# RECALIBRATING THE SCALES: BALANCING THE PERSECUTOR BAR

**Abstract:** Just as U.S. asylum law accepts individuals fleeing persecution, it also excludes from eligibility those who have assisted or otherwise participated in the persecution of others under what is known as the "persecutor bar." In applying the persecutor bar, courts look to whether the applicant's conduct played any causal role in the persecution, whether the applicant knew that his conduct would have some causal effect on the persecution, and whether the conduct was voluntary. Because exclusionary provisions to asylum such as the persecutor bar are to be applied restrictively, U.S. jurisprudence wrongly ignores other key factors that are necessary in assessing the application of the persecutor bar. After surveying both domestic and international critiques of U.S. asylum law, this Note argues that courts applying the persecutor bar should employ a balancing test that weighs the persecution from which the applicant is fleeing against the gravity of the applicant's conduct, the nature of the persecution in which the applicant assisted, and any other mitigating factors such as the time elapsed since the applicant's conduct or any redemptive acts performed by the applicant.

## INTRODUCTION

Daniel Negusie, a dual citizen of Ethiopia and Eritrea, arrived on the United States shore after traveling hidden on a ship departing from Africa.[1] He fled after a torturous decade in his war-ridden country.[2] He had been imprisoned, beaten with sticks, and held without shelter in extreme heat.[3] His crime: refusing to take arms on behalf of Eritrea against Ethiopia.[4] Asylum denied.[5]

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[1] Negusie v. Holder, 555 U.S. 511, 514–15 (2009).

[2] *See id.* (noting that the applicant was first captured and forced into conscription by the Eritrean military in 1994, imprisoned from 1998 to 2000 by the Eritrean government for refusing to fight, and again forced to serve in the Eritrean military until 2004 before fleeing to the United States). The war between Ethiopia and Eritrea over competing territorial claims killed an estimated one hundred thousand people and displaced one million. *See* Patrick Gilkes & Tom Barry, *The War Between Ethiopia and Eritrea*, INST. FOR POL'Y STUD. (Oct. 11, 2005), https://ips-dc.org/the_war_between_ethiopia_and_eritrea/ [https://perma.cc/TT5X-NYKQ] (explaining that the war between Ethiopia and Eritrea from 1998 to 2000 was over claims of "'national pride' and 'territorial integrity'").

[3] *Negusie*, 555 U.S. at 515 (discussing the abusive tactics employed by the Eritrean government against the applicant).

[4] *Id.* at 514–15.

[5] *Id.* at 515–16 (providing the procedural history of the applicant's asylum claim). Negusie's application for asylum was first denied by the immigration judge because the applicant engaged in the persecution of others. *Id.* The Board of Immigration Appeals (BIA) and the U.S. Court of Appeals for the Fifth Circuit both affirmed the determination. *Id.* The BIA "is the highest administrative body" regarding immigration law and is responsible for hearing appeals from decisions made by immigration judges. *Board of Immigration Appeals*, U.S. DEP'T JUSTICE, https://www.justice.gov/eoir/board-of-

Prior to escaping from Eritrea and after spending two years incarcerated, Negusie finally agreed to work as a prison guard for the Eritrean Army where he performed minimal duties, never personally punished anyone, and often provided aid to prisoners.[6] In the initial asylum application, the U.S. Immigration Judge found it likely that Negusie would be tortured if sent back to Eritrea.[7] The judge even admitted that he was not a malicious or aggressive person.[8] Nevertheless, Daniel Negusie was denied asylum because the judge determined that Negusie had assisted in persecution.[9] Under U.S. law, any person unable or unwilling to return to their home country due to fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion" is eligible to apply for asylum.[10] Asylum law retracts eligibility, however, if the judge finds that an applicant played any role in persecution, in a provision known as "the persecutor bar."[11]

Negusie appealed the immigration judge's decision to the Supreme Court, which remanded the case back to the Board of Immigration Appeals (BIA) to decide whether an applicant could be barred from asylum if he was coerced into performing the persecutory actions.[12] After nine years of deliberation, in 2018, the BIA set a new precedent by ruling that, in limited circumstances, asylum may be granted to an individual who committed persecutory acts under

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immigration-appeals [https://perma.cc/GW8B-A5QV] (summarizing the responsibilities and authority of the BIA).

[6] *See Negusie*, 555 U.S. at 515 (discussing the applicant's testimony in which he admitted to performing guard duties for the Eritrean Army for four years on rotation, but also that he never directly participated in any abusive conduct towards the prisoners and helped various prisoners).

[7] *Id.*

[8] *Id.* (noting that the immigration judge found no evidence that the applicant was a "malicious person or . . . aggressive person who mistreated the prisoners").

[9] *Id.* at 515–16 (holding that the applicant was statutorily barred from receiving asylum due to his participation "in the persecution of others"). Under U.S. law, individuals are deemed ineligible for asylum if they are found to have "participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Infra* note 11 (providing the statutory language of the "persecutor bar").

[10] *See* 8 U.S.C. § 1158(b)(1)(A) (2018) (providing the Secretary of Homeland Security or the Attorney General the authority to grant asylum to anyone who is determined to be a refugee as defined by 8 U.S.C. § 1101(a)(42)); *see also id.* § 1101(a)(42) (defining refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

[11] *See id.* § 1101(a)(42) ("The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.").

[12] *See Negusie*, 555 U.S. at 524–25 (remanding the case to the BIA to determine whether to adopt a standard that considers the "voluntariness" of the applicant's conduct when applying the persecutor bar).

duress.[13] Under the narrow test employed by the BIA, however, Negusie was still barred.[14]

Whereas asylum law provides a haven to individuals found to have a credible fear of persecution in their home country, the persecutor bar acts as the other side of the coin, prohibiting individuals found culpable for such persecution from being granted relief.[15] Upon judicial review, the circuit courts have been tasked with drawing the line to determine what level of conduct constitutes assistance or participation in persecution so as to trigger the persecutor bar.[16]

By recognizing a limited duress defense to the persecutor bar in *Matter of Negusie I*, the BIA acknowledged that the subjective intent of the applicant should be considered.[17] The BIA's analysis, however, stops short of undertaking a comprehensive review of the applicant's circumstances.[18]

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[13] Matter of Negusie, 27 I. & N. Dec. 347, 363 (B.I.A. 2018) (*Matter of Negusie I*) (holding that an applicant must satisfy all elements of a five-prong test before being able to present a duress defense to the persecutor bar). As part of his overhaul of U.S. immigration law, former Attorney General Jeff Sessions stayed the BIA's decision and invited parties to submit amicus briefs on the question of "[w]hether coercion and duress are relevant to the application of the . . . persecutor bar." Matter of Negusie, 27 I. & N. Dec. 481, 481 (A.G. 2018) (*Matter of Negusie II*). *See also* Sari Horwitz, *Sessions, Pressing Trump's Agenda, Seeks 'Merit-Based' Immigration, End to 'Sanctuary' Cities*, WASH. POST (Jan. 26, 2018), https://www.washingtonpost.com/world/national-security/sessions-pressing-trumps-agenda-seeks-merit-based-immigration-end-to-sanctuary-cities/2018/01/26/1c1db4ca-02c4-11e8-8acf-ad2991367d9d_story.html [https://perma.cc/P5L3-9WMP] (noting that former Attorney General Jeff Sessions called for an "overhaul of the nation's 'lax' immigration system for immigrants here legally and illegally").

[14] *Matter of Negusie I*, 27 I. & N. Dec. at 368 (holding that Negusie did not meet the five-prong test for duress because the alleged death threats he received did not meet the level of harm required for a duress defense and he had a reasonable chance to escape from the prison).

[15] *See Negusie*, 555 U.S. at 535 (Stevens, J., concurring in part and dissenting in part) (noting that the statutory context and legislative history of the persecutor bar demonstrates Congress's intent to use it to indicate culpability); Rosenberg v. Yee Chien Woo, 402 U.S. 49, 55 (1971) (noting that one of the goals of asylum law is to create "a haven for the world's homeless people").

[16] *See* Stanojkova v. Holder, 645 F.3d 943, 948–49 (7th Cir. 2011) (finding that the circuit courts carry the burden of distinguishing between conduct that constitutes assistance in persecution from less culpable conduct); Castaneda-Castillo v. Gonzales, 464 F.3d 112, 133–34 (1st Cir. 2006) (collecting cases from the First, Second, Fourth, Eighth, and Ninth Circuits). If the BIA denies an asylum claim, the applicant may seek judicial review in the U.S. Court of Appeals. *See* 8 U.S.C. § 1252(a)(1) (granting U.S. appeals courts with jurisdiction to "review final orders of removal"); Abdisalan v. Holder, 774 F.3d 517, 523 (9th Cir. 2014) (confirming that circuit courts have jurisdiction to review final orders of removal issued by the immigration judge).

[17] *See Matter of Negusie I*, 27 I. & N. Dec. at 348 (recognizing that the state of mind of an individual forced to carry out persecutory acts is germane to the persecutor bar determination).

[18] *See id.* at 363–64 (providing a five-part test to assess an applicant's duress defense which does not include an assessment of the situation the applicant is fleeing from, any redemptive acts taken by the applicant, or the severity of the persecution in which the applicant allegedly assisted); *see also infra* Part III (proposing the implementation of a balancing test when applying the persecutor bar in order to provide for a more comprehensive review of the applicant's circumstances).

This Note argues that in applying the persecutor bar, courts should balance the severity of the applicant's conduct with the persecution the applicant is fleeing from, the nature of the persecution in which the applicant assisted, as well as any mitigating factors such as any redemptive acts and the time elapsed since the applicant's persecutory conduct.[19] Part I of this Note provides an overview of asylum law and the persecutor bar as well as a focused study of its application to those involved in carrying out China's one-child policy.[20] Part II discusses various domestic and international critiques of the rigid nature of U.S. immigration law and its application of the persecutor bar.[21] Part III argues that in order to assess asylum claims with concern for human rights, courts should conduct a balancing test when applying the persecutor bar.[22]

## I. THE EVOLUTION OF THE PERSECUTOR BAR

The law of asylum in the United States is an evolving doctrine, constantly adjusting to account for the circumstances of countries and the people that live in them.[23] In addition to allowing those fleeing persecution into the country, asylum laws also keep those responsible for persecuting others out of the country through application of the persecutor bar.[24] Section A of this Part provides a brief history of asylum law in the United States.[25] Section B discusses the origins of the persecutor bar and the Supreme Court's seminal cases on the matter.[26] Section C discusses various interpretations circuit courts have made in applying the persecutor bar.[27] Section D, in order to demonstrate the persecutor

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[19] *See infra* notes 23–213 and accompanying text.

[20] *See infra* notes 23–114 and accompanying text.

[21] *See infra* notes 115–186 and accompanying text.

[22] *See infra* notes 187–213 and accompanying text.

[23] *See* Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1059 (9th Cir. 2017) (stating that beginning with the aftermath of World War II, the United States has yet to produce a concrete approach to defining refugee); Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 63 (1993) (noting that asylum law is intended to cover an "endless variety of situations"). *See generally* 3 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 33.04 (2018) (stating that by leaving the term persecution undefined in the Immigration and Nationality Act (INA), the definition of refugee has evolved through the courts over time). Enacted in 1952 and codified under Title 8 of the U.S. Code, the INA is the primary federal statute governing immigration and citizenship in the United States. *See* 82 Cong. Ch. 477, 66 Stat. 163, 163 (stating that the purpose of the INA is to "revise the laws relating to immigration, naturalization, and nationality"); *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 10, 2019), https://www.uscis.gov/legal-resources/immigration-and-nationality-act [https://perma.cc/6WBK-V7KH] (discussing how the INA "contains many of the most important provisions of immigration law").

[24] *See* Matter of McMullen, 19 I. & N. Dec. 90, 97 (B.I.A. 1984) (stating that by barring from asylum those who have persecuted others, U.S. asylum law signals that those who have persecuted others are "unworthy and not deserving of international protection").

[25] *See infra* notes 29–38 and accompanying text.

[26] *See infra* notes 39–66 and accompanying text.

