id.* at 513.
34. *Id*.
35. *Id*. at 513 (quoting Detroit Trust Co. v. Barlum, 293 U.S. 21, 38 (1934)).
36. *Id.* at 514.
37. *Id.*
38. *Id*. at 519.
39. *Id*. at 535 (Stevens, J., dissenting).
40. *Id*.
41. *Id*. at 535–36.

Justice Stevens concluded that Fedorenko would not have been barred as a persecutor "[i]f the DPA [had been] correctly construed."[42]

C. Persecutor Exception Caselaw

Following the Court's rejection of the voluntary standard in *Fedorenko* in favor of the acts of persecution test, the lower courts have subsequently interpreted and reinterpreted what the acts of persecution test means.[43] As a result, applications of the test have been inconsistent.[44] However, most caselaw has avoided the *Fedorenko* decision when analyzing whether the actions of the alien meet the definition of "persecution" in favor of an approach that looks to the culpability of the alien in relation to the persecution.[45]

The First Circuit, for example, accepts the *Fedorenko* assessment that involuntary participation is enough to garner a persecutor tag, placing the involuntary defense "somewhere between a showing of true duress and an 'obeying orders' defense."[46] However, that court has acknowledged the need for some degree of moral culpability and has found that an alien would not be barred under the Persecutor Exception if he did not know of the persecution taking place.[47]

The Second Circuit regards *Fedorenko* as the guide to determining what "assistance" in persecution is and, consequently, who is barred from receiving asylum due to the Persecutor Exception.[48] The test laid out in *Fedorenko* has been extrapolated by the Second Circuit to "[look] not to the voluntariness of the person's actions, but to his behavior as a whole. Where the conduct was active and had direct consequences for the victims . . . it was 'assistance in persecution.'"[49] This assessment holds true even if the act is relatively minor.[50] However, if the acts can be classified as "tangential to the acts of oppression and passive in nature," then the actions fail to meet the Persecutor Bar standard.[51]

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42. *Id*.
43. Lockhart, *supra* note 9, at 283–84.
44. *Id.*
45. *Id.* at 284.
46. Castaneda-Castillo v. Gonzales, 488 F.3d 17, 21 (1st Cir. 2007).
47. *Id*. at 21–22.
48. Xu Sheng Gao v. United States Attorney Gen., 500 F.3d 93, 99 (2d Cir. 2007).
49. *Id.*
50. *Id*. at 99–100.
51. Xie v. Immigration and Naturalization Serv., 434 F.3d 136, 143 (2d Cir. 2006).

In the Fourth Circuit the principles set forth in *Fedorenko* are still stringently followed, although the court is not as quick to tie its language back to *Fedorenko*.[52] The court uses a broad definition for persecution that encompasses acts beyond inflicting direct physical harm.[53] It should also be noted that the Fourth Circuit has relied heavily on the interpretation of the persecutor bar from Fifth and Seventh Circuits when employing its own bar.[54] Both of these circuits have relied heavily on *Fedorenko* in crafting their persecutor bar, thus adopting the *Fedorneko* language into the Fourth Circuit.[55]

Prior to rendering a decision denying asylum in *Negusie*, the Fifth Circuit had previously decided that the intent of the alien was irrelevant in applying the persecutor bar.[56] The argument that an alien who was forced to participate in persecution did not share the intent of the persecuting agency was rejected soundly by the court as an attempt to circumvent the plain reading of the statute.[57] Utilizing this plain meaning approach, the court found that asylum was barred to those whose actions amounted to persecution.[58]

This hard-line acceptance of *Fedorenko* is also apparent in the Sixth Circuit, which puts its focus on the actions, voluntary or involuntary, of the asylum applicants.[59] The court explicitly states that involuntary participation can be considered as assisting in persecution.[60] The Sixth Circuit also points out that the government does not need to prove personal involvement in atrocities in order for the persecutor bar to take effect.[61]

Similarly, the Seventh Circuit accepted the *Fedorenko* test, but it also acknowledged that engaging in "line-drawing" to determine what constitutes actual persecution can be difficult.[62] To solve this problem, the court suggested "a distinction be made between genuine assistance and inconsequential association with persecutors."[63] To achieve this end, the "record must reveal that the alien actually assisted or otherwise participated in persecution" before the persecutor bar is applied.[64]

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52. *See* Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006).
53. *Id*. at 421.
54. *Id.* at 420–21 (citing Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003) and Singh v. Gonzales, 417 F.3d 736 (7th Cir. 2005)).
55. *See Bah*, 341 F.3d 348; *Singh*, 417 F.3d 736.
56. *Bah*, 341 F.3d 348.
57. *Id.*
58. *Id.*
59. United States v. Dailide, 227 F.3d 385, 390 (6th Cir. 2000).
60. *Id.*
61. Hammer v. Immigration and Naturalization Serv., 195 F.3d 836, 843–44 (6th Cir.1999).
62. Singh v. Gonzales, 417 F.3d 736, 739 (7th Cir. 2005).
63. *Id.*
64. *Id*. at 740.

The guidelines created by *Fedorenko* are both followed and refined in the Eighth Circuit, which employs a fact-heavy analysis of whether the alien's actions constituted persecution.[65] The court stressed that the entire record must be examined in order to determine whether an individual should be held personally culpable for actions committed by a persecutory group of which the individual was a part.[66] Under Eighth Circuit precedent, mere participation in a group that engages in persecution is not enough to warrant persecutor status for an individual.[67]

The notion of personal culpability also permeates the post-*Fedorenko* asylum caselaw for the Ninth Circuit, despite referring to the guiding language in *Fedorenko* as "somewhat cryptic."[68] The court uses a two part test to determine if the asylum seeker engaged in persecution, looking first to "individual accountability" and then to "the surrounding circumstances, including whether the alleged persecutor was acting in self defense."[69] This standard was further expanded to include an assessment of "the degree to which [the alien's] conduct was central, or integral, to the relevant persecutory act."[70]

