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Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(a)(42) to Include a Duress Exception

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Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(a)(42) to Include a Duress Exception

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I. INTRODUCTION

Asylum seekers in the United States face broad disparities in the nation's 54 immigration courts, with the outcome of cases influenced by things like the location of the court and the sex and professional background of judges, a new study has found. . . . "Often-times, it's just the luck of the draw," said Cheryl Little, a lawyer and executive director of the Florida Immigrant Advocacy Center, a legal assistance group in Miami that represents many asylum seekers. "It's heartbreaking," Ms. Little said. "How do you explain to people asking for refuge that even in the United States of America we can't assure them they will receive due process and justice?"¹

The asylum system is in disarray. The United States is unable to guarantee that every asylum seeker will receive a fair and impartial hearing.² Although media attention recently has focused on the asylum system's procedural flaws,³ unjust statutory interpretations also work against those seeking refuge in the United States. This Note focuses on one particular example within this commonly criticized area of the law: the prevailing interpretation of section 101(a)(42) of the Immigration and Nationality Act⁴ to bar those who have persecuted others under duress from attaining refugee status.

It is intuitively appealing that a system of laws should hold persons accountable only for actions undertaken pursuant to their own free will and not for coerced actions. This concept is a staple of criminal law, under which duress serves as an excuse for conduct otherwise considered criminal.⁵ Courts have interpreted asylum law, however, to preclude consideration of this moral precept in determining whether an applicant for asylum has participated or assisted in the persecution of others.⁶

A person seeking asylum in the United States must prove she satisfies the definition of "refugee" under the Immigration and Nationality Act ("INA"), which requires that she be unwilling or unable to return to her home country because of "[past] persecution or a well-

1. Julia Preston, *Wide Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1.

2. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. (forthcoming 2008) (manuscript at 6), available at <http://ssrn.com/abstract=983946> (suggesting that the results in asylum cases are determined more by who the judge is and where the court is located than by the facts and law of the case).

3. See, e.g., Preston, *supra* note 1.

4. 8 U.S.C. § 1101(a)(42) (2000).

5. KAPLAN ET AL., CRIMINAL LAW 559-60 (5th ed. 2004).

6. See, e.g., *Zhang Jian Xie v. INS*, 434 F.3d 136, 141 (2d Cir. 2006) (holding that the Immigration and Nationality Act does not include an implicit voluntariness requirement).

founded fear of [future] persecution.”⁷ The INA qualifies this definition of “refugee,” however, to exclude “*any person who ordered, incited, assisted, or otherwise participated in the persecution of any person.*”⁸ This clause bars those considered “unworthy” of obtaining protection from refugee status.⁹ Thus, the United States will not grant an applicant asylum due to the persecution she suffered if she inflicted the same type of harm upon others. The past persecutory acts taint the applicant.

The INA does not state explicitly that those who participated in the persecution of others against their will—who were forced, for example, to inflict harm upon pain of death—should be barred from seeking asylum, but this is how some courts have interpreted the Act.¹⁰ This interpretation dates back several decades and rests largely upon the Supreme Court’s interpretation in *Fedorenko v. United States*, not of the INA, but of a “similar” provision in the Displaced Persons Act of 1948 (“DPA”).¹¹ Despite the notable dissimilarities between the two pieces of legislation,¹² modern courts have declined to limit *Fedorenko* to the context of the DPA, regarding it as precedent in interpreting the INA as well.¹³ Thus, for many asylum seekers, any past persecution in which they took part, even if they acted under duress, serves as an absolute bar to refugee status. The United States often deports such applicants to the very countries in which they suffered past persecution or fear future persecution.

This Note proposes that reliance on *Fedorenko* in the INA context is unfounded and that courts should reinterpret section 101(a)(42) of the INA to include an implied exception for acts committed under duress. The fact that an asylum applicant was coerced into committing

7. 8 U.S.C. § 1101(a)(42). Under conventions of immigration law, “refugee” refers to a person applying for protection in the United States from outside its borders, whereas a person seeking asylum from within is an “asylee.” DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 4 (3d ed. 1999). This Note uses the term “refugee” to echo the language of the INA, even though most of the applicants mentioned raised claims from within the United States, making them asylees.

8. *Id.* (emphasis added).

9. See ANKER, *supra* note 7, at 415 (discussing exclusions from refugee status and asylum under U.S. law).

10. See, e.g., *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005); *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003).