[27] *See infra* notes 67–87 and accompanying text.

bar's effect on a specific population, delves into the application of the bar to individuals indirectly involved in carrying out China's one-child policy.[28]

### *A. A Brief History of U.S. Asylum Law*

Throughout its history, the United States has always provided safe harbor to certain foreign persons.[29] Nevertheless, without a distinct legal status for noncitizens fleeing persecution, the United States denied refuge to thousands of displaced Jews and other victims of the Nazi regime during World War II.[30] Following the war, as part of the international movement towards recognizing human rights as a global issue, the United Nations sought to remedy this injustice by providing a comprehensive definition of refugee as well as a set of responsibilities for nations in granting asylum.[31] The United Nations 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), later amended by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), defined refugee as a person who fears persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.[32] In harmony with the international community, as part of the Refugee

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[28] *See infra* notes 88–114 and accompanying text. Though China officially implemented a two-child policy in place of its one-child policy in 2016, the one-child policy and its impact on U.S. asylum law demonstrate the collateral effects that result from the recognition of new forms of persecution. *See* Wang Feng et al., *The End of China's One-Child Policy*, 47 STUD. FAM. PLAN., 83, 83 (2016) ("Starting on January 1, 2016, all Chinese couples are allowed to have two children.").

[29] *See* THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 793 (8th ed. 2016) (noting that in 1875, when first deciding to exclude former criminals from admission into the United States, Congress made an exemption for those "who had been convicted of political offenses"); *see also* An Act Supplementary to the Acts in Relation to Immigration (Page Act), 43 Cong. Ch. 141, 18 Stat. 477 (exempting convicts of political offenses from the exclusion of alien convicts).

[30] *See* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 4 (3d ed. 2007) (stating that by refusing refuge to persons escaping Germany and the surrounding countries, "[t]he response of the Allies was shameful"); Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017), https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust [https://perma.cc/P5WU-EMCH] (noting that during World War II, the United States rejected entry of nine hundred German Jews who arrived on a ship, and later denied a proposition that would grant refuge to twenty thousand Jewish children).

[31] *See* DONNELLY, *supra* note 30, at 4 (stating that the Holocaust was the unfortunate trigger that made human rights a global issue); Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 B.C. L. REV. 1123, 1124 (2013) (stating that international treaties such as the 1951 Refugee Convention created global standards regarding the admission and exclusion of refugees); *Refugees*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/refugees/ [https://perma.cc/M6ZG-DUJH] (noting that the United Nations created an agency specifically designed to help refugees following World War II and to provide a legal framework for helping refugees).

[32] Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A), 19 U.S.T. 6577, 189 U.N.T.S. 150, 152 [hereinafter 1951 Refugee Convention] (providing that the term refugee applies to anyone who "as a result of events occurring before [January 1,] 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group

Act of 1980, which made various amendments to the Immigration and Nationality Act of 1952 (INA), the United States aligned its definition of refugee with that of the 1951 Refugee Convention while further expanding it to include victims of past persecution.[33]

Though first statutorily defined by Congress in response to the blatant horrors of World War II, the term refugee is not limited to persons fleeing genocide.[34] In contrast, because of the many different forms persecution has taken and the indefinite forms of persecution the future may hold, the ambiguity of

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or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"). Whereas the 1951 Refugee Convention only covered persons fleeing persecution occurring in Europe before January 1, 1951, the 1967 Protocol removed these limitations. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (omitting the geographic and temporal restrictions of the 1951 Refugee Convention, thereby expanding the definition of refugee).

[33] *Compare* Refugee Act of 1980, § 201, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.) [hereinafter Refugee Act of 1980] (amending the definition of refugee to be, generally, any person who has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"), *with* 1951 Refugee Convention, 189 U.N.T.S. at 152 (defining refugee as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"). Though the United States is a party to the 1967 Protocol, it is not a party to the 1951 Refugee Convention. *See* U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf [https://perma.cc/C5YD-3VDZ] (listing the parties to the 1951 Refugee Convention and the 1967 Protocol). The United Nations High Commissioner for Refugees (UNHCR) is the United Nations agency created to assist and protect refugees. *See generally History of UNHCR*, UNHCR, https://www.unhcr.org/history-of-unhcr.html [https://perma.cc/ESC7-V5JV] (outlining the background and activities of the UNHCR). In addition to offering safe harbor, asylum in the United States comes with various coveted immigration benefits and securities including a pathway to citizenship. *See Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees [https://perma.cc/DT3M-54WW] (summarizing the various benefits associated with being granted asylum including work authorization, access to a social security card, ability to request asylum status for spouses or children, and eligibility to apply for permanent residence after one year in the United States). Whereas a refugee is defined as a person outside of his or her country who fears persecution in his or her home country, an asylee is a person already in the United States or seeking admission to the United States at a port of entry who meets the statutory definition of refugee. *Refugees and Asylees*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/refugees-asylees [https://perma.cc/VB6A-PSAM] (distinguishing definition of refugee from asylee).

[34] *See* GORDON ET AL., *supra* note 23, § 33.04 (noting that "persecution has come to include a wide variety of acts, from the most egregious, such as imprisonment and severe forms of torture, to the less harmful, such as abuse and confiscation of property"); *Refugees*, *supra* note 31 (noting that the United Nations created an agency specifically tailored to assist refugees in the aftermath of World War II); *see also, e.g.*, Tian-Yong Chen v. INS, 359 F.3d 121, 128 (2d Cir. 2004) (holding that applicants who suffered physical harm arising from their religious beliefs may establish past persecution); Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996) (finding that, to be considered persecution, while the applicant's conduct "need not necessarily threaten the petitioner's 'life or freedom,' it must rise above the level of mere 'harassment'").

the term allows court interpretation of conduct constituting persecution to change over time.[35] As a result, the definition of refugee is fluid and sufficiently malleable to protect an array of persons fleeing from different types of persecution.[36] Over the years, the courts have recognized certain groups of people as deserving protection under asylum laws such as victims of mandatory female genital mutilation in Togo and homosexuals in Cuba punished on account of their sexual orientation.[37] Other groups, such as victims of a coercive population control program like China's one-child policy, have been recognized as eligible for asylum by statute.[38]

### *B. The Persecutor Bar*

Under the INA's "persecutor bar," a noncitizen is ineligible for asylum if he or she "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."[39] Replicating the language used to define refugee under the INA, the persecutor bar ensures that individuals

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[35] *See* Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) (suggesting that the notion of persecution tends to change frequently and therefore is left undefined by statute); *see, e.g.*, Matter of A-B-, 27 I. & N. Dec. 316, 320 (A.G. 2018) (vacating the BIA's grant of asylum to the victim of domestic abuse and finding that, in future proceedings, victims of "domestic violence or gang violence perpetrated by non-governmental actors will not [generally] qualify for asylum").

[36] *See* Topalli v. Gonzales, 417 F.3d 128, 132 (1st Cir. 2005) ("Due to the infinite variety of factual circumstances the BIA is likely to face, the BIA has preferred to decide what amounts to past persecution on a case-by-case basis, instead of announcing rigid rules embodying some precise calculus of maltreatment and suffering."). With the impending threat of countries becoming uninhabitable due to climate change, many scholars argue that asylum eligibility must be extended to so-called "climate change refugees." *See generally* Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 393 (2009) (identifying advocates for granting refugee status to those who suffer from environmental harm).

[37] *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996) (recognizing the status of being an uncircumcised woman as a characteristic one "should not be required to change," thereby declaring that persons being persecuted on account of mandatory female genital mutilation are eligible for asylum); Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 820–22 (B.I.A. 1990) (recognizing sexual orientation as an "'immutable' characteristic," and thus protecting certain persons being persecuted on account of homosexuality as eligible for asylum).

[38] *See* 8 U.S.C. § 1101(a)(42) (2018) (specifically recognizing that for purposes of defining refugee, "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion"). The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), passed in 1996, amended the definition of refugee in the INA by adding language to clarify that victims of "a coercive population control program" are eligible for asylum as victims of persecution "on account of political opinion." *See infra* note 91 and accompanying text (providing language added to the definition of refugee to include victims of coercive population control programs).

[39] 8 U.S.C. § 1158(b)(2)(A)(i); *see also Negusie*, 555 U.S. at 514 (referring to the relevant section of the INA as the "so-called 'persecutor bar'").

responsible for any recognized form of persecution are denied refugee status.[40] The persecutor bar is thus one way to limit asylum to only those who the United States deems are worthy of protection.[41]

The first form of the persecutor bar in U.S. law appeared in the now defunct Displaced Persons Act of 1948 (DPA), which was passed primarily to allow European refugees of World War II to emigrate to the United States.[42] The DPA also contained language that specifically excluded from admission participants in any movement hostile to the United States and anyone who advocated or assisted in the persecution of others because of their race, religion, or national origin.[43] It was not until the Refugee Act of 1980, which established the five protected grounds for granting asylum status still recognized today, that Congress expanded the persecutor bar to disallow asylum status to anyone who had persecuted others on account of one of the five protected grounds.[44] Whereas the DPA was enacted specifically to address the Holocaust

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[40] *Compare* 8 U.S.C. § 1101(a)(42) (limiting refugees to those who are fleeing their home country due to "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"), *with id.* § 1158(b)(2)(A)(i) (applying the persecution exception to all asylum applicants 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").

[41] *See id.* §§ 1158(b)(2)(A)(i–vi), (B)(i) (listing additional exceptions to asylum eligibility); *Negusie*, 555 U.S. at 526–27 (Scalia, J., concurring) (noting that an overarching concern in determining admissibility of noncitizens is "desirability").

[42] *See generally* Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, 62 Stat. 1009 [hereinafter DPA] (amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (codified as amended at 50 U.S.C. App. §§ 1951–1965 (1951)) (no longer in force)) (stating that the purpose of the DPA was to "authorize for a limited period of time the admission into the United States of certain European displaced persons for permanent residence"); Fedorenko v. United States, 449 U.S. 490, 495 (1981) (explaining that Congress's principal purpose in enacting the DPA was to provide haven to Europeans fleeing persecution after World War II). The DPA adopted the definition of "displaced person" from Annex I of the Constitution of the International Refugee Organization (IRO), the intergovernmental organization created to address the surge of refugees following World War II, which defined refugee as a person who "has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons." Constitution of the International Refugee Organization, annex I, pt. I, § B, Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3, 13 [hereinafter IRO Constitution] (defining "displaced person"); *see* DPA § 2(b) (stating that in context of the DPA, the term "displaced person" is to be read consistent with its definition in the Constitution of the IRO).

[43] DPA § 13 (listing categories of persons ineligible for a visa under the DPA). Congress limited the beneficiaries of the DPA to "any displaced person or refugee" as defined in the IRO Constitution. *Id.* § 2(b). Annex I of the IRO Constitution made ineligible for refugee or displaced person status any persons who had assisted in the persecution of members of the United Nations or who have voluntarily assisted the enemy forces in their operations against the United Nations since the outbreak of World War II. IRO Constitution, annex I, pt. II, § 2 (listing "persons who will not be the concern of the [IRO]").

[44] *See* Refugee Act of 1980 § 201 (providing that refugee status may not be granted to "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"); *McMullen*, 19 I. & N. Dec. at 97 (finding that excluding those who participated in the persecution of

and resulting refugee crisis, the Refugee Act of 1980, which amended various parts of the INA, was implemented to comprehensively provide for any humanitarian crisis.[45]

Although application of the persecutor bar requires that the applicant participated in the persecution of others on account of one of the five protected grounds, the INA does not define persecution either in substance or in scope.[46] In 2005, in *Sahi v. Gonzales*, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit colorfully noted that although the BIA is charged with defining persecution in the INA, it has failed to do so despite numerous attempts.[47] Due to the inability of the BIA to define persecution, the responsibility has fallen to the appellate courts to create a working definition.[48]

The INA is equally silent on what amount of assistance or participation triggers the persecutor bar.[49] Even in situations where the question of whether persecution occurred is uncontested, it may be difficult to determine whether a person was sufficiently involved to establish assistance or participation in the

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others from the definition of refugee represents the view that such persons are "unworthy and not deserving of international protection"); 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, 231 (2007) (noting that by passing the Refugee Act of 1980 "Congress sought to provide a comprehensive, ideologically-neutral approach to defining 'refugee'").

[45] *See Negusie*, 555 U.S. at 519–20 (stating that because the DPA was enacted to address the postwar problems of World War II, it does not control the interpretation of the persecutor bar under the INA, which was amended by the Refugee Act of 1980 in order to provide for general treatment of refugees worldwide). *Compare* Refugee Act of 1980 (stating that the purpose of the Refugee Act of 1980 was "to amend the [INA] . . . to establish a more uniform basis for the provision of assistance to refugees"), *with* DPA § 1 (stating that the purpose of the DPA was to enable admission to the United States of "certain European displaced persons").