Finally, in the Eleventh Circuit, the court seeks to apply similar tests to those utilized by the Second, Seventh, Eighth, and Ninth Circuits.[71] Combining these four tests, the Eleventh Circuit stresses that the persecution bar test "is a particularized, fact-specific inquiry into whether the applicant's personal conduct was merely incidental, peripheral and inconsequential association or was active, direct, and integral."[72]

Collectively, the various circuits have continued to follow the precedent established in *Fedorenko*, but the implementation of the guidelines and tests presented in that case have seen limited uniformity between the courts.[73] This fractured application highlights the necessity for a new test to facilitate unity and cohesion within the understanding of the Persecutor Exception.[74]

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65. Hernandez v. Reno, 258 F.3d 806, 815 (8th Cir. 2001).
66. *Id.* at 814.
67. *Id.*
68. Miranda Alvarado v. Gonzales, 449 F.3d 915, 925 (9th Cir. 2006).
69. Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252–53 (9th Cir. 2004).
70. Im v. Gonzales, 497 F.3d 990, 997 (9th Cir. 2007), *withdrawn*, Im v. Mukasey, 522 F.3d 966 (9th Cir. 2008), *pending* Negusie v. Mukasey, 128 S. Ct. 1695 (2008).
71. Chen v. United States Attorney Gen., 513 F.3d 1255, 1259 (11th Cir. 2008).
72. *Id.*
73. Lockhart, *supra* note 9, at 283–84.
74. The Third Circuit and Tenth Circuit have not addressed *Fedorenko*-based persecution issues that are pertinent to this note. *Fedorenko* analysis in those circuits has centered on the Displaced Persons Act and issues regarding naturalization. *See* United States v. Koreh, 59 F.3d 431 (3d Cir. 1995); United States v. Stelmokas, 100 F.3d 302 (3d Cir 1996); United States v. Szehinskyj, 277 F.3d 331 (3d Cir. 2002); United States v. Geiser, 527 F.3d 288 (3d Cir. 2008); United States v. Sheshtawy, 714 F.2d

III. EXPOSITION OF *NEGUSIE V. GONZALES*

The issues addressed in *Negusie* centered on whether a prison guard, who was forced into service but who did not personally engage in the torture or persecution of civilians, would qualify as a "persecutor" for the purposes of asylum law and thus would be barred from receiving asylum under the "Persecutor Exception."[75] The Fifth Circuit Court of Appeals held that there was no evidence to overturn the persecutor classification and essentially denied asylum by refusing to grant judicial review of the BIA's ruling.[76] The court's decision focused on the language of the Supreme Court's conclusion in *Fedorenko* that under the Displaced Persons Act there was no voluntary participation standard for persecution of civilians.[77]

A. Statement of Facts

Daniel Girmai Negusie, a native born Eritrean citizen who is half Ethiopian, was eighteen years old when he was conscripted into the Eritrean Navy during the Ethiopian-Eritrea Border War in 1994.[78] He never saw combat.[79] He was discharged at the end of hostilities with Ethiopia, but subsequently was re-conscripted in 1998 when the conflict re-ignited.[80] Negusie refused to fight after being re-entered into the army, and consequently was imprisoned for his failure to serve.[81] He was also persecuted for his Ethiopian heritage.[82] During his time in prison, Negusie converted to Protestant Christianity, an outlawed religion in Eritrea, and was punished with solitary confinement, beatings, and torture as a result.[83]

When he was released from prison in 2001, Negusie was still not free, as he was forced under threat of death to assume the role of a prison guard by the camp's commanding officer.[84] Negusie found that, had he been caught

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1038 (10th Cir. 1983); Perales-Cumpean v. Gonzales, 429 F.3d 977 (10th Cir. 2005); Solomon v. Gonzales, 454 F.3d 1160 (10th Cir. 2006).

75. Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).
76. *Id.*
77. *Id.*
78. Reply Brief for the Petitioner at 13–14, Negusie v. Mukasey, 231 F. App'x 325 (5th Cir. 2007) (No. 07-499).
79. *Id.*
80. *Id.* at 14.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 15.

attempting to escape his service, he would have been executed; he had witnessed on two occasions conscripted guards being killed while trying to flee.[85] During his time of forced labor in the prison, Negusie moved prisoners from their cells to locations where they were tortured and stood guard during torture, but he never personally punished or tortured any prisoners; going so far as to refuse direct orders and secretly allowing prisoners to take showers, which they had been denied by the prison officials.[86] After nearly four years of coerced service, Negusie, knowing he would be killed if he was caught, fled the prison under the cover of night.[87] Eventually, he smuggled himself aboard a containership anchored in the Red Sea.[88] He filed for asylum upon reaching the United States one month later.[89]

B. Procedural History

The process of seeking asylum is an administrative law matter that begins with an interview before an asylum officer, provided that the alien has filed an affirmative application for asylum and is not in the process of being deported.[90] If the asylum officer determines the alien to be inadmissible, the case is referred to an immigration judge.[91] An unfavorable ruling by that judge can be appealed to the Board of Immigration Appeals (BIA).[92] The BIA rarely hears oral arguments, but rather does "paper reviews" of cases, and its decisions are subject to judicial review by the federal courts.[93] The burden of proving eligibility for asylum rests with the alien, but the alien's testimony may be sufficient to meet this burden, even without collaboration.[94]
Negusie's claim was referred to and denied by an immigration judge.[95] The rejection, which was based on the language in *Fedorenko*, centered on the fact that Negusie, in his role as a guard, had kept prisoners in a location where he knew persecution was taking place.[96] Despite the rejection, the immigration judge found that there was no evidence to challenge the credibility of Negusie,

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. 8 C.F.R. § 208.9 (2008).
91. *Id.* § 208.14.
92. *Id.* § 103.3.
93. 8 U.S.C. § 1252 (2000); United States Department of Justice Executive Office for Immigration Review, http://www.usdoj.gov/eoir/index.html (last visited Mar. 25, 2010).
94. 8 C.F.R. § 208.13 (2008).
95. Reply Brief for the Petitioner, *supra* note 78, at 16.
96. *Id.*

and there was no evidence to show that he had mistreated prisoners.[97] The judge concluded it was "more likely than not" that Negusie would be tortured upon returning to Eritrea, so a deferral of removal was granted, meaning that Negusie could remain in the country with no legal citizenship rights.[98] While Negusie was not expelled from the United States, he could still be removed at any time and relocated to another country where he is not likely to be tortured.[99]