11. 449 U.S. 490, 512 (1981); see also *Xie*, 434 F.3d at 141 (noting the similarity of the two Acts). See generally Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009, amended by Act of June 16, 1950, ch. 262, Pub. L. No. 81-555, 64 Stat. 219, and Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96.

12. See *infra* text accompanying notes 80-91.

13. See, e.g., *Castaneda-Castillo v. Gonzales*, 464 F.3d 112 (1st Cir. 2006); *Xu Sheng Gao v. U. S. Attorney Gen.*, 500 F.3d 93, 99 (2d Cir. 2007); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 n.10 (9th Cir. 2006) (citing *Fedorenko* as precedent in interpreting § 101(a)(42) of the INA).

persecution should factor into a court's determination of her status as a refugee. Such an approach would mirror the function that the affirmative defense of duress serves in the criminal law context. This Note outlines the proposed scope of such an exception, identifying the limited circumstances under which coercion should excuse acts of persecution that would otherwise bar a grant of asylum.

Part II of this Note offers background on this issue, examining the text of section 101(a)(42) of the INA, as well as the scope of the term "persecution." Part III surveys the development of case law interpreting the statutory bar to refugee status for past persecution of others and the extent to which the interpretations of appellate courts diverge. Part IV offers a critique of the current application of section 101(a)(42) of the INA, and Part V proposes the reinterpretation of that provision to recognize duress as an excuse for past persecution in circumstances where actions truly were coerced.

II. STATUTORY LAW AND "PERSECUTION"

Asylum law is a statutory creation, a right granted by Congress to foreign nationals who are unable to return to their home countries. This Part first examines the text of section 101(a)(42) of the Immigration and Nationality Act, which defines the term "refugee." It then considers the common law development of the term "persecution," upon which a grant of asylum is predicated.

A. Section 101(a)(42)

The United States first formally pledged to aid refugees worldwide in 1968, when it became a signatory to the United Nations Protocol Relating to the Status of Refugees.¹⁴ This international document did not include procedural mechanisms by which signatories could determine refugee status, leaving implementation to each individual country.¹⁵ From 1968 to 1980, the United States had no systematic method of granting asylum; it reviewed such claims on an ad hoc basis.¹⁶

14. Protocol Relating to the Status of Refugees art. II, *opened for signature* Jan. 31, 1967, 19 U.S.T 6223, 606 U.N.T.S 267 (entered into force Oct. 4, 1967).

15. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 8:1 (2d ed. 2006).

16. *Id.*; *see, e.g.*, *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 52 (1971) (resolving the conflict between the Second and Ninth Circuits regarding the relevancy of resettlement in the consideration of an application for asylum).

With the Refugee Act of 1980, Congress addressed this gap in the law.¹⁷ Section 101(a)(42) of the Refugee Act defines “refugee” for purposes of the preexisting Immigration and Nationality Act as:

[A]ny person who . . . is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [his or her country of origin] 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.¹⁸

The section continues by qualifying the term “refugee” to exclude “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.”¹⁹ This latter clause bars individuals who committed persecution from seeking refugee status. Other sections of the INA echo the language of section 101(a)(42), reiterating that someone who persecuted others cannot be granted asylum or qualify for other refugee benefits.²⁰

B. The Scope of “Persecution”

The Immigration and Nationality Act does not contain a definition of persecution, despite the fact that the definition of refugee relies upon the scope of that term. Instead, the INA lists the grounds upon which one can allege that persecution has taken place: “on account of race, religion, nationality, membership in a particular social group, or political opinion.”²¹ The absence of a definition within the Act implies that Congress delegated the determination of which particular acts rise to the level of persecution to the courts.

Article I and Article III courts generally agree upon the scope of the term.²² Circuit courts accept the definition initially put forth by

17. ANKER, *supra* note 7, at 1.

18. 8 U.S.C. § 1101(a)(42) (2000).

19. *Id.* The bulk of this Note focuses on situations in which the refugee was “assisting” or “participating” in the persecution of others, as opposed to “ordering” or “inciting” it. Although all four types of action are sufficient to bar an applicant under section 101(a)(42), this discussion focuses on involuntariness, and thus “assisted” and “participated” are the more relevant verbs. Insofar as the words “ordered” and “incited” imply a greater degree of volition, they are less pertinent to this discussion.