[46] *See* 8 U.S.C. § 1101(a)(42) (including "fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" in the definition of refugee yet not providing guidance on conduct that constitutes persecution); *Bocova*, 412 F.3d at 263 (stating that "the BIA has eschewed the articulation of rigid rules for determining when mistreatment sinks to the level of persecution, preferring instead to treat the issue on an ad hoc, case-by-case basis").

[47] *See* 416 F.3d 587, 588–89 (7th Cir. 2005) (noting that the BIA has yet to define persecution and stating "we haven't a clue as to what [the BIA] thinks religious persecution is").

[48] *See Stanojkova*, 645 F.3d at 949 ("Responsibility has by default devolved on the courts . . . to try to create some minimum coherence in the adjudication of claims of persecution . . . ."); Mansour v. Ashcroft, 390 F.3d 667, 681 (9th Cir. 2004) (Pregerson, J., concurring in part and dissenting in part) (noting that "the definition of persecution that our court applies is a creature of purely our own case law"). *But see* Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution has generally been defined as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive") (internal quotations omitted).

[49] *See* 8 U.S.C. § 1158(b)(2)(A)(i) (stating that an alien is ineligible for asylum if he or she "assisted, or otherwise participated in the persecution of" others but failing to define what amounts to assistance or participation in persecution); *see also* Martine Forneret, *Pulling the Trigger: An Analysis of Circuit Court Review of the "Persecutor Bar,"* 113 COLUM. L. REV. 1007, 1017–18 (2013) (summarizing four "triggering factors" concerning the applicant's participation in the persecution that appellate courts use to determine whether an asylum applicant's actions trigger the persecutor bar).

persecution.[50] The origins of the courts' jurisprudence regarding the level of activity required to constitute assistance in persecution can be traced back to a case decided soon after passage of the Refugee Act of 1980.[51]

In 1981, in *Fedorenko v. United States*, the Supreme Court considered the case of a Ukrainian-born man granted asylum under the DPA and later naturalized as a U.S. citizen.[52] Upon discovery that he served as a Nazi prison guard during World War II, the government sought to denaturalize and deport him, as he was ineligible for protection under the DPA and had thus gained his citizenship illegally.[53] Fedorenko admitted to his service as a Nazi prison guard, but claimed that he was forced to do so as a captured Soviet soldier.[54] Despite his claim that he was forced to work as a guard against his will, the Court held that his denaturalization was justified regardless of whether he performed his duties under duress.[55] The Court concluded that it could not interpret the DPA to include an exception for involuntary actions and that the controlling question was an objective one: whether the particular conduct can be considered, at the very least, assistance in the persecution of others.[56]

The debate over the relevancy of duress in the application of the persecutor bar resurfaced in 2009 when the Court decided *Negusie v. Holder*.[57] Rely-

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[50] *Compare* Zhang Jian Xie v. INS, 434 F.3d 136, 143–44 (2d Cir. 2006) (finding that the applicant played a minor role in China's coercive population control program by transporting women to hospitals where they would receive forced abortions), *with* Yan Yan Lin v. Holder, 584 F.3d 75, 81–82 (2d Cir. 2009) (holding that the applicant's conduct "as a whole" demonstrates that she did not play a role in China's coercive population control program) (internal quotations omitted).

[51] *See Fedorenko*, 449 U.S. at 512 & n.34 (addressing the question of when conduct is considered assisting in the persecution of others); *see also* Castaneda-Castillo v. Gonzales, 464 F.3d 112, 133 (1st Cir. 2006) (stating that in cases where whether the applicant assisted in persecution is unclear, the courts look to footnote 34 in *Fedorenko* for direction); *Zhang Jian Xie*, 434 F.3d at 140 (referring to *Fedorenko* when determining what constitutes assistance in persecution).

[52] 449 U.S. at 496–97 (describing the falsified story told by a former Nazi prison guard to immigration officials of being displaced from Poland).

[53] *See id.* at 493 (stating that the government sought to denaturalize the defendant on account of his failure to disclose the fact that he served as an armed guard at a Nazi concentration camp during World War II, which would have "rendered his citizenship revocable as 'illegally procured' or procured by willful misrepresentation of a material fact"); *see also* 8 U.S.C. § 1451(a) (requiring revocation of U.S. citizenship "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation").

[54] *See Fedorenko*, 449 U.S. at 500 (recounting the respondent's testimony that while he was forced to serve as a Nazi guard after being imprisoned with fellow Russian soldiers, he did not have "personal involvement in the atrocities committed at the camp").

[55] *See id.* at 512 ("The plain language of the [DPA] mandates precisely the literal interpretation . . . [that] an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa.").

[56] *See id.* (stating that "Congress was perfectly capable of adopting a 'voluntariness' limitation" on the persecutor bar, and that by omitting the word "voluntary" from the DPA, Congress must have intended "*all* those who assisted in persecution of civilians [to be] ineligible for visas").

[57] *See* 555 U.S. at 517–18 (confirming that the INA's persecutor bar statute is ambiguous regarding the relevancy of coercion or duress).

ing on *Fedorenko*, the BIA and the U.S. Court of Appeals for the Fifth Circuit both upheld the immigration judge's decision to deny Negusie's asylum application due to his role in the persecution of others.[58] The Supreme Court rejected the lower courts' reasoning, finding that they relied on the wrong statute; unlike in *Fedorenko*, the persecutor bar in question in *Negusie* was that of the INA, not the DPA.[59] Though the Court refused to determine the availability of duress as a defense to the persecutor bar, the majority opinion reasoned that both the statutory language and principles of the now-defunct DPA are distinct from the INA, and therefore, it is not clear whether Congress intended to disallow a duress defense to the INA's persecutor bar.[60]

In 2018, on remand in *Matter of Negusie I*, the BIA concluded that duress is relevant to the application of the INA's persecutor bar.[61] In doing so, the BIA acknowledged that the subjective intent of the asylum applicant must be considered when assessing his persecutory conduct.[62] The duress defense proposed by the BIA, however, was narrowly cabined and requires various conditions, the first of which is that the applicant acted under an imminent threat of death or serious bodily injury to himself or others.[63] Finding that the threats made to Negusie when he refused to comply with the Eritrean Army did not satisfy this standard, the BIA affirmed the application of the persecutor bar.[64]

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[58] *See id.* at 514 (noting that the lower court affirmed the immigration judge's decision because "the persecutor bar applies even if the alien's assistance in persecution was coerced or otherwise the product of duress"); *Fedorenko*, 449 U.S. at 512–13 (holding that an applicant is ineligible for asylum regardless of whether his persecutory acts were involuntary).

[59] *See Negusie*, 555 U.S. at 518–20 (noting that "*Fedorenko* . . . addressed a different statute enacted for a different purpose" and thus "[did] not control the BIA's interpretation of this persecutor bar").

[60] *See id.* at 524 (remanding the case to the BIA with specific instructions to consider the difference in statutory scheme between the DPA and INA in considering whether coercion and duress are relevant in application of the persecutor bar).

[61] *See* 27 I. & N. Dec. at 363 (holding that the "duress standard is intended to apply only in rare and extraordinary circumstances"). The BIA required an asylum applicant to prove "by a preponderance of the evidence that he (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others." *Id.*

[62] *See id.* (holding that an applicant is not necessarily made ineligible for asylum by the persecutor bar if he or she acted under duress). *But see Matter of Negusie II*, 27 I. & N. Dec. at 481 (staying the BIA's decision and inviting amicus briefs on the question of "[w]hether coercion and duress are relevant to the application of the Immigration and Nationality Act's persecutor bar").

[63] *Matter of Negusie I*, 27 I. & N. Dec. at 363 (proposing five requirements that the applicant must prove in order to meet the standard for a duress defense to the persecutor bar).

[64] *Id.* at 368 (holding that the verbal death threats "did not constitute the imminent threat of death or serious bodily injury"). The BIA also concluded that the applicant "had a reasonable opportunity to escape or otherwise avoid guarding the prisoners" and therefore did not meet the criteria for a duress defense. *Id.* (explaining that because the applicant had previously escaped from the military base and

Although the decisions from *Fedorenko* and *Matter of Negusie I* clarify that directly committing persecutory acts triggers the persecutor bar, subject to a narrow duress defense, they do not clarify how to assess conduct that is indirectly related to and relatively far removed from persecution.[65] Instead, as Sections C and D of this Part will demonstrate, the circuit courts have created similar tests that apply the persecutor bar to applicants as long as they knowingly contributed to and objectively furthered the persecution of others.[66]

### *C. Circuit Courts' Interpretation of "Assistance in Persecution"*

Despite the Court's clarification in *Negusie* that its holding in *Fedorenko* may not be used to determine whether there is a duress defense to the INA's persecutor bar, courts still consider *Fedorenko* when analyzing whether conduct amounts to assistance in persecution.[67] Rather than setting out a clear definition of what constitutes assistance in persecution, however, the Court in *Fedorenko* offered guidance, imbedded within a footnote, in the form of a hypothetical test case.[68]

In its footnote, the Court compared the actions of a prison barber who merely cut inmates hair before they were executed with those of a prison guard who was armed, paid for his duties, and willing to shoot at escaping inmates upon command from his superior officer.[69] Standing on different ends of the spectrum, the Court clarified that the barber would not be found to have assist-

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walked to his friend's home through the jungle, he had a reasonable opportunity to escape or avoid guarding the prisoners).

[65] *See Fedorenko*, 449 U.S. at 512–14 (holding that the applicant's direct persecutory conduct as a Nazi prison guard made him ineligible for asylum); *Matter of Negusie I*, 27 I. & N. Dec. at 363 (holding that there is a limited duress defense to the persecutor bar); Forneret, *supra* note 49, at 1026 (stating that there is "inconsistency both between circuits and internally within circuits" in determining whether tangential participation by the asylum applicant in the persecutory act implicates the persecutor bar).

[66] *See infra* notes 67–114 and accompanying text.

[67] *See Negusie*, 555 U.S. at 522–23 (finding that the BIA was wrong to rely on *Fedorenko* in determining whether the persecutor bar applies to both voluntary and involuntary persecutory acts); Parlak v. Holder, 578 F.3d 457, 469 (6th Cir. 2009) (stating that where voluntariness in committing persecutory acts is not in question, *Fedorenko* is proper precedent for "defining what constitutes 'assisting in persecution'").

[68] *See* 449 U.S. at 512 & n.34 (providing examples of individuals who did and did not assist in persecution); *see also* Miranda Alvarado v. Gonzales, 449 F.3d 915, 925–26 (9th Cir. 2006) (stating that the Court's "somewhat cryptic footnote" in *Fedorenko* "has since become the principal guide to interpreting persecutor exceptions").

[69] *Fedorenko*, 449 U.S. at 512 & n.34 (stating that "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" while "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").

ed in persecution while the guard unquestionably would have been found to assist in persecution.[70] While noting that the comparison of the barber to the guard offered a clear distinction, the Court did not venture to make a more nuanced definition of what constitutes assistance in persecution, ultimately finding it unnecessary in the case at hand.[71] Since 1981, circuit courts have used the footnote in *Fedorenko* comparing the prison barber with the prison guard as a starting point in identifying assistance in persecution.[72]

In 2006, in *Miranda Alvarado v. Gonzales*, the U.S. Court of Appeals for the Ninth Circuit found that an asylum applicant, Miranda, assisted in persecution when he provided translation services to the Peruvian police force during interrogations of members of an opposing radical political group.[73] Though Miranda knew the opposition members would be tortured after their interviews, he did not participate in the torture itself.[74] Furthermore, he attempted to resign from the police force in disapproval of the police's abusive tactics and received multiple death threats from the opposition group targeting both him and his family.[75] In deciding whether to apply the persecutor bar, the Ninth Circuit found both the threats against his family and his attempt to resign irrelevant.[76] Instead, once determining that he was not coerced into acting as a translator, the court's decision turned on whether Miranda's actions were integral to the persecution that occurred.[77] Despite finding the case to be at "the margin of the culpability required under the statute," the Ninth Circuit applied the persecutor bar because Miranda knew that his translation services were necessary within the chain of events that ultimately led to the persecution of others.[78]

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[70] *See id.* (clarifying that the persecutor bar would be applied to a Nazi prison guard but not to a barber who merely cut the hair of Nazi prisoners).

[71] *See id.* ("Other cases may present more difficult line-drawing problems but we need decide only this case.").

[72] *See Parlak*, 578 F.3d at 468 (noting that "courts have since looked to *Fedorenko* for guidance in determining what constitutes 'assisting in persecution'").

[73] *See Miranda Alvarado*, 449 F.3d at 919, 929–30 (finding that the applicant "materially assisted the persecution" of members of an opposing political group without legal justification, and therefore was ineligible for asylum).