Negusie promptly appealed to the Board of Immigration Appeals.[100] The appeal was dismissed by a single panel member of the Board in an unpublished decision.[101] In language similar to that used by the immigration judge and the Supreme Court in the *Fedorenko* decision, the panel member dismissed Negusie's motive and intent as irrelevant to his participation in persecution.[102] Furthermore, the fact that Negusie had been compelled to participate and had not actively mistreated the prisoners was deemed to be immaterial.[103] However, the BIA did acknowledge that Eritrea was notorious for its human rights violations and its abuses of military deserters, so the panel member affirmed the deferral of removal.[104] Negusie then petitioned the Fifth Circuit Court of Appeals for judicial review of the BIA decision.[105]

C. Decision and Rationale

The Fifth Circuit Court of Appeals denied Negusie's petition for review in an unreported, one-page per curiam decision.[106] The court ruled that Negusie had conceded that persecution had taken place by acknowledging that he attempted to help those who were being persecuted at the prison where he worked.[107] The court acknowledged Negusie's statements that he did not participate or assist in the persecution, that he attempted to help those who were facing persecution, and that he hated his job due to all the suffering he witnessed.[108] Little weight was given to Negusie's redemptive acts or the fact that he disobeyed orders on occasion and did not actively or affirmatively

97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 17.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).
107. *Id.*
108. *Id.*

torture or injure prisoners.[109] The factual nature of this evidence was not challenged, nor was Negusie's credibility or honesty.[110] Rather, the court dismissed this information, along with the fact that Negusie did not share the intentions held by the government, as irrelevant.[111] Citing once more to the *Fedorenko* decision, the court determined that its focus was directed toward "whether particular conduct can be considered assisting in the persecution of civilians."[112] Because Negusie worked as an armed prison guard at a location where he knew persecution was being committed by his superiors and because his job description included guarding the prisoners to ensure these tactics could be employed, the court concluded that Negusie was a persecutor in the meaning of the statute and he was denied asylum.[113]

D. Subsequent History

The Supreme Court granted certiorari in the case on March 17, 2008.[114] Respondent Michael B. Mukasey was substituted for Respondent Alberto R. Gonzales upon succeeding him as the Attorney General of the United States on November 9, 2007.[115] On March 3, 2009, the Supreme Court reversed and remanded the case, now known as *Negusie v. Holder*.[116] The Supreme Court held that the BIA is not bound to apply *Fedorenko*, although they are not barred from applying a *Fedorenko*-style interpretation to the current asylum law.[117] Consistent with the normal remand rules, the Court refused to create a new definition for "persecutor" or to create a new persecutor bar, instead deferring to the BIA to decide the standard.[118]

IV. ANALYSIS

While the *Fedorenko* decision remains the guiding light for analysis of the application of the persecutor bar, its application has been erratic between circuits. Ultimately, this has lead to a misapplication of *Fedorenko* that has generated erroneous decisions in some cases, including *Negusie*. The court in

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* (citing Fedorenko v. United States, 449 U.S. 490 (1981)).
113. *Id.*
114. Negusie v. Mukasey, 128 S. Ct. 1695 (2008).
115. United States Department of Justice website, http://www.usdoj.gov/ag/ (last visited Mar. 25, 2010).
116. Negusie v. Holder, 129 S. Ct. 1159 (2009).
117. *Id.* at 1167.
118. *Id.* at 1168.

Negusie reached an incorrect decision by ignoring the extenuating circumstances surrounding the alien's actions and instead forcing the case into the framework created by *Fedorenko*. Although the Fifth Circuit was following what it thought was the correct application of the *Fedorenko* test, it was actually highlighting the flaws in *Fedorenko* and the necessity for a new test. The Supreme Court has provided the Board of Immigration with a golden opportunity to break the shackles of *Fedorenko* and create a new *Negusie* test for asylum. This section will discuss *Negusie* within the context of current caselaw, the negative results that would arise if the BIA fails to correct the mistakes in *Negusie*, and the necessity of a new *Negusie* test for the persecutor bar centering on a totality of the circumstances standard.

A. The *Negusie* Decision within the Context of Current Caselaw

The majority of courts that have addressed the persecutor bar still hold that the alien's intent is irrelevant if his or her actions amount to persecution, although some circuits have moved toward a deeper analysis of the actions and intentions.[119] In *Negusie*, the Fifth Circuit strictly followed the Supreme Court's decision in *Fedorenko*. This created a flawed result as *Negusie* fails to fit the *Fedorenko* framework. Simply, the *Negusie* court's ruling was incorrect because it forced the *Negusie* facts into an outdated *Fedorenko* test that was never meant to handle asylum issues beyond the DPA.

1. Varied Interpretations of Fedorenko *Create Divisive Circuits*

In the years since *Fedorenko* was decided, its interpretation amongst the appellate circuits has been anything but uniform. This has created unequal and unjust application of the law because cases often do not fit into these frameworks and because the differences in the tests applied in each individual circuit could potentially generate different verdicts for similarly situated aliens.

First and foremost, the application of the bar created in *Fedorenko* to all cases of alleged persecution can generate unsatisfactory results as the test is applied to problems it was never intended to fit. *Fedorenko* interpreted the Displaced Persons Act, which was drafted in the wake of World War II and was intended to prevent the entry of those involved in Nazi activities to the United States.[120] While times have changed and global conflicts have evolved,

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119. Lockhart, *supra* note 9, at 283–84.

120. Lori K. Walls, Comment, *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, 229–30 (2007).

the persecutor bar has remained stagnant, using the antiquated framework of *Fedorenko* to apply to situations that were unfathomable when the DPA was written since the DPA was dealing solely with the fallout of the Holocaust.[121] *Fedorenko* was never even intended to be the final word on the persecutor bar as the decision dealt chiefly with revocation of citizenship under the DPA.[122] By the *Fedorenko* court's own admission, its decision on the persecutor bar was only meant to apply to *Fedorenko* as "[o]ther cases may present more difficult line drawing problems."[123] Clearly, too much stock has been placed in the text of *Fedorenko*, leading to overreliance on a test that no longer fits the law or the needs of society.

Despite the flaws in the holding of *Fedorenko*, it is continually applied and reinterpreted, causing the various courts to become more and more unaligned. As a result, a haphazard, "luck of the draw" system has been generated in which one appellate circuit may apply the persecutor bar in a situation when another circuit would say that the bar does not apply even though both circuits cite *Fedorenko*. For example, in *Im v. Gonzales* the Ninth Circuit found that an alien from Cambodia was not subject to the persecutor bar for actions undertaken while working as a prison guard at a location where persecution was taking place.[124] The *Im* court drew the conclusion that under *Fedorenko* it was necessary that the alien's actions be integral to the persecution being carried out.[125] While the actions in *Fedorenko*, which included shooting prisoners, where considered integral, the guard's actions in *Im*, which included unlocking cells, guiding prisoners to interrogation, and no active torture, were not considered integral.[126]

Likewise, in *Hernandez v. Reno*, the Eighth Circuit vacated an asylum denial to a Guatemalan alien who had been forced into service with a paramilitary group that had murdered civilians.[127] In that case, the alien was under threat of death if he disobeyed orders. Nonetheless, he attempted to disobey as much as he could without sacrificing his own life. Ultimately, the alien made his escape at the first opportunity, but was wounded by his captors in the process.[128] The Eight Circuit cited to *Fedorenko* but distinguished it on the grounds that Fedorenko was given leave from his forced guard duties and

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121. *Id.* at 236.
122. Xie v. Immigration and Naturalization Serv., 434 F.3d 136, 139–40 (2d Cir. 2006).
123. Fedorenko v. United States, 449 U.S. 490, 514 (1981).
124. Im v. Gonzales, 497 F.3d 990, 997 (9th Cir. 2007), *withdrawn*, Im v. Mukasey, 522 F.3d 966 (9th Cir. 2008), *pending* Negusie v. Mukasey, 128 S. Ct. 1695 (2008).
125. *Id.*
126. *Id.*
127. Hernandez v. Reno, 258 F.3d 806, 815 (8th Cir. 2001).
128. *Id.* at 809.

lied to United States officials about his involvement in concentration camps, whereas Hernandez was given no leave, escaped at his first chance, and was forthcoming to U.S. officials about his actions.[129]

The facts in *Negusie* are very similar to those in the *Im* case, as Negusie was a prison guard involved in the transporting and supervising of prisoners as opposed to actual torture or direct violence.[130] One could easily conclude that if *Im* fell on the safe side of the "integral to persecution" line, so would *Negusie*. Similarly, comparisons can be drawn between the facts in *Negusie* and *Hernandez*. Negusie served as a prison guard under threat of death, attempted to disobey orders, tried to mitigate the suffering of prisoners, and ultimately fled his captors, as did Hernandez.[131] Following the logic put forth by the *Hernandez* court, Negusie would have likely been granted asylum. In this light, it appears that, on the same set of facts and applying the same test put forth by *Fedorenko*, *Negusie* could have easily come out differently had it passed through a different circuit. This problem highlights just how unwieldy the *Fedorenko* decision has become, and how inappropriate it was for the *Negusie* court to rely upon it. Moving *Negusie* out of the shadow of *Fedorenko* would not only generate a just outcome in this case but would also facilitate the creation of a new test that will lead to more uniform results between the courts in the future.

2. The Negusie *Court Reached an Incorrect Conclusion*

The Fifth Circuit holding is perhaps the strictest interpretation of the *Fedorenko* test and it was this strict adherence to the doctrine of "intent irrelevance" that led to the denial of asylum in *Negusie*, despite the fact that the circumstances in *Negusie* are vastly different from the precedent cases in the Circuit.[132] In denying Negusie's application for asylum, the Fifth Circuit relied on the language of both *Fedorenko* and *Bah v. Ashcroft*, which it had decided in 2003.[133] While the court found these cases to provide the appropriate frame of analysis for the persecutor bar, *Negusie* presents additional facts and circumstances that render the Fifth Circuit's precedents inapplicable.

As previously established, the *Fedorenko* decision does not purport to be the guiding light in all matters of the persecutor bar, as the Court

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129. *Id.* at 814.
130. Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).
131. *Id.*
132. *See* Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).
133. *Negusie*, 231 F. App'x 325.

acknowledged it only addressed the case at bar and not the more difficult "line drawing" instances that can arise in applying the persecutor bar.[134] Furthermore, even if one were to ignore that *Fedorenko* interpreted a different piece of legislation than the current asylum law and that *Fedorenko* expressly warned of its inability to sort out other line drawing problems, Negusie's actions may not have even reached the "persecution" threshold set forth by the *Fedorenko* court. In deciding whether Fedorenko's actions constituted assistance in persecution of civilians, the Supreme Court found there was no doubt 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" should be considered a persecutor for the purposes of the statute.[135] Further, Fedorenko passed himself off as a German civilian after British forces entered Germany in order to prevent reprisals for these actions, and lied about his wartime activities to get into the United States.[136]

By contrast, Negusie never shot at nor personally inflicted other harms upon the inmates of the prison where he was forced to work. [137] He was also barred from leaving the prison at any time prior to his escape, making him essentially a prisoner as well as a guard.[138] Although Negusie did carry a gun and was given some "pocket money," he did not receive an actual salary and there is no mention that he wore a uniform.[139] It is impossible to know if the actions in *Negusie* would be enough to reach the persecutor threshold articulated in *Fedorenko*, but instead of even attempting to analyze the relevant facts, the Fifth Circuit simply applied the *Fedorenko* decision as the all-encompassing bar to asylum.[140] This was erroneous.