[74] *Id.* at 918–19 (describing the applicant's admission to witnessing the torture of opposing political members but denial of playing a direct role in it).

[75] *Id.*

[76] *See id.* at 929 (failing to consider threats against the applicant's family when determining whether there were extenuating circumstances that would lift the persecutor bar).

[77] *See id.* at 929–30 (finding that because the applicant failed to prove that he acted in self-defense, the persecutor bar would apply as long as the applicant's conduct materially assisted and furthered the persecution).

[78] *See id.* (applying the persecutor bar despite acknowledging that the applicant was not in a position of authority, did not directly torture the victims, and did not use force in any way to detain the victims).

In 2010, in *Ntamack v. Holder*, the U.S. Court of Appeals for the Fourth Circuit employed a similar objective test when it upheld the persecutor bar against a member of the Cameroonian civic guard.[79] During the fourteen years of Ntamack's service, there were reports of repeated human rights abuses by the civic guard against Cameroonian civilians.[80] Ntamack, however, opposed such abuses and was imprisoned three times throughout his tenure by his superiors for refusing to engage in such violence.[81] On the second occasion, he was standing with his unit to suppress a student protest demanding political freedom.[82] When Ntamack refused to join the other members of his unit in beating and arresting the students, he was imprisoned and beaten.[83] Later, during his third imprisonment, he was beaten unconscious before escaping from prison and fleeing for the United States.[84] The Fourth Circuit affirmed the lower courts' application of the persecutor bar, finding that by merely standing with the civic guard while they violently suppressed the protesting students, Ntamack objectively furthered persecution.[85] The court did not find his legitimate fear of torture upon return to Cameroon to be relevant to the determination.[86]

Other circuit courts employ tests similar to those of the Fourth and Ninth Circuits, examining the totality of the applicant's conduct to determine whether they knowingly contributed to and had an objective effect on the persecution of others.[87]

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[79] *See* 372 F. App'x 407, 411 (4th Cir. 2010) (affirming the BIA's application of the persecutor bar because the applicant's conduct "objectively furthered persecution").

[80] *See id.* at 408 (noting the frequent human rights abuses by the Cameroonian government reported by the U.S. Department of State, "including unlawful killings, the use of harsh interrogation techniques, and torture").

[81] *See id.* at 409 (discussing three separate incidents in which the applicant was imprisoned by the civic guard for refusing to "employ violent tactics" and suspicion of his political beliefs).

[82] *Id.* (describing the applicant's refusal to engage in violence against a student demonstration at the University of Yaounde "during which the students were demanding democratic reforms and freedom").

[83] *Id.*

[84] *Id.*

[85] *Id.* at 411.

[86] *See id.* at 411–12 (discussing the application of the persecutor bar without considering the applicant's fear of bodily injury if returned to Cameroon). The court also did not find the applicant's "redemptive acts," which included warning students about upcoming raids, to be relevant. *See id.* at 412 (stating that redemptive acts do not eliminate evidence of assistance in persecution, and therefore do not factor into the application of the persecutor bar).

[87] *See* Diaz-Zanatta v. Holder, 558 F.3d 450, 458 (6th Cir. 2009) (evaluating applicant's claim that she did not know that her conduct would lead to persecutory acts by analyzing whether there was a nexus between the applicant's conduct and the persecution of others and whether the applicant had knowledge of the ongoing persecution); Singh v. Gonzales, 417 F.3d 736, 739–41 (7th Cir. 2005) (holding that the taking of individuals into custody to face police abuse triggered the persecutor bar because it constituted a link in the chain of persecutory acts rather than an "inconsequential association with persecutors"). There is, however, disagreement among the circuit courts regarding the extent to which an applicant's personal motivation should be considered. *See* Brigette L. Frantz, *Assistance*

### *D. A Case Study: The Second Circuit's Application of the Persecutor Bar to China's One-Child Policy*

#### 1. Specific Recognition of Persons Fleeing China's One-Child Policy

In an effort to halt the rapid growth rate of the country with the world's largest population, in 1979 China enacted its "one-child policy."[88] Although condemned publicly by authorities, government actors routinely performed forced abortions and sterilizations on women who were pregnant with their second child.[89] If women were in hiding, government officials subjected their families, friends, and neighbors to fines, beatings, and imprisonment for staying quiet.[90]

In 1996, as part of The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the United States further amended its definition of refugee by including coercive population control as a form of persecution based on political opinion.[91] To prove victimization of coercive population

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*in Persecution Under Duress: The Supreme Court's Decision in* Negusie v. Holder *and the Misplaced Reliance on* Fedorenko v. United States, 3 U.S. DEP'T JUST., IMMIGR. L. ADVISOR, no. 5, May 2009, at 1, 4 (explaining that the circuit courts differ regarding the extent to which they consider the applicant's motivation or voluntariness when applying the persecutor bar).

[88] *See* Tessa Bernson, *Here's How China's One-Child Policy Started in the First Place*, TIME (Oct. 29, 2015), http://time.com/4092689/china-one-child-policy-history/ [https://perma.cc/DE7V-KBBH] (stating that in the 1970s, when many countries were worried about overpopulation, China "took an extreme approach to the problem" by introducing a national policy limiting couples of Han ethnicity to one child); *see also* Wendy Connett, *Understanding China's Former One Child Policy*, INVESTOPEDIA (July 7, 2019), https://www.investopedia.com/articles/investing/120114/understanding-chinas-one-child-policy.asp [https://perma.cc/R9E4-R8YR] (explaining that China's population, which reached 970 million in 1979, was outpacing the country's food supply).

[89] *See* Nathan Vanderklippe, *The Ghost Children: In the Wake of China's One-Child Policy, a Generation Is Lost*, GLOBE & MAIL (Mar. 13, 2015), https://www.theglobeandmail.com/news/world/the-ghost-children-in-the-wake-of-chinas-one-child-policy-a-generation-is-lost/article23454402/ [https://perma.cc/9EEE-NXNF] (reporting that as part of China's one-child policy, there have been an estimated 336 million abortions, 196 million sterilizations, and 403 million intrauterine device insertions); Michael Weisskopf & Wash. Post Foreign Serv., *One Couple, One Child: Abortion Policy Tears at China's Society*, WASH. POST (Jan. 7, 1985), https://www.washingtonpost.com/archive/politics/1985/01/07/one-couple-one-child-second-of-three-articles-abortion-policy-tears-at-chinas-society/5abf0d83-b01f-46c5-80be-a6ca2dc20958/ [https://perma.cc/A2P3-YAWF] (stating that government officials publicly claim to "rely on the powers of persuasion and education" in accomplishing its one-child policy).

[90] *See* Chen Guangcheng, Opinion, *China Is Finally Ending the One-Child Policy. It Can't Happen Soon Enough*, WASH. POST (June 11, 2018), https://www.washingtonpost.com/opinions/china-is-finally-ending-the-one-child-policy-it-cant-happen-soon-enough/2018/06/11/5dde684c-6b4b-11e8-9e38-24e693b38637_story.html [https://perma.cc/SE8V-2JLY] (reporting that in enforcing the country's one-child policy, Chinese authorities forced women out of hiding by kidnapping their family members, friends and neighbors, holding them in "prison-like conditions for days or weeks, extorting them for cash or beating them until the [women] revealed themselves").

[91] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 601(a), Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA] (amending the definition of refugee in the INA by adding that "a person who has been forced to abort a pregnancy or to undergo involuntary

control, an applicant must show that he or she was forced or fears being forced to undergo an abortion or sterilization or fears being persecuted for resisting such a procedure.[92] As a collateral effect, the provision made anyone who ordered, incited, assisted, or otherwise participated in the policy ineligible for asylum due to the persecutor bar.[93]

### 2. Application of the Persecutor Bar to China's One-Child Policy

By recognizing China's coercive population control as per se persecution, anyone who is found to have assisted or otherwise participated in enforcing the policy may be deemed ineligible for asylum, including victims of the policy.[94] In applying the persecutor bar to the one-child policy, the U.S. Court of Appeals for the Second Circuit casts a wide net that reaches not only the government officials who set the policy and the doctors who perform forced abor-

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sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion"). In identifying coercive population control as a recognized form of persecution, the IIRIRA provision overruled the BIA's decision in *Matter of Chang*, which held that persecution inflicted by the Chinese government on account of opposition to its one-child policy did not qualify an applicant for asylum under one of the five protected grounds listed in the definition of refugee in the INA. *See* 20 I. & N. Dec. 38, 44 (B.I.A. 1989) (finding that the implementation of China's one-child policy, if "solely tied to controlling population, rather than as a guise for acting against people" who would be protected as a refugee under the INA, does not render those subject to the policy as "victims of persecution or hav[ing] a well-founded fear of persecution").

[92] *See* Yi Ni v. Holder, 613 F.3d 415, 425 (4th Cir. 2010) (finding that in passing the IIRIRA, Congress's unambiguous intent was to protect those who had undergone forced abortions or sterilizations, been persecuted for resisting, or who had a well-founded fear of such persecution). More sparingly, men too have been granted asylum by demonstrating that their wives were subjected to coercive population control methods. *See* Matter of C-Y-Z-, 21 I. & N. Dec. 915, 917–19 (B.I.A. 1997) (confirming that forced abortion or sterilization is an infringement on a married couple's shared reproductive rights, and therefore may qualify a woman for refugee status as well as her husband).

[93] 8 U.S.C. § 1158(b)(2)(A)(i) (stating that an alien is ineligible for asylum if he or she "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"); *id.* § 1101(a)(42) (recognizing that victims of coercive population control are considered to have been persecuted on account of political opinion).

[94] *See* Yaqin Chen v. Att'y Gen., 622 F. App'x 155, 157, 161–62 (3d Cir. 2015) (finding a midwife who assisted doctors in five to six forced abortions to be ineligible for asylum due to the persecutor bar); Su Qing Chen v. Att'y Gen., 513 F.3d 1255, 1260–61 (11th Cir. 2008) (finding a Chinese government worker who guarded women detained for violating family planning policies to be ineligible for asylum due to the persecutor bar); Xing Jie Guan v. Bureau of Citizenship & Immigration Servs., 183 F. App'x 76, 77–78 (2d Cir. 2006) (finding a hospital worker who prepared for forced abortions, as well as aided women after forced abortions, to be ineligible for asylum due to the persecutor bar despite later undergoing a forced abortion herself).

tions, but also any person who at some point knowingly furthered the execution of the policy.[95]

In 2006, in *Zhang Jian Xie v. INS*, the Second Circuit considered the extent to which one must be involved in implementing China's one-child policy to be subject to the persecutor bar.[96] The Second Circuit held that a driver who transported women to hospitals where they would be subjected to forced abortions sufficiently assisted in persecution to trigger the persecutor bar.[97] Xie transported three to five women total and on his final trip he helped a woman escape as soon as there was no other guard present.[98] In its analysis, the Second Circuit looked at the totality of Xie's conduct to determine whether it furthered the persecution or was merely tangential.[99] Because the driver's actions were "but-for" causes of the women's forced abortions, the Second Circuit found that the driver's conduct triggered the persecutor bar.[100]

In 2009, in *Yanqin Weng v. Holder*, the Second Circuit found that although a nurse's assistant worked in a Chinese public hospital that performed forced abortions, her actions did not violate the persecutor bar.[101] In departure from Weng's typical duties, one day she was required to watch over patients awaiting forced abortion procedures to ensure they did not escape.[102] After standing guard for just ten minutes, she helped a patient escape.[103] Weng was physically abused, fired, and repeatedly interrogated about the missing patient, causing her to flee to the United States and apply for asylum.[104] Relying on its ruling in *Xie* as precedent, the Second Circuit found that the entirety of Weng's

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[95] *See* Forneret, *supra* note 49, at 1027–30 (noting that the Second Circuit applies the persecutor bar on both direct and indirect participants in China's one-child policy).

[96] *See* 434 F.3d at 140–43 (relying on precedent dealing with forms of persecution other than coercive population control programs to determine what constitutes assistance in persecution).

[97] *See id.* at 143–44 (finding that Xie "played an active and direct" role in forced abortions, and therefore is ineligible for asylum due to the persecutor bar).

[98] *Id.* at 138.

[99] *See id.* at 142–43 (distinguishing between conduct that had direct persecutory consequences for victims and "conduct [that] was tangential to the acts of oppression and passive in nature").