Second, the Fifth Circuit's decision in *Bah v. Ashcroft* also fails to provide an appropriate framework to apply to *Negusie*. In *Bah*, the court employed the persecutor bar to deny asylum to an alien from Sierra Leone.[141] Bah had been forced to join an insurgent group under the threat of death after seeing his family murdered.[142] During the time prior to his escape from the group, Bah shot and killed a prisoner with his AK-47 and also engaged in the

134. Fedorenko v. United States, 449 U.S. 490, 514 (1981).
135. *Id.*
136. *Id.* at 494–96.
137. *Negusie*, 231 F. App'x 325.
138. *Id.*
139. Brief for the Respondent at 5, Negusie v. Mukasey, 231 F. App'x 325 (5th Cir. 2007) (No. 07-499).
140. *Negusie*, 231 F. App'x 325.
141. Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).
142. *Id.* at 349.

practice of using a machete to decapitate and maim civilians.[143] On two separate occasions, he was captured by government officials and imprisoned, and then was subsequently freed and forced back into service when the insurgents overran the facilities where he was being held.[144] Upon finally making his escape, Bah fled to England and then to the United States, where he did not initially disclose his prior involvement with the insurgent group for fear of criminal charges being levied against him.[145]

Once again, *Bah* is distinguishable from the facts in *Negusie*, rendering *Bah* an inappropriate lens through which to decide *Neguise.* While neither alien had the intent to engage in persecution, Bah's denial centered on the heinous acts he engaged in, including killing and maiming civilians with a machete.[146] While the torture and imprisonment that Negusie was a party to is certainly deplorable, Negusie's personal involvement failed to reach the extremes of Bah's conduct.[147] Also, Negusie was always forthcoming with his involvement in the persecution in Eritrea, a factor that should have weighed in his favor.[148]

Due to these significant factual differences and the overall severity of the actions of Fedorenko and Bah compared to the actions of Negusie, it is evident that *Negusie* was wrongly decided. The Fifth Circuit attempted to fit a unique set of facts into a framework that was created for a different problem, resulting in an erroneous decision. By failing to appropriately analyze the facts in *Negusie*, the Fifth Circuit has denied justice and once more underscored the necessity of a new test for the persecutor bar.

B. Failure by the Board of Immigration Appeals to Re-define the Persecutor Bar Would Result in an Unjust and Unacceptable Outcome

Now that the Supreme Court has remanded *Negusie* back to the Board of Immigration Appeals, the opportunity has arisen for the BIA to create a new test for the persecutor bar. Of course, there is no guarantee that a new test will be created. The BIA could always affirm the original *Negusie* decision and, consequently, re-affirm the *Fedorenko* framework. This would be a critical mistake that would not only rob Negusie of justice but would stand in stark

143. *Id.* at 350.
144. *Id.*
145. *Id.*
146. *Id.*
147. *See* Reply Brief for the Petitioner, *supra* note 78, at 15; Brief for the Respondent, *supra* note 139, at 2.
148. *See* Negusie v. Gonzales, 231 F. App'x 325 (5th Cir. 2007).

contrast to the intent of the asylum statute and the notions of justice for countless other aliens.

1. Maintaining the Current Persecutor Bar Would Run Contrary to Legislative Intent

The BIA, by maintaining Negusie's asylum denial and the current persecutor definition, would create an end result that would ultimately run contrary to legislative intent. The Supreme Court has established that statutory interpretation analysis should "begin[] with the language of the statute."[149] Following this method of analysis, one would see that the current persecutor bar as codified in 8 U.S.C. § 1158 does not contain "intention" language, just like the Displaced Persons Act before it.[150] The Supreme Court refused to imply "intent" language into its interpretation of the DPA, claiming that such an action would not be an interpretation of the act but rather an amendment.[151] This language seems to condemn any notion of creating an "intent" test for persecution. However, the Court has also said that the existing statutory text can be used as a tool to discern legislative intent, which opens another avenue of interpretation.[152] Simply put, while it may be unreasonable to attempt to read intent into the statute, it would be entirely reasonable to analyze whether Congress meant for this legislation to bar an alien such as Negusie.

A plain reading of the statutory language bars asylum to an alien 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."[153] By definition, to "persecute" is to "harass in a manner to injure, grieve, or afflict . . . [or to] set upon with cruelty."[154] Hence, cruelty must be present in the actor in order to be guilty of persecution. "Cruelty" is the quality or state of being cruel, and "cruel" is defined as "disposed to inflict pain, esp[ecially] in a wanton, insensate, or vindictive manner; pleased by hurting others."[155] Thus, while the word "intent" was not expressly included in the statute, the word "persecution" seems to imply a necessity for intent. Furthermore, the court recognizes the

149. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (internal quotation marks omitted).
150. *See* 8 U.S.C. § 1158 (2000); Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009.
151. Fedorenko v. United States, 449 U.S. 490, 513 (1981) (quoting Detroit Trust Co. v. Barlum, 293 U.S. 21, 38 (1934)).
152. Lamie v. United States Tr., 540 U.S. 526, 534 (2004).
153. 8 U.S.C. § 1158(2)(a)(i) (2000).
154. WEBSTER'S THIRD NEW INT'L DICTIONARY, 1685 (Philip Gove ed., Merriam-Webster)(1981).
155. *Id.* at 546.

term "participate" as being limited to the context in which it appears.[156] As a result, on a definitional basis, the statute requires looking beyond the actions of the alien to see what circumstances motivated those actions in order to determine if they truly constituted persecution. The *Negusie* court failed to account for these definitional requirements and thus applied the persecutor bar without meeting the definitional threshold.

Furthermore, the congressional intent of the persecutor bar can be seen beyond its word choice. On multiple occasions, the Court has looked at the purpose behind the refugee and asylum legislation and has come to two conclusions regarding the congressional objectives.[157] First, Congress was attempting to give the United States "sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world."[158] This necessity for flexibility was not needed when the Displaced Persons Act was crafted, as that legislation was solely aimed at preventing the entry of former Nazis into the United States. As a result, there was no reason for flexibility to be considered in the *Fedorenko* decision. If Congress intended the subsequent, post-DAP asylum law to be able to flexibly respond to the changing needs of refugees, it would run contrary to the rigid application of the *Fedorenko* framework to *Negusie*.