[100] *See id.* at 143–44 (finding that because the applicant's role in transporting women to hospitals where they would undergo forced abortions was a necessary step to the performance of forced abortions, it was "active and had direct consequences for the victims"). In response to Xie's argument that the bar should be lifted due to his role in helping the final woman escape, the court indicated that redemptive acts may be relevant to the analysis but did not find it instructive in this case. *See id*. at 144.

[101] *See* Yanqin Weng v. Holder, 562 F.3d 510, 512–13, 515–16 (2d Cir. 2009) (holding that applicant's conduct as a nurse's assistant, in its entirety, did not amount to assistance in persecution sufficient to implicate the persecutor bar).

[102] *Id.* at 512 (describing applicant's typical job duties as "registering patients, assisting nurses in caring for patients, recording vital signs, and maintaining patients' files"). One night, due to a traffic accident that caused the hospital to be abnormally busy, Weng was assigned to guard five pregnant women who were detained to undergo forced abortions. *Id.*

[103] *Id.* at 512–13, 515.

[104] *Id.*

conduct was tangential and not sufficiently direct, active, or integral to carrying out the forced abortions.[105] The court distinguished Weng's conduct from that of Xie, finding her actions to be too attenuated from the forced abortions to constitute assistance in the persecution.[106]

During the same session, in *Yan Yan Lin v. Holder*, the Second Circuit found that the applicant's actions did not trigger the bar.[107] Lin was a maternity nurse at a state-run hospital that performed forced abortions.[108] She performed various tasks at all pregnancy stages, some of which were for women who would later be forced to undergo abortions.[109] After helping one woman escape from the hospital, Lin was interrogated by the police, driving her to seek asylum in the United States.[110] Placing Lin's role in the persecution of others somewhere in between that of Xie and Weng, the Second Circuit ultimately found that because her actions did not make the forced abortions more likely to occur, her actions were closer to Weng's and therefore did not amount to assistance in persecution.[111]

By looking at the objective effect of the applicant's conduct in applying the persecutor bar to persons involved in China's one-child policy, the Second Circuit's analysis is consistent with other circuit courts.[112] In cases of forced abortions, if the actions contributed directly to or were in furtherance of the

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[105] *See id.* at 515–16 (holding that the applicant's behavior did not cross the line from passive conduct to conduct that assists in persecution); *Zhang Jian Xie*, 434 F.3d at 142–43 (distinguishing between conduct that is active and has direct consequences for victims and conduct that is tangential and passive in nature).

[106] *See Yanqin Weng*, 562 F.3d at 516 (distinguishing the applicant's conduct from the driver in *Zhang Jian Xie* because her role in the forced abortions was less substantial and not a necessary step in the ultimate persecutory acts).

[107] *See* 584 F.3d at 81–82 (holding that Lin's conduct as a whole did not amount to assistance in persecution).

[108] *Id.* at 77.

[109] *Id.* at 77–78 (identifying the applicant's job duties as a nurse in a state-run hospital, including, "tending to pregnant women, assisting in the performance of ultrasound and other prenatal examinations, participating in live-birth deliveries, caring for newborns, and providing recovery care to women who had undergone forced abortions").

[110] *Id.* at 78 (explaining why applicant fled her native China to apply for asylum in the United States). While working at the hospital, Lin realized that she knew one of the patients scheduled to undergo a forced abortion and later helped her escape from the hospital. *Id.* Lin was questioned immediately as well as months later by a doctor and government officials. *Id.*

[111] *See id.* at 80–82 (comparing Lin's conduct with the applicants' conduct in *Zhang Jian Xie* and *Yanqin Weng*).

[112] *See Yanqin Weng*, 562 F.3d at 516 (holding that, because Weng did not "engage in conduct necessary to [the] commission of forced abortions," her conduct did not trigger the persecutor bar); *Zhang Jian Xie*, 434 F.3d at 142–43 (holding that in assessing the applicant's actions as a whole, the court must decipher between conduct that was "active and had direct consequences for the victims" and conduct that was "tangential to the acts of oppression and passive in nature"); *see also Miranda Alvarado*, 449 F.3d at 929–30 (basing application of persecutor bar on whether the applicant's conduct "materially assisted the persecution" so as to further the persecution).

procedure, the court has applied the persecutor bar.[113] On the other hand, if the actions had no causal connection to the ultimate abortion and did not make it more likely to occur, the court is unwilling to apply the bar.[114]

## II. A COMPARATIVE VIEW OF THE PERSECUTOR BAR

In interpreting the INA's persecutor bar, circuit courts have developed straightforward and consistent tests that focus solely on whether the applicant knowingly furthered the persecution of others.[115] The rigidity of such tests are emblematic of the inflexible and binary nature of U.S. immigration law.[116] Various critiques have been voiced both within the United States and internationally that call for a more nuanced approach not only to the exclusion clauses to asylum, but immigration law more generally.[117] Section A of this Part exposes the inflexibility of the persecutor bar and explores the calls for injecting more creativity in its application.[118] Section B discusses a proposed balancing test when applying the exclusion clause to applicants for prior non-political crimes.[119] Section C returns to the analysis of China's one-child policy to examine whether barring those indirectly involved with carrying out the policy is consistent with the basic rationale for exclusion clauses.[120]

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[113] *See Xing Jie Guan*, 183 F. App'x at 78 (holding that because the applicant's role in preparing women for forced abortions, "even if relatively minor," furthered the implementation of China's one-child policy, her conduct was in violation of the persecutor bar and therefore she was ineligible for asylum); *Zhang Jian Xie*, 434 F.3d at 143 (finding that because the applicant played "an active and direct, if arguably minor, role" in persecution by driving the women to the hospital where they would undergo forced abortions, his conduct triggered the persecutor bar).

[114] *See Yan Yan Lin*, 584 F.3d at 81–82 (finding that Lin's performance of routine prenatal exams did not cause the abortions nor make them more likely to occur, and therefore, her conduct did not trigger the persecutor bar); *Yanqin Weng*, 562 F.3d at 515 (finding that by standing guard for just ten minutes before helping a victim escape, the applicant's "conduct neither caused the abortions, nor made it easier or more likely that they would occur" and therefore her actions were, "at most, 'tangential,' 'passive accommodation' of the conduct of others, and thus they do not trigger the persecutor bar").

[115] *See supra* Part I.

[116] *See generally* Forneret, *supra* note 49 and accompanying text.

[117] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1741 (2009) (arguing for the implementation of a system of "proportionate sanctions" that considers the nature of the immigration violation).

[118] *See infra* notes 121–147 and accompanying text.

[119] *See infra* notes 148–171 and accompanying text.

[120] *See infra* notes 172–186 and accompanying text.

### *A. Calls for Creativity*

#### 1. The Rigid Box of the Persecutor Bar

What constitutes "persecution," as used in the INA, is ambiguous.[121] What amounts to assistance or participation in persecution is likewise ambiguous.[122] Once it has been established that an applicant did assist in persecution, however, the result in U.S. immigration law becomes clear—a statutory bar on asylum.[123] By deeming applicants who "incited, ordered, assisted, or otherwise participated in" the persecution of others to be ineligible for asylum, the INA's persecutor bar lumps all violators together as an undesirable class of people.[124] Irrespective of whether the applicant played a significant or minor role in the eventual persecution, the statute unequivocally denies asylum.[125]

Though the exact language the courts use in their analyses differs slightly, the focus remains on the objective effect of the applicant's conduct.[126] In other words, as long as the court finds that the applicant's conduct in any way furthered the persecution and the applicant had knowledge that his or her actions would further the persecution, the courts invariably apply the persecutor bar.[127]

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[121] *See* Sahi v. Gonzales, 416 F.3d 587, 588–89 (7th Cir. 2005) (noting that the INA does not define the term "persecution"); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 4:2 (Aug. 2019 ed.) (stating that the drafters of the 1951 Refugee Convention intentionally left "persecution" undefined so that it could be interpreted in a flexible manner).

[122] *See* Miranda Alvarado v. Gonzales, 449 F.3d 915, 925–26 (9th Cir. 2006) (stating that the Court's attempt at defining assistance in persecution in *Fedorenko* was "somewhat cryptic").

[123] *See, e.g.*, Singh v. Gonzales, 417 F.3d 736, 739–41 (7th Cir. 2005) (affirming application of persecutor bar where the applicant, as a police officer, took members of a minority religious group into custody where he knew they would be physically abused); *see also* 8 U.S.C. § 1158(b)(2)(A)(i) (2018) (making persons who engaged in the persecution of others ineligible for asylum).

[124] *See Singh*, 417 F.3d at 739–41 (contrasting persecutory acts of Nazi guards, "whose complete existence was premised upon the persecution of innocent civilians," with local police officers who could be furthering "legitimate law enforcement purposes" in addition to engaging the persecution of religious minorities); Matter of McMullen, 19 I. & N. Dec. 90, 97 (B.I.A. 1984) (stating that the INA's persecutor bar "represents the view that those who have participated in the persecution of others are unworthy and not deserving of international protection").

[125] *See* Xing Jie Guan v. Bureau of Citizenship & Immigration Servs., 183 F. App'x 76, 77–78 (2d Cir. 2006) (finding that the applicant's conduct, "even if relatively minor," amounted to assistance in persecution and thus triggered the persecutor bar); Zhang Jian Xie v. INS, 434 F.3d 136, 143 (2d Cir. 2006) (finding that even though the applicant played an "arguably minor" role in persecution, his conduct triggered the persecutor bar).

[126] *Compare* Suzhen Meng v. Holder, 770 F.3d 1071, 1074 (2d Cir. 2014) (identifying the four-part test employed by the Second Circuit in determining whether the applicant's conduct constitutes assistance in persecution), *with* Quitanilla v. Holder, 758 F.3d 570, 577 (4th Cir. 2014) (identifying the two-part test employed by the Fourth Circuit in determining whether the applicant's conduct constitutes assistance in persecution), *and* Kumar v. Holder, 728 F.3d 993, 998–99 (9th Cir. 2013) (identifying the two-part test employed by the Ninth Circuit in determining whether the applicant's conduct constitutes assistance in persecution).

[127] *See* Yanqin Weng v. Holder, 562 F.3d 510, 515–16 (2d Cir. 2009) (finding that the applicant's "conduct neither caused the abortions, nor made it easier or more likely that they would occur" and therefore does not trigger the persecutor bar); Diaz-Zanatta v. Holder, 558 F.3d 450, 457 (6th Cir.

Furthermore, despite the BIA's recent recognition that the persecutor bar is not necessarily triggered if one assisted in persecution under duress, former Attorney General Sessions issued an automatic stay of the decision.[128] Though the decision remains stayed at the time of this Note, it may ultimately be overruled.[129]

### 2. Thinking Outside the Rigid Box

In straying somewhat from the pack, some courts have suggested that an applicant's redemptive acts ought to be considered when assessing whether to apply the persecutor bar.[130] For example, both the Second and Seventh Circuits have remanded cases to the BIA with instructions to determine whether the applicant's redemptive acts could weigh in favor of granting asylum, especially if the applicant took risks in order to protect those who were being persecuted.[131] In subsequent cases, however, the Second Circuit has seemingly walked back this position, suggesting that redemptive acts are not a significant part of the determination whether a person assisted or participated in persecution.[132]

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2009) (analyzing whether there was a "nexus between the [applicant's] actions and the persecution of others" and whether the applicant had knowledge of the ongoing persecution); *Singh*, 417 F.3d at 739–40 (holding that the taking of individuals into custody to face police abuse triggered the persecutor bar because it constituted a link in the chain of persecutory acts rather than an "inconsequential association with persecutors").

[128] *See Matter of Negusie I*, 27 I. & N. Dec. at 363 (holding that the availability of a duress defense to the persecutor bar is "narrow" and "is intended to apply only in rare and extraordinary circumstances"); *Matter of Negusie II*, 27 I. & N. Dec. at 481 (issuing an automatic stay on the BIA's holding in *Matter of Negusie I*).

[129] *See* Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 195 (2019) (arguing that former-Attorney General Sessions' "decision to reconsider the relevance of a duress defense suggests that he may well overrule the BIA's decision" in *Matter of Negusie I*).

[130] *See* 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*, 29 A.L.R. Fed. 2d 267, § 29 (2008) (discussing cases in which the court noted that a noncitizen who "sought to prevent similar persecutory acts from occurring" may be able to overcome application of the persecutor bar).