Second, Congress was attempting to bring United States asylum law up to a level of conformity with the United Nation's policy on refugees.[159] It stands to reason that the United States, having based the Displaced Persons Act entirely on the constitution of the UN's International Refugee Organization, would look back to the UN when crafting new asylum legislation.[160] For its part, the UN reworked its refugee standards in 1967 with the implementation of the United Nations Protocol Relating to the Status of Refugees, which was approved by the United States Senate and signed by President Johnson in October of 1968.[161] In that document, refugee status was denied to any aliens who "ha[d] committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."[162] In deciding *Negusie*, the

156. Reves v. Ernst & Young, 507 U.S. 170, 177–79 (1993).

157. *See* Immigration and Naturalization Serv. v. Stevic, 467 U.S. 407 (1984); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987); Immigration and Naturalization Serv. v. Doherty, 502 U.S. 314 (1992); Immigration and Naturalization Serv. v. Aguirre-Aguirre, 526 U.S. 415 (1999).

158. *Cardoza-Fonseca*, 480 U.S. at 449–50.

159. *Aguirre-Aguirre*, 526 U.S. at 427.

160. *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009.

161. United Nations Protocol Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 606 U.N.T.S. 267.

162. *Id.* Art. 1(F)(a).

Fifth Circuit ignored this goal of the new asylum policy and continued to apply the outdated DPA construction articulated by *Fedorenko*, creating a result that was not intended by either the United States Congress or the United Nations.

It has long been established in American jurisprudence that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[163] The language of the UN Protocol would seem to require a higher degree of culpability than the American "participate in persecution" standard, as the alien's actions would need to constitute a war crime or a crime against humanity. However, these two separate standards could have been reconciled by the *Negusie* court if the United States statute is read with the aforementioned definition of persecution.[164] On a similar note, the UN has actually criticized the *Negusie* court's reading of the asylum law, arguing that "Congress intended that exclusion from asylum and withholding of removal be applied in a manner consistent with United States' international law obligations under the 1951 Convention and 1967 Protocol."[165] Thus, Congressional intent for the asylum law requires that the BIA create a new persecutor definition in *Negusie* that will be functional for future asylum cases.

2. Maintaining the Current Persecutor Bar in Negusie *Would Have Negative Effects on United States Asylum Law*

Not only would maintaining the current *Negusie* decision run contrary to legislative intent, but it would also create far reaching negative consequences for asylum law in the United States. By refusing to correct *Negusie,* the BIA would essentially be reaffirming and ultimately bolstering the *Fedorenko* framework so that even the courts with a more lenient interpretation of the persecutor bar would be powerless to grant asylum in many cases.

Just as Negusie was a refugee from a war-torn country, the United States can expect to see an influx of asylum seekers from places that have been ravaged by civil war and paramilitary violence like Somalia, Sudan, Congo, Myanmar, and Columbia. Often times, these wars and uprisings involve forced participation in atrocities that would ultimately bar asylum. For example, a favored method of persecution in Cote d'Ivoire is to force members

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163. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

164. The UN Refugee Protocol has been used previously to assist in interpretations of U.S. asylum law. *See* Immigration and Naturalization Serv. v. Stevic, 467 U.S. 407 (1984); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987); United States Dep't of State v. Ray, 502 U.S. 164 (1991); Martins v. Mukasey, 264 F. App'x 72 (2d Cir. 2008).

165. Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioner at 6, Negusie v. Mukasey, 231 F. App'x 325 (5th Cir. 2007) (No. 07-499), 2008 WL 2550609.

of the persecuted group to engage in rape and incest against other members of the persecuted group.[166] Under the Fifth Circuit's reading of *Fedorenko* as applied to *Negusie*, those forced to engage in such heinous acts would be "assisting" in persecution and would thus be barred from asylum. Likewise, during Saddam Hussein's reign in Iraq, it was not uncommon to use one member of a family, under threat of death or torture, to lead government forces to other members of the family that were considered political or religious dissidents.[167] Once again, these individuals would be denied asylum by the *Negusie* court because their actions would be tantamount to assisting in persecution. In Burma, persecuted Christians and Muslims have been used as forced labor in the destruction of churches and mosques, and in the construction of Buddhist pagodas in their place.[168] These individuals would be considered persecutors under the Fifth Circuit's ruling in *Negusie*.

Furthermore, the persecutor bar as applied in *Negusie* would bar asylum to most, if not all, child soldiers. Estimates as to the number of children involved in conflicts around the world are roughly 300,000, although it is impossible to get an exact count.[169] These children are subject to torture, maiming, rape, forced drug use, and death, all while they are simultaneously forced to subject others to the same atrocities.[170] If the BIA were to continue relying on *Fedorenko* in *Negusie*, the persecutor bar would serve to block asylum applications from nearly all of these children. A decision by the BIA to continue to follow a *Fedorenko* like analysis in *Negusie* would actually bolster the persecutor bar to the point that it would become over-inclusive, keeping out not only those responsible for persecution but also those most in need of the protection of the asylum law.

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166. Reply Brief for the Petitioner, *supra* note 78, at 27.

167. AMNESTY INTERNATIONAL, IRAQ: VICTIMS OF SYSTEMATIC OPPRESSION, (1999) http://www.amnesty.org/en/library/info/MDE14/010/1999/en.

168. UNITED STATES DEPARTMENT OF STATE, BURMA INTERNATIONAL RELIGIOUS FREEDOM REPORT (2007), http://www.state.gov/g/drl/irf/rpt/ (follow "2007 Report on International Religious Freedom" hyperlink, then follow "Burma" hyperlink).

169. Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism" Provision*, 20 GEO. IMMIGR. L.J. 437, 462 (2006).

170. *See* Mary-Hunter Morris, *Babies and Bathwater: Seeking an Appropriate Standard of Review for the Asylum Applications of Former Child Soldiers*, 21 HARV. HUM. RTS. J. 281 (2008).