[131] *See* Doe v. Gonzales, 484 F.3d 445, 451 (7th Cir. 2007) (instructing the BIA to consider whether the applicant may be granted asylum if his "attenuated participation in the persecution" was offset by his redemptive acts, which put himself at risk); Ofosu v. McElroy, 98 F.3d 694, 701 (2d Cir. 1996) (noting that the court had not yet had the opportunity to consider whether the persecutor bar should be applied to someone who had rejected the persecution or "put himself at risk in order to protect those who were persecuted"). *But see* Ntamack v. Holder, 372 F. App'x 407, 412 (4th Cir. 2010) (clarifying that though the applicant's redemptive acts demonstrate that he disagreed with the persecutory acts committed by the civic guard, they do not compel the court to lift the persecutor bar).

[132] *See, e.g.*, Yan Yan Lin v. Holder, 584 F.3d 75, 78, 81–82 (2d Cir. 2009) (finding that in viewing the applicant's conduct, her redemptive act of helping a woman escape before undergoing a forced abortion merely "bolstered" the decision not to apply the persecutor bar); *Zhang Jian Xie*, 434 F.3d at 144 (clarifying that redemptive behavior is not "necessarily irrelevant to the inquiry as to whether an applicant has assisted in persecution").

One consideration present in other areas of immigration law yet absent in the application of the persecutor bar is the time elapsed since the alleged persecutory conduct.[133] When determining eligibility for certain immigration benefits outside of the asylum context, conduct that would otherwise constitute a violation is ignored if not sufficiently recent.[134] One justification for including temporal limitations is to acknowledge that individuals may rehabilitate over time, and are thus no longer deserving of sanctions.[135] In applying the persecutor bar, however, courts consider the time elapsed since the persecutory acts to be irrelevant.[136]

Finally, the severity of the applicant's conduct offers another factor that courts downplay when applying the persecutor bar and when evaluating immigration violations more generally.[137] Unlike in other areas of the legal system, such as criminal, contract, and tort law, the consequences of violating immigration laws are often inflicted without proportionality.[138] For example, in criminal law, holding all things equal, the theory of retributive justice suggests that one can expect to receive punishment that fits the crime.[139] In terms of immi-

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[133] *See, e.g.*, Pastora v. Holder, 737 F.3d 902, 906 (4th Cir. 2013) (applying the persecutor bar despite the fact that the applicant had not participated in persecutory conduct in twenty-seven years). *See generally* Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1713–16 (2009) (discussing how the naturalization process accounts for the elapsed time between application and the problematic conduct).

[134] *See, e.g.*, 8 U.S.C. § 1427(a) (requiring that an applicant demonstrate that he or she "has been and still is a person of good moral character" for only "five years immediately preceding the filing of his [or her] application" for naturalization).

[135] *See* Stumpf, *supra* note 133, at 1713–16 (describing the various roles that time plays in the naturalization process and providing rationalizations for its inclusion in immigration statutes).

[136] *See, e.g.*, *Pastora*, 737 F.3d at 906 (finding that a twenty-seven-year gap did not negate the persecutor bar).

[137] *See supra* notes 67–87 and accompanying text (explaining that in applying the persecutor bar, the tests employed by the circuit courts merely require that the applicant's conduct furthered the persecution of others, regardless of its severity).

[138] *See* Stumpf, *supra* note 117, at 1688–91 (comparing the various methods of inserting proportionality into punishment or damage awards stemming from violations of other branches of law with the "on-off switch" of deportation as the sole sanction in immigration law). While noncitizens, deportable by statute, may remain in the country via statutory relief and officer discretion, the immigration system ultimately either exempts deportation or merely postpones it. *See id.* at 1694–98 (describing relief from deportation and officer discretion as "unique characteristics . . . [that] create an appearance of proportionality"). Tasked with managing immigration law and its violators to the best of their abilities, immigration officials have prosecutorial discretion in initiating deportation proceedings and so will not prosecute all immigration violators. *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 621 (2006) (stating that immigration officers' discretion allows them to decide to charge an immigration violator by "considering the full complexity of an applicant's situation rather than reducing it to a checklist of standard factors").

[139] *See* U.S. CONST. amend. VIII (prohibiting the infliction of cruel and unusual punishments); Lockyer v. Andrade, 538 U.S. 63, 72–73 (2003) (finding that grossly disproportionate criminal sentences may violate the Eighth Amendment).

gration consequences, however, two strikingly different crimes produce the same result: removal from the United States.[140]

The push for injecting proportionality into the U.S. immigration system has been voiced by legal scholars in their call for overhauling the way immigration violations are treated.[141] Some scholars argue that rather than the current binary system that prescribes deportation as the only sanction, a system of graduating sanctions should be established that takes into consideration various circumstances surrounding the violation.[142] Under a graduated system, judges would be encouraged to look beyond the immigration violation and consider surrounding circumstances such as the gravity of the conduct and potential consequences for the noncitizen.[143]

Other scholars argue for a more nuanced immigration system that avoids the current "one-size-fits-all" model.[144] In steering away from the binary model that often leads to exile from the country for relatively minor violations, these scholars stress the need to think more creatively about penalizing immigration violators and modeling the immigration system on successful sanction schemes from other courts.[145]

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[140] *See* 8 U.S.C. § 1101(a)(43) (listing offenses that qualify as aggravated felonies under the INA, which include murder, rape, and sexual abuse of a minor); *id.* § 1227(a)(2)(A)(iii) (stating that "any alien who is convicted of an aggravated felony at any time after admission is deportable"); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000) (noting that under certain circumstances, shoplifting can be deemed an aggravated felony and therefore trigger deportation).

[141] *See* Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465, 488–93 (2015) (advocating for the "meaningful implementation of proportionality" into immigration statutes and for experimentation with "graduated sanctions" for immigration violations); Stumpf, *supra* note 117, at 1733–40 (proposing the use of proportionate punishment for commission of immigration violations).

[142] *See, e.g.*, Stumpf, *supra* note 117, at 1732–33 (proposing a multi-factor analysis for immigration courts when considering punishments for immigration violations that accounts for: (1) the severity and details of the violation, (2) the government interest in imposing the sanction, (3) the harm done to the government, the noncitizen, and others as a result of the sanction, and (4) the noncitizen's interest in residing in the United States). Stumpf also argues that instead of ascribing an "on-off switch" to all immigration violations, the system should incorporate less severe consequences for less severe violations. *See id.* at 1737 (listing potential proportionate sanctions, including "restricting or delaying access to immigration benefits, imposing probation-like conditions or requiring community service, higher application fees for immigration benefits, or attending remedial courses on citizenship preparedness").

[143] *See id.* at 1694 (explaining that under the current system, in determining deportability of a noncitizen, immigration judges look solely to whether he or she violated an immigration provision).

[144] *See, e.g.*, Kanstroom, *supra* note 141, at 491–92 (proposing an immigration sanctions model that is more "cost-effective, humane, and responsive to the legitimate goals" of immigration control compared to the current model).

[145] *See, e.g.*, *id.* at 490–92 (explaining how the immigration system could benefit by using concepts from the "graduated sanctions" scheme implemented in the juvenile court system). Kanstroom suggests letting immigration judges partner with social service and probation networks to create alternative punishments for immigration violators that allow them to stay in the country. *Id.* Kanstroom also highlights international governmental bodies that allow deportation only after comparing the

Proportional sanctions may not be applicable in the context of the persecutor bar, as the decision to apply the persecutor bar is ultimately a binary decision.[146] In determining whether to apply the persecutor bar, however, factors such as redemptive acts, the time elapsed since the applicant's assistance or participation in persecution, and the various circumstances considered by scholars may provide guidance.[147]

### *B. The Balancing Test*

As part of Congress's attempt to provide a comprehensive definition of refugee in passing the Refugee Act of 1980, several categories of noncitizens were precluded from asylum eligibility, including those subject to the persecutor bar.[148] Congress's purpose in enacting the Refugee Act of 1980 was to bring U.S. domestic law in conformity with the internationally agreed upon standards set out in the 1951 Refugee Convention and 1967 Protocol.[149] Specifically, the persecutor bar mirrored Article 1(F)(a) of the 1951 Refugee Convention and 1967 Protocol, which makes asylum protection unavailable to persons who have "committed a crime against peace, a war crime, or a crime against humanity."[150] Included in the definition of crimes against humanity is persecution against any identifiable group or collectivity.[151]

Article 1(F)(b) of the 1951 Refugee Convention and 1967 Protocol provides for another exclusion clause to persons who have committed a serious

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state-interest against that of the applicant. *See id.* at 482 (noting that various international bodies, such as the European Court of Human Rights and the Inter-American Commission on Human Rights, recognize that "deportation must be 'proportionate to the legitimate aim pursued'").

[146] *See generally* ANKER, *supra* note 121, § 4:2 (providing an overview of the various bars to asylum, including the persecutor bar).

[147] *See supra* notes 133–146 and accompanying text.

[148] *See* Refugee Act of 1980 (stating that one of the purposes of the Refugee Act of 1980 was to "establish a more uniform basis for the provision of assistance to refugees" and specifying that the term refugee, as used in the INA, does not include any person who "ordered, incited, assisted, or otherwise participated in" the persecution of others); *see also* Walls, *supra* note 44, at 231 (noting that by passing the Refugee Act of 1980, "Congress sought to provide a comprehensive, ideologically-neutral approach to defining 'refugee'").

[149] Negusie v. Holder, 555 U.S. 511, 520 (2009).

[150] 1951 Refugee Convention, art. 1(F)(a); *see also Matter of Negusie I*, 27 I. & N. Dec. at 353 (stating that the legislative history of the Refugee Act of 1980 demonstrates that the language used in the Act "was based on . . . and is intended to be interpreted consistent with" the 1951 Refugee Convention and its 1967 Protocol); Matter of J.M. Alvarado, 27 I. & N. Dec. 27, 30 n.3 (B.I.A. 2017) ("[O]ne of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the United Nations Convention Relating to the Status of Refugees . . . and the United Nations Protocol Relating to the Status of Refugees.").

[151] *See* Rome Statute of the International Criminal Court, art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90, 93–94 (listing acts that qualify for a crime against humanity, one of which is "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law").

non-political crime.[152] Guidelines set out by the United Nations High Commissioner for Refugees (UNHCR) urges countries, when applying Article 1(F)(b), to weigh the gravity of the applicant's offense against the consequences to the applicant if excluded.[153] The UNHCR suggests that in order to exclude a person who has a credible fear of persecution, the character of the prior crime must outweigh their character as a "bona fide refugee."[154] Failure to conduct such a test, the UNHCR proposes, would be inconsistent with the purpose of the 1951 Refugee Convention and its focus on global human rights.[155]

Scholars note that by scrutinizing the circumstances of the crime and the culpability of the applicant, the exclusion clause better adheres to the policy of considering inclusion before exclusion.[156] Other scholars take the concern for persecution one step further, arguing that if a person faces grave danger, he should not be excluded from asylum even if guilty of a truly serious non-political crime.[157]

While the UNHCR's proposed balancing test speaks to a global audience, the effort has gained distinct footing in Europe.[158] In 1996, the Council of the European Union specifically called for weighing the seriousness of the applicant's offense against the extent of the persecution the applicant faces when

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[152] 1951 Refugee Convention, art. 1(F)(b) (stating that the protections afforded to refugees under the 1951 Refugee Convention "shall not apply to any person . . . [who] has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee").

[153] U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 24, U.N. Doc. HCR/GIP/03/05 (2003) [hereinafter UNHCR Guidelines] (stating that the exclusion clauses, specifically Article 1(F)(b), must be applied proportionately to their humanitarian objective such that the "gravity of the offence in question is weighed against the consequences of exclusion" to the applicant).

[154] U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 156, U.N. Doc. HCR/IP/4/Engl.REV.1 (1979, rev. 1992) [hereinafter UNHCR Handbook] (explaining that a crime must be sufficiently significant in order to exclude a person who has a "well-founded fear of persecution" in his home country).

[155] UNHCR Guidelines, ¶ 24 (noting that balancing the conduct of asylum applicants against the consequences of exclusion "ensure[s] that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention").

[156] *See, e.g.*, GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 180–84 (3d ed. 2007) (arguing that the fundamental objectives of the 1951 Refugee Convention demand a case-by-case consideration of asylum applicant claims); *see also* UNHCR Guidelines, ¶ 31 (stating that due to the potentially "grave consequences of exclusion[,] . . . a full factual and legal assessment" must be conducted for each applicant and that "inclusion should generally be considered before exclusion").

[157] *See, e.g.*, ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 298 (1966) (arguing that states should protect those who fear for their lives, despite their commission of a serious non-political crime, and that "the yardstick may be whether the persecutory measures seem far out of proportion to what would be a just punishment for the crime committed").

[158] *See* Akbar Rasulov, *Criminals as Refugees: The "Balancing Exercise" and Article 1F(b) of the Refugee Convention*, 16 GEO. IMMIGR. L.J. 815, 826 (2002) (noting the presence of the "balancing test" within European Union documents).

applying Article 1(F)(b).[159] Although the issuance is not binding on the European countries, it promotes policy consistent with the UNHCR's proposal.[160]

Furthermore, various courts around the world have incorporated a balancing test when applying exclusion clauses.[161] In 1998, the Supreme Court of Canada acknowledged that Article 1(F)(b) contains a balancing mechanism that reflects a humanitarian concern to compare the applicant's fear of persecution with the state's concern in excluding criminals from admission.[162] In Belgium, the courts used a balancing test in three cases involving Ethiopian nationals seeking asylum.[163] After balancing the severity and likelihood of persecution faced upon return to Ethiopia, however, the Belgian courts held that the applicants were still excluded under Article 1(F)(a).[164]

Despite the UNHCR's proposal, the balancing test has been all but rejected in U.S. jurisprudence.[165] In 1999, in *INS v. Aguirre-Aguirre*, the U.S. Supreme Court reversed the Ninth Circuit's application of a balancing test in which it considered the persecution the applicant could suffer upon return to

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[159] O.J.C.E., Mar. 13, 1996, No. L63/2. As an "essential [European Union] decision-maker," one of the tasks of the Council of the European Union is to develop the "European Union's foreign and security policy." *The Council of the European Union*, EUROPEAN COUNCIL (Apr. 16, 2019), https://www.consilium.europa.eu/en/council-eu/ [https://perma.cc/RGH3-CTGT].

[160] Rasulov, *supra* note 158, at 826; UNHCR Guidelines, ¶ 24 (stating that in applying Article 1F(b) of the 1951 Refugee Convention, the "gravity of the offence in question" should be weighed against the potential consequences of exclusion faced by the applicant).

[161] *See* GOODWIN-GILL & MCADAM, *supra* note 156, at 180 (noting the global support for comparing the seriousness of an asylum applicant's bad acts against his credible fear of persecution when applying Article 1(F)(b) of the 1951 Refugee Convention); *see also* Sibylle Kapferer, *Exclusion Clauses in Europe—A Comparative Overview of State Practice in France, Belgium and the United Kingdom*, 12 INT'L J. REFUGEE L. 195, 217 (2000) (discussing three asylum cases in Belgium where the court, in deciding whether to exclude asylum seekers, balanced the applicants' risk of persecution with the gravity of their conduct).

[162] Pushpanathan v. Canada [1998] 1 S.C.R. 982, ¶ 73 (Can.).

[163] *See* Kapferer, *supra* note 161, at 217 (discussing three asylum cases in Belgium where the court was deciding whether to exclude asylum seekers under Article 1(F)(a) for their participation in human rights violations). In each of the asylum cases, the applicants had allegedly participated in human rights violations in Ethiopia under Mengistu Haile Mariam. *Id.* Soon after taking power in 1974, Ethiopia's former dictator, Mengistu Haile Mariam, began committing human rights abuses against political opponents. *See* Steve Bloomfield, *Mengistu Found Guilty of Ethiopian Genocide*, INDEPENDENT (Dec. 13, 2006), https://www.independent.co.uk/news/world/africa/mengistu-found-guilty-of-ethiopian-genocide-428233.html [https://perma.cc/JS6Y-KYCQ] (detailing how Mengistu Haile Mariam, the former Ethiopian dictator who murdered thousands of political opponents, was convicted of genocide).

[164] *See* Kapferer, *supra* note 161, at 217 (detailing the balancing test employed by the Belgian courts in which they found that the applicants' risk of persecution in Ethiopia was outweighed by "the gravity of [their] human rights violations committed voluntarily and systematically").

[165] *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425–26 (1999) (finding that a crime shall not be mitigated by considering the persecution a noncitizen may face upon returning to his country of origin); Matter of Rodriguez-Coto, 19 I. & N. Dec. 208, 209 (B.I.A. 1985) (rejecting the notion that the interpretation of serious crimes varies with the nature of persecution faced by a noncitizen upon returning to his home country).

his native country.[166] In that case, a Guatemalan national was entered into deportation proceedings for illegal entry into the United States.[167] Simultaneously, the applicant applied for asylum and was found to have a credible fear on account of political persecution; however, his application was denied due to his participation in prior non-political crimes.[168] Reading the statute literally, the Court found that a crime subject to an exclusion clause is not to be offset by considering the possibility that the applicant may face persecution if denied asylum.[169] Though the Court acknowledged the UNHCR's suggestion of balancing the persecution faced against the crime committed, it emphasized that the UNHCR Guidelines are not binding on U.S. courts.[170] Reluctance to recognize a balancing test is not unique to the United States, as courts in other nations have rejected the test on similar grounds.[171]

### *C. Distinguishing Between Forms of Persecution*

The Supreme Court in *Fedorenko* acknowledged the looming difficulty of identifying individual persecutors in cases less straightforward than a Nazi prison guard, yet equipped the lower courts with little guidance on how to do so.[172] In its wake, courts are quick to bar those who have committed atrocities but pause when considering conduct that is less severe.[173] Nevertheless, be-

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[166] *See* 526 U.S. at 425–26 (finding that the Ninth Circuit erred in holding that the "BIA was required to balance [applicant's] criminal acts against the risk of persecution he would face if returned to Guatemala").

[167] *Id.* at 421.

[168] *See id.* at 418 (noting that the applicant was determined to have "burned buses, assaulted passengers, and vandalized and destroyed property in private shops"). U.S. immigration law parallels Article 1(F)(b) of the 1951 Refugee Convention by barring asylum seekers who "committed a serious nonpolitical crime outside the United States." *Compare* 8 U.S.C. § 1158(b)(2)(A)(iii) (excepting from asylum eligibility applicants for whom "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States"), *with* 1951 Refugee Convention, art. 1(F)(b) (excepting from asylum eligibility applicants who have "committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee").

[169] *Aguirre-Aguirre*, 526 U.S. at 426.

[170] *See id.* at 427–28 (noting that the UNHCR Handbook is not binding on the U.S. Attorney General, the BIA, or U.S. courts).

[171] *See* Rasulov, *supra* note 158, at 827–33 (discussing the rejection of the balancing test in courts in the United Kingdom, Germany, Australia, and New Zealand).

[172] *See* 449 U.S. at 512 & n.34 (acknowledging that it may be more difficult to classify someone as a persecutor if presented with cases in between a prison barber and prison guard); *Yanqin Weng*, 562 F.3d at 515 (recognizing the challenge avoided by the Supreme Court in *Fedorenko* by presenting the barber and prison guard example while avoiding "more difficult line-drawing problems") (internal quotations omitted); *Miranda Alvarado*, 449 F.3d at 925–26 (identifying the Court's guidance in determining what amounts to assistance in persecution as "somewhat cryptic").

[173] *See Yanqin Weng*, 562 F.3d at 514 (noting that courts have routinely found "abhorrent conduct" to be grounds for barring asylum applicants yet have had difficulty in determining where to draw the line).

cause of the homogenous barring of all "persecutors" from asylum, coupled with the broad reach of the persecutor bar, even those on the margins of culpability—such as nurse's assistants and drivers with minimal connections to China's one-child policy—are deprived of their ability to seek safety in the United States.[174]

Compared with other forms of persecution, China's one-child policy is unique in that it has been deemed persecution per se by statute.[175] Until enactment of the IIRIRA, victims of forced abortions or sterilizations were not eligible for asylum because courts found that the persecution was not of a type that fit into one of the five protected grounds.[176] In 1989, in *Matter of Chang*, the BIA denied asylum to a Chinese man fleeing persecution on account of his violation of the one-child policy.[177] The government threatened the applicant, who already had two children and refused to abide by the policy.[178] Although it acknowledged China's country-wide policy as a "profound dilemma," the BIA held that so long as its purpose is only population control, the applicant's fear of persecution does not fit within one of the five protected grounds of asylum.[179] Despite subsequent demands by the U.S. government for immigration officials to conduct a more favorable review of Chinese asylum seekers fleeing the one-child policy, the BIA continued to follow its precedent set in *Chang* in the following years.[180]

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[174] *See, e.g.*, *Xing Jie Guan*, 183 F. App'x at 77–78 (applying the persecutor bar to a hospital worker who played a "relatively minor" role in effectuating China's one-child policy); *Zhang Jian Xie*, 434 F.3d at 143–44 (applying the persecutor bar to a driver who played an "arguably minor" role in effectuating China's one-child policy).

[175] *See* IIRIRA, § 601(a) (amending the definition of refugee in the INA by adding: "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion"); Walls, *supra* note 44, at 241 (describing the amendment specifying coercive population control programs as a category of persecution on account of political opinion as "odd in its specificity," considering the term persecution is typically vague).

[176] *See* IIRIRA, § 601(a) (amending the definition of refugee under the INA to include victims of coercive population control programs); Matter of Chang, 20 I. & N. Dec. 38, 47 (B.I.A. 1989) (finding that a Chinese man who feared mandatory sterilization was not eligible for asylum because it was not persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion").

[177] 20 I. & N. Dec. at 47.

[178] *Id.* at 39 (recounting that the government wanted to sterilize the applicant sterilized and had already scheduled the applicant's wife for sterilization).

[179] *Id.* at 44.

[180] *See* Katherine L. Vaughns, *Retooling the Refugee Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 51 (1998) (discussing the numerous attempts by President George H.W. Bush to require "enhanced consideration" for asylum applicants fleeing their country due to fear of its policy of forced abortions or sterilizations); *INS Sends Instructions on New Chinese Asylum Seekers Policy*, 71 INTERPRETER RELEASES

It is inarguable that the abhorrent treatment of women and families by the Chinese government in carrying out its policy constitutes persecution.[181] When considering the massive population surge China was facing before implementing the policy, however, it may have been reasonable for its citizens to believe that they ought to comply.[182] Regardless of the applicants' intentions, the practical effect of the law increases the number of otherwise bona fide refugees who are barred from seeking safety.[183]

With World War II as the starting point in the evolution of asylum law and the persecutor bar, a stark contrast was presented between the persecutor—the Nazi—and the persecuted—the various victims of the Nazi regime.[184] When considering the modern understanding of persecution, which encompasses an indefinite number of forms of persecution ranging from civil war atrocities to China's one-child policy, this distinction is often less clear-cut.[185] As the legal definition of persecutor evolves alongside changes to the broad definition of refugee, it becomes more attenuated from the prototypical Nazi guard.[186]

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1056, 1056–58 (1994) (affirming that the BIA's holding in *Chang* is recognized as precedent regarding asylum applicants evading coercive population control programs).

[181] *See* Guangcheng, *supra* note 90 (reporting that in enforcing the country's one-child policy, Chinese authorities forced women out of hiding by kidnapping, imprisoning, and threatening their family members). Given the political conflict between the United States and China surrounding China's quashing of democratic movements in the late twentieth-century, commentators have suggested that the United States was "politically motivated" to declare coercive population control as a form of persecution on account of political opinion, rather than doing so out of genuine concern for human rights. *See, e.g.*, Walls, *supra* note 44, at 241–47 (suggesting that the declaration that China's one-child policy is an obvious human rights violation is undercut by U.S. courts' history of denying such asylum claims).

[182] *See* Wang Feng et al., *supra* note 28, at 83 (suggesting that the one-child policy ended in China "at least a decade later than it should have" partially due to the Chinese public's fear that "unchecked population growth" could lead to disastrous social and economic problems); Bernson, *supra* note 88 (noting that in the late 1970s, when China was facing food shortages and fearing a second famine from the previous decade, the Chinese government implemented its one-child policy and emphasized family planning).

[183] *See* Matter of Rodriguez-Majano, 19 I. & N. Dec. 811, 816 (B.I.A. 1988) (noting that due to the persecutor bar's reach, "[a]s the concept of what constitutes persecution expands, the group which is barred from seeking haven in this country also expands").

[184] *See* Walls, *supra* note 44, at 235–36 (describing the Nazi persecutor as "archetypal"); *see also* UNHCR Guidelines, ¶ 2 (providing that the "rationale for the exclusion clauses . . . is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees").

[185] *See* Su Qing Chen v. U.S. Att'y Gen., 513 F.3d 1255, 1257 (11th Cir. 2008) (noting that because the statutory definition of persecution includes a coercive population control program, like China's one-child policy, a noncitizen is ineligible for asylum if he or she "ordered, incited, assisted, or otherwise participated" in the one-child policy); *Figures at a Glance*, UNHCR (June 19, 2018), https://www.unhcr.org/figures-at-a-glance.html [https://perma.cc/D5W2-C9JJ] (reporting that 57% of the refugees worldwide come from South Sudan, Afghanistan, and Syria, all nations facing civil turmoil).