C. The Necessity of a New *Negusie* Test for the Persecutor Exception

The call to reform the *Fedorenko* interpretation of the persecutor bar predates, to a certain extent, the *Negusie* decision.[171] However, when the Supreme Court granted certiorari to *Negusie*, the push to create a new test was renewed.[172] While various tests and interpretations have been suggested to replace *Fedorenko*, these tests fail to provide the necessary solution to the problem. This subsection will specifically analyze the suggested approaches and why they fail to provide the best option for the post-*Fedorenko* persecutor bar. Then, a framework for a new *Negusie* test that looks to the "Totality of Circumstances" will be presented, along with an explanation of why this test is the correct option that should be adopted by the Board of Immigration Appeals in *Negusie*.

1. Suggested Alternatives to the Fedorenko *Analysis*

While the ruling in *Negusie* was erroneous, the error cannot be corrected through a simple rejection of *Fedorenko*. Even if the *Negusie* court had moved away from the *Fedorenko* analysis, it would have been left facing the task of creating a new test for the persecutor bar. While there are various possibilities for the new test, none besides the "Totality of Circumstances" test would provide both a just framework for *Negusie* and an acceptable guiding light for asylum law. These alternative tests must be analyzed in order to show why they provide an inappropriate test to apply in *Negusie* and beyond.

a. Uncoupling Framework

The first alternative test for the persecutor bar centers on the idea of uncoupling "persecutor" from "persecution."[173] The contention is that certain acts, specifically forced abortions and female genital cutting, have been labeled as "persecution" due to political pressure and subsequently those who carry out these activities are automatically labeled as persecutors.[174] As a result, specific groups, such as doctors who perform forced abortions, are

171. Walls, *supra* note 120, at 230; 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 (2007).

172. Seema Ahmed, Current Development, *Supreme Court Grants Certiorari in Negusie v. Mukasey*, 22 GEO. IMMIGR. L.J. 561–62 (2008).

173. Walls, *supra*, note 120, at 253.

174. *Id*. at 254.

automatically deemed to be persecutors even if their actions are not associated with persecution.[175] This labeling in turn undermines the persecutor bar as a whole.[176] By utilizing an "uncoupling" of persecutor from persecution, the persecutor bar evolves to "a more flexible approach in the case of practices that rightly constitute persecution but whose practitioners fall short of the traditional persecutor's culpability."[177]

If it were applied as the new test for the persecutor bar, the uncoupling framework would run the risk of being either under-inclusive or over-inclusive. First, while it may work in the narrow sense for cultural female genital cutting and forced abortion, the framework would become under-inclusive when applied to other issues. That is, it only really works for cases where the action committed and the reasoning behind it can somehow be construed as non-persecutory. For the true "forced" participation cases, such as those forced to be prison guards or those forced to be part of paramilitary forces, the "uncoupling" method would have little benefit because the actions committed would still be considered assisting in persecution.[178]

Alternatively, even if the adoption of the "uncoupling" approach is interpreted in a broader sense, it would end up being over-inclusive, pulling the persecutor bar back too far and rendering it nearly useless. For example, the courts have been consistent that forced abortions amount to persecution, and those who administered, guarded, or transported women to have these abortions were engaging in persecution.[179] This entire framework would be thrown out by the uncoupling method. By extending this logic beyond just the abortion cases, uncoupling would allow all prison guards, administrators, transporters, and the like to skirt the persecutor bar, even if they freely associated with a persecutory body for personal gain, just because their individual actions did not establish enough culpability to invoke the bar.

When applied to *Negusie*, the "uncoupling" approach shows its weakness. If the under-inclusive interpretation is used, Negusie would still be barred as a persecutor because his role as a prison guard would still amount to persecution, even if his individual culpability did not. If the over-inclusive

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175. *Id.*
176. *Id.*
177. *Id.* at 255.
178. *See* Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003); Im v. Gonzales, 497 F.3d 990, 997 (9th Cir. 2007), *withdrawn*, Im v. Mukasey, 522 F.3d 966 (9th Cir. 2008), *pending* Negusie v. Mukasey, 128 S. Ct. 1695 (2008); Mendoza-Lopez v. Gonzales, 205 F. App'x 630 (9th Cir. 2006).
179. *See* Feng Zheng v. Gonzales, 232 F. App'x 48 (2d Cir. 2007); Guo Liang Lin v. Keisler, 251 F. App'x 37 (2d Cir. 2007); Jia Yun Li v. Gonzales, 203 F. App'x 360 (2d Cir. 2006); Xing Jie Guan v. Bureau of Citizenship and Immigration Serv., 183 F. App'x 76 (2d Cir. 2006); Xu Sheng Gao v. United States Att'y. Gen., 500 F.3d 93 (2d Cir. 2007); Zheng v. Bd. of Immigration Appeals, 119 F. App'x 321 (2d Cir. 2005); Chen v. United States Attorney Gen., 513 F.3d 1255 (11th Cir. 2008).

version of uncoupling is used, Negusie would not be barred, because he lacked personal culpability. However, countless other individuals with a higher degree of culpability than Negusie would also not be barred because they would still fail to meet the uncoupling threshold. Essentially, adopting this test would mean that the *Negusie* court would have replaced one broken system with another. Thus, the uncoupling alternative is inappropriate for *Negusie*.

b. The Duress Test

The second alternative to the *Fedorenko* test, and arguably the most popular, is a duress test. This approach would create "an implied excuse for actions committed under duress when individuals persecuted others in response to credible threats of imminent death or severe bodily harm to oneself or another."[180] Such a standard would give the courts flexibility to grant asylum in the cases where overwhelming coercion took place.[181] A similar approach was suggested for former child soldiers seeking asylum.[182] The duress test has also been suggested for use in determining when an alien's actions amounted to material support for terrorist activities.[183]

While the duress excuse provides a better framework than the uncoupling process, it is still not without its flaws. While allowing such an excuse would work well in many circumstances, and is undeniably an improvement from the current *Fedorenko* test, the duress test would end up making the persecutor bar contingent on one fact. That is, if duress or coercion can be shown, the rest of the record and the other surrounding facts become irrelevant, paving the way for an absolute "just following orders" defense that would again reserve the persecutor bar for only those in the highest positions of power within the persecuting entity.