[186] *See* Walls, *supra* note 44, at 236 (arguing that the rationale behind a persecutor bar does not map well to many modern contexts of persecution because the dichotomy between persecutor and persecuted is not as straightforward as it was with the Nazis and their victims).

## III. PROPOSED BALANCING TEST

The primary purpose of the Refugee Act of 1980 was to conform U.S. asylum law with the 1951 Refugee Convention and the 1967 Protocol.[187] Both the 1951 Refugee Convention and UNHCR Guidelines suggest reading the asylum exclusion clauses, such as the persecutor bar, to include a thumb on the scale of admitting those who have a legitimate fear of persecution.[188] Therefore, in order to apply the persecutor bar as intended, U.S. courts should take every precaution to ensure that they do not interfere with the fundamental right of all people to seek refuge from persecution.[189]

By applying the persecutor bar to persons who have played marginal roles in effectuating persecution, the courts have expanded the reach of the bar far beyond its purpose of ensuring that those who have committed grave crimes against the international community are not afforded the same benefits as those fleeing persecution.[190] Instead, bona fide refugees are denied asylum not because they have committed abhorrent and undesirable acts, but because courts are willing to draw the faintest of lines connecting them to the persecution of others.[191] Furthermore, when analyzing the elements of the persecutor bar, the courts look solely to the objective effect of the applicant's conduct, and therefore do not conduct a full assessment of the individual circumstances of each case.[192]

To ensure a more appropriate interpretation of the persecutor bar, it is necessary to consider factors beyond the objective effect of the applicant's

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[187] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (noting that the legislative history clearly indicates congressional intent to bring the definition of refugee under U.S. law to match the 1967 Protocol).

[188] *See* 1951 Refugee Convention, Preamble (stating that the United Nations has "manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms"); UNHCR Guidelines, ¶ 31 (advising that "[t]he exceptional nature of [the exclusion clauses] suggests that inclusion should generally be considered before exclusion").

[189] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, art. 14 at 74 (Dec. 10, 1948) (declaring the right to seek asylum as a universal human right).

[190] *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 526–27 (2009) (Scalia, J., concurring) (noting that the overarching consideration in determining admissibility of noncitizens is desirability); Yanqin Weng v. Holder, 562 F.3d 510, 514 (2d Cir. 2009) (stating that the persecutor bar is easily applied to applicants who have committed "abhorrent conduct").

[191] *See* Miranda Alvarado v. Gonzales, 449 F.3d 915, 929 (9th Cir. 2006) (applying the persecutor bar despite recognizing that the applicant acted at the "margin of culpability required under the statute"); Zhang Jian Xie v. INS, 434 F.3d 136, 143 (2d Cir. 2006) (finding that because the applicant played "an active and direct, if arguably minor, role" in persecution by driving the women to the hospital where they would undergo forced abortions, his conduct triggered the persecutor bar).

[192] *See* UNHCR Guidelines, ¶ 2 (stating that "given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case" and therefore, that the exclusion clauses should "always be interpreted in a restrictive manner"); *see also supra* notes 67–87 and accompanying text (discussing the objective test employed by the circuit courts when applying the persecutor bar).

conduct.[193] The UNHCR proposes conducting a balancing test when considering whether to deny asylum to those who have committed a serious nonpolitical crime.[194] The UNHCR further suggests that such a test would not normally be appropriate when assessing those who have persecuted others because the implicit wrongfulness of persecuting others can never be diminished.[195] Its guidance, however, is directed towards heinous crimes against humanity, which may not include less egregious conduct such as transporting women to a hospital or even unwillingly performing prison guard duties.[196] When considering the expansive reach of the persecutor bar, therefore, it is reasonable to conduct a balancing test when assessing applicants who merely "assisted or otherwise participated" in the persecution of others.[197]

Consistent with the balancing test for Article 1(F)(b), the proposed balancing test for the persecutor bar would begin by considering the persecution from which the applicant is fleeing.[198] By considering the persecution feared by the applicant in his or her home country, the balancing test would align with the purpose of asylum law as creating a haven for those who cannot safely return to their home.[199]

Courts should then consider the conduct itself, giving less weight to less egregious conduct.[200] Using the concept of proportionality present throughout much of the U.S. legal system, courts must recognize that the denial of an asy-

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[193] *See* GOODWIN-GILL & MCADAM, *supra* note 156, at 180 (arguing that the circumstances of the crime, the culpability of the applicant, and an analysis of the persecution the applicant is fleeing from must be considered when applying the exclusion clauses).

[194] *See* UNHCR Guidelines, ¶ 24 (suggesting that in applying Article 1(F)(b) of the 1951 Refugee Convention, the seriousness of the non-political crime must be "weighed against the consequences of exclusion" faced by the applicant).

[195] *See id.* (clarifying that the balancing test suggested regarding Article 1(F)(b) would "not normally be required in the case of . . . crimes against humanity . . . as the acts covered are so heinous"); GOODWIN-GILL & MCADAM, *supra* note 156, at 180 (stating that the UNHCR Guidelines suggest that the implicit gravity of offenses such as the persecution of others rules out the implementation of a balancing test).

[196] *See, e.g.*, *Negusie*, 555 U.S. at 515 (discussing how the applicant's duties as a prison guard were performed under duress); *Zhang Jian Xie*, 434 F.3d at 143 (conceding that the applicant played a "minor role" in the persecution of others).

[197] UNHCR Guidelines, ¶¶ 24, 31 (advising that "[t]he exceptional nature of [the exclusion clauses] suggests that inclusion should generally be considered before exclusion" and that "the exclusion clauses must . . . be applied in a manner proportionate to their objective").

[198] *See* UNHCR Handbook, ¶ 156 (explaining that a crime must be sufficiently grave to exclude a person who has a "well-founded fear" of persecution in his home country).

[199] *See* Rosenberg v. Yee Chien Woo, 403 U.S. 49, 55–56 (1971) (noting that one of the goals of asylum law is to create "a haven for the world's homeless people").

[200] *See* Stumpf, *supra* note 117, at 1736–37 (noting that while "seriously reprehensible conduct" may warrant deportation, the argument is substantially weakened for less egregious conduct).

lum claim despite a well-founded fear of persecution is a grossly excessive sanction for an individual whose contribution to persecution was minimal.[201]

Additionally, courts should consider the nature of the persecution in which the applicant was involved with an understanding of the context of the persecution.[202] For example, the worst perpetrators of persecution should not be equated with those employed as government automobile drivers that rarely assisted in carrying out China's one-child policy.[203] Finally, courts should consider any mitigating factors such as the amount of time elapsed since the applicant's conduct and any substantial redemptive acts performed by the applicant, especially if they put him or her at risk in order to protect those who were persecuted.[204]

Although currently stayed by former Attorney General Jeff Sessions, the recent decision by the BIA in *Matter of Negusie I* to allow for a duress defense was a step in the right direction.[205] By conceding that an individual who committed persecutory acts out of fear of death or serious bodily injury to himself or others should not be barred from applying for asylum, the BIA poked a small hole in the airtight box of the persecutor bar.[206] Beyond the acknowledgement of a duress defense, however, is the need for a comprehensive balancing test that encompasses all of the circumstances surrounding an asylum applicant's application.[207]

In his concurring opinion in *Negusie v. Holder*, Justice Scalia posited another reason for barring persecutors: that the persecutor "may end up living in

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[201] *See id.* at 1688–91 (noting that whereas proportionality plays a large role in criminal, contract, and tort law, immigration violations can result in removal from the United States regardless of the gravity of the offense).

[202] *See* Walls, *supra* note 44, at 245–47 (suggesting that doctors and others who participate in implementing China's one-child policy are "less culpable" than Nazi prison guards).

[203] *See Zhang Jian Xie*, 434 F.3d at 137–38 (noting that as a state-employed driver, the applicant complied with orders to transport "as few as three and as many as five" women to the hospital where they would undergo forced abortions); *see also* UNHCR Guidelines, ¶ 2 (explaining that the rationale behind the exclusion clauses, including the persecutor bar, is to ensure that perpetrators of certain grave acts are "undeserving of international protection as refugees"); Walls, *supra* note 44, at 235–36 (arguing that the persecutor bar, as initially developed to combat Nazi soldiers, does adapt to more recent forms of persecution such as participation in China's one-child policy).

[204] *See* Ofosu v. McElroy, 98 F.3d 694, 701 (2d Cir. 1996) (suggesting that redemptive acts could permit granting asylum to an applicant who previously assisted in the persecution of others, particularly when the applicant "ultimately rejected the repressive activities in which he was involved, or put himself at risk in order to protect those who were persecuted"); Stumpf, *supra* note 133, at 1713–16 (describing the reasons why U.S. immigration law incorporates measurements of time to determine whether a noncitizen is eligible for certain benefits).

[205] *See* 27 I. & N. Dec. 347, 363 (B.I.A. 2018) (allowing for a duress defense to the persecutor bar if the applicant meets five conditions); *Matter of Negusie II*, 27 I. & N. Dec. at 481 (staying the BIA's decision).

[206] *See Matter of Negusie I*, 27 I. & N. Dec. at 363 (laying out a five-part test for a potential duress defense).

[207] *See supra* notes 198–204 and accompanying text.

the same community as one of his victims."[208] There is no doubt that such a scenario would be undesirable in the context of the stereotypical persecutor.[209] But would we have the same fear if Daniel Negusie happened to settle in the same neighborhood as an Ethiopian refugee?[210] Would we worry that Zhang Jian Xie would harm a woman who had previously undergone a forced abortion in China?[211] When considering the substance and context of their conduct as well as any redemptive acts they undertook, it is hard to imagine any serious danger in the hypothetical offered by Justice Scalia.[212] Furthermore, if we consider Negusie and Xie's fear of persecution in their home countries to be well-founded, rejecting their applications undermines a fundamental purpose of international asylum law.[213]

## CONCLUSION

The persecutor bar is a legitimate and necessary part of the U.S. immigration laws that prevents those who are responsible for the persecution of others from receiving the protections of asylum. The language of the persecutor bar, however, casts a wide net that entraps not only those who have clearly and directly persecuted others, but also those who have played the most marginal of roles along the chain of events that led to the persecution. As a result, many persons fleeing persecution in their home countries are statutorily unable to seek refuge in the United States, and are thus denied a fundamental human right.

This Note argues that courts should employ a balancing test when applying the persecutor bar. First, the courts should analyze the gravity of the applicant's conduct and weigh it against the persecution the applicant is fleeing. Next, the courts should evaluate the nature of persecution in which the appli-

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[208] *See* 555 U.S. at 526–27 (Scalia, J., concurring) (arguing that granting asylum to noncitizens who persecuted others under duress may import "ethnic strife from remote parts of the world" if they happen to live in the same community as their victims).

[209] *See* Fedorenko v. United States, 449 U.S. 490, 512 & n.34 (1981) (delineating between the Nazi prison guard, the prototypical persecutor, and a barber at the same prison).

[210] *See Negusie*, 555 U.S. at 515 (noting that the immigration judge determined that there is no evidence that Negusie was "a malicious person or that he was an aggressive person who mistreated the prisoners").

[211] *See Zhang Jian Xie*, 434 F.3d at 138, 143 (describing the applicant's assistance in helping a woman escape from before a forced abortion and noting that the applicant played an "arguably minor" role in the persecution).

[212] *Negusie*, 555 U.S. at 526–27 (Scalia, J., concurring); *see id.* at 515–16 (majority opinion) (describing the non-aggressive behavior by the applicant); *Zhang Jian Xie*, 434 F.3d at 143 (describing the applicant's role in assisting in the persecution of others as minor).

[213] *See Negusie*, 555 U.S. at 515–16 (demonstrating the applicant's fear of being tortured if sent back to Eritrea); *Zhang Jian Xie*, 434 F.3d at 138 (describing the applicant's fear of persecution on account of both his role in the student democratic movement and China's coercive population control program); *see also Rosenberg*, 402 U.S. at 55 (noting that one of the goals of asylum law is to create "a haven for the world's homeless people").

cant assisted with the understanding that not all forms of persecution are alike. Finally, the courts should consider the distance between the applicant's conduct and the time of seeking refuge as well as any of the applicant's redemptive acts, with a particular interest in whether such acts risked the applicant's well-being in order to protect those who were persecuted.

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