Consider the result when the duress test is applied to the *Fedorenko* decision. Fedorenko became a Nazi guard under duress, as he was a prisoner of war captured by the Nazis and the threat to his life was very real.[184] Under the duress test, the analysis would stop here, and Fedorenko would be granted asylum. The test fails to account for the facts that Fedorenko never tried to escape even though he was allowed to leave the camp on multiple occasions,

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180. Lerescu, *supra* note 171, at 1907.
181. *Id.*
182. Morris, *supra* note 170, at 287.
183. Laufer, *supra* note 169, at 462; Theodore Roethke, *American Law and the Problem of Coerced Provision of Support to a Terrorist Organization as Grounds for Removal*, 17 TEMP. POL. & CIV. RTS. L. REV. 173, 176 (2007).
184. Fedorenko v. United States, 449 U.S. 490, 494 (1981).

that Fedorenko received a good service strip from his superiors, or that Fedorenko tried to hide his actions from the government upon entering the United States.[185]

To further illustrate how the duress framework would fail, one can look to the Ninth Circuit's 2006 decision in *Mendoza-Lopez v. Gonzales*.[186] In that case the alien, a member of the Guatemalan Army, engaged in persecution including wounding civilians and shooting a thirteen year old child.[187] These acts where committed under the threat of torture.[188] The alien was actually tortured on at least one occasion for disobeying orders.[189] However, despite this alleged duress, the alien stayed in the army beyond the mandatory service period, indicating some degree of voluntariness.[190] Under the straight application of the duress test, an asylum seeker in a case like *Mendoza-Lopez* would be granted asylum despite the extenuating factors that supply evidence of the alien's role as a persecutor.

Based on this evidence, the duress test is also not the appropriate tool to create a *Negusie* Test for the persecutor bar. While the duress test would likely secure asylum for Negusie, it would also open the door too far to allow asylum in cases that were unlike *Negusie*. Thus, had the *Negusie* court employed the straight duress test, it would have reached the correct verdict, but the long-term and far-reaching impacts of such a ruling would still be erroneous. As such, the *Negusie* court was correct in its decision not to use the duress test.

2. The Negusie *Test Should Encompass "Totality of Circumstances"*

In order to correctly decide *Neguise* and create a precedent that will be viable over the long term for asylum law, the Board of Immigration Appeals should adopt a totality of the circumstances test ("totality test") for determining if an alien's actions amounted to participation in persecution. This test would look to establish culpability, but the application and analysis would go far beyond the tests previously employed or suggested. The totality test would require that, before the persecutor bar is triggered, the entire collection of facts regarding the alien's involvement in persecution must be reviewed. No singular fact would serve to decide if the bar was triggered, but rather asylum would be denied if the acts deemed to be persecutory

185. *Id.* at 500.
186. Mendoza-Lopez v. Gonzales, 205 F. App'x 630 (9th Cir. 2006).
187. *Id.* at 631.
188. *Id.*
189. *Id.*
190. *Id.*

outweighed the evidence that the alien was not a persecutor, including mitigating factors such resistance to performing persecutory acts, assistance to victims, possibility of escape, self defense, and duress.

A test of this nature would give the courts flexibility by not creating a cookie-cutter mold that cases are then forced to fit. Applying the totality test, the court can still operate within the framework of the language of the statute, as asylum will be denied to those who engage in persecution, but the analysis of what constitutes persecution would be expanded. This would give the courts discretion to punish those who did persecute, but would also give the court the flexibility to grant asylum to those who were acting under duress. However, it would differ from the duress test because duress in and of itself would not be enough to prevent the persecutor bar from triggering if there are other factors present, such as excessive avoidable brutality or a failure to attempt escape when the opportunity was presented. It would also allow for rewarding those asylum seekers who were forthcoming regarding their actions, as opposed to those who attempt to deceive in order to escape the persecutor bar. Essentially, the totality test would allow duress to be considered but would not turn a blind eye to the facts beyond the alleged coercion the way the "straight" duress test would in cases like *Fedorenko* and *Mendoza-Lopez*.

This test could be criticized as being too ethereal; possibly resulting in inconsistent applications because it fails to provide bright line guidance as to when the persecutor bar should be triggered. While there is some validity to this concern, it does not outweigh the benefits of the test. Admittedly, the fact intensive nature of the analysis under the totality test could result in some inconsistency between the courts, but because each applicant for asylum would provide a unique set of facts there would be no controlling precedent like *Fedorenko* that would shackle the individual court's ability to render a verdict on the merits of each case.

If it were to apply the totality test to the facts in *Negusie*, the BIA could weigh the evidence of persecution against the evidence against it. On one hand, the Board will have Negusie's service as a guard at a location where prisoners were tortured, the fact that he was armed, and the fact that he received "pocket money" for his work.[191] On the other hand, the Board will have the fact that Negusie himself was tortured, the fact that he worked under threat of death, his redemptive acts, evidence that he never affirmatively injured prisoners, the fact that he was not allowed to leave camp, and the fact that he ultimately escaped.[192] The BIA should hold that Negusie's few persecutory acts are outweighed by the duress, the redemptive acts, and the

191. Brief for the Respondent, *supra* note 139, at 2.
192. Reply Brief for the Petitioner, *supra* note 78, at 15.

ultimate escape. Thus, Negusie would not be labeled a persecutor, and would be granted asylum.

V. CONCLUSION

The Fifth Circuit ruled erroneously when it denied asylum in *Negusie v. Gonzales*. The court relied upon the outdated, incorrectly applied test from *Fedorenko v. United States* that created the persecutor bar to asylum. The Supreme Court was correct to reverse the Fifth Circuit's ruling in *Neguise*. The task has now fallen back to the Board of Immigration Appeals to correct this flaw in asylum law by rejecting the use of the *Fedorenko* interpretation of the persecutor bar. In its place, the BIA should generate a new *Negusie* test for the persecutor bar that does not look for a single trigger point, but rather examines the totality of the circumstances in deciding if the alien's actions amount to persecution. The totality of the circumstances test would allow the courts greater flexibility in deciding asylum cases to ensure that the Persecutor Exception only bars those that have meaningfully assisted in persecution.