20. See 8 U.S.C. § 1158(b)(2)(A)(i) (2000) (barring those who persecuted others from asylum); see also 8 U.S.C. § 1231(b)(3)(B)(i) (barring those who persecuted others from withholding of removal); 8 C.F.R. § 208.13(c)(2)(ii) (2007) (shifting the burden of proof to the applicant to rebut allegations of persecution of others).

21. 8 U.S.C. § 1101(a)(42).

22. Asylum law is a branch of administrative law that involves courts in both the executive and judicial branches. A claim for asylum proceeds first through the Department of Homeland Security within the executive branch, with the applicant appearing before an immigration judge. Press Release, U.S. Dep’t of Justice, Executive Office for Immigration Review, Immigration Court Process in the United States (Apr. 28, 2005), available at <http://www.usdoj.gov/eoir/press/>

the Board of Immigration Appeals ("BIA"): "a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive."²³ This two-pronged definition reflects the language of the INA itself, which allows an applicant for asylum to allege either past persecution (requiring a showing of past "infliction of suffering or harm") or "a well-founded fear of persecution" in the future, (requiring a showing of "threat[s] to . . . life or freedom").²⁴

The harm endured or threatened must be severe to qualify as grounds for persecution. According to the Fifth and Ninth Circuits, "[t]he harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage, or the deprivation of liberty, food, housing, employment, or other essentials of life."²⁵ However, not every harmful act is persecutory; acts do not rise to the level of persecution when they consist of only "a few isolated incidents of verbal harassment or intimidation."²⁶ The BIA has stated that "persecution [does] not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional."²⁷ The overall context of the applicant's situation must be examined to determine whether she has suffered persecution.²⁸ Certain acts are completely excluded from the scope of persecution: acts of self-defense,²⁹ acts of normal warfare between nations or civil war within a

05/ImmigrationCourtProcess2005.htm. If denied asylum, the applicant can appeal his case to the Board of Immigration Appeals ("BIA"), also within the executive branch. *Id.* Decisions of the BIA are appealed directly to federal appellate courts. *Id.* Such courts grant deference to the agency on questions of fact when supported by substantial evidence, but review questions of law de novo. *E.g.*, *Karaj v. Gonzales*, 462 F.3d 113, 116 (2d Cir. 2006).

23. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (emphasis added), *modified on other grounds*, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (internal quotation marks and citation omitted) (quoting the second part of the definition, that persecution is the "infliction of suffering or harm upon those who differ *in race, religion or political opinion* in a way regarded as offensive" (emphasis added)); see also *Dandan v. Ashcroft*, 339 F.3d 567, 573 (7th Cir. 2003) (defining persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate").

24. 8 U.S.C. § 1101(a)(42).

25. *Abdel-Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996) (quoting *In re Laipenieks*, 18 I. & N. Dec. 433, 456-57 (B.I.A. 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985)).

26. *Sepulveda v. Attorney Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005) (citation omitted).

27. *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

28. *E.g.*, *Gilaj v. Gonzales*, 408 F.3d 275, 285 (6th Cir. 2005).

29. *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) ("[H]olding that acts of true self-defense qualify as persecution would run afoul of the 'on account of requirement . . . [and] be contrary to the purpose of the statute.'").

nation,³⁰ and torture and physical pain when such acts are part of a criminal interrogation rather than for persecutory motives.³¹

Those qualifying as persecuted must also meet the so-called “nexus” requirement: that any harm suffered or threatened must be “on account of” one of the five statutorily enumerated grounds.³² Thus, for example, an applicant who alleges being threatened by an insurgent group for failure to cooperate with its aims does not qualify as a persecuted individual unless she can prove that the threats were premised upon race, religion, nationality, membership in a particular social group, or political opinion.³³

Finally, persecution requires subjective intent to harm. The BIA has stated that “[a] finding of persecution requires some degree of *intent on the part of the persecutor* to produce the harm that the applicant fears in order that the persecutor may overcome a belief or characteristic of the applicant.”³⁴ This subjective component is notably different from the objective component in that the focus is on the persecutor, not the victim. However, the applicant’s (not the persecutor’s) belief must form the basis for the persecution.³⁵

The common law thus defines persecution with three components: severe harm (the objective component), intent to harm (the subjective component), and harm on account of one of the statutorily protected grounds (the nexus requirement). Predicate to a finding that an applicant is barred from a grant of asylum because she assisted or participated in the persecution of others is a finding that the actions taken by the applicant did in fact constitute persecution. Section IV.B of this Note will contrast these three requirements with the lesser standard employed by courts for a finding of persecution of others.

30. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (B.I.A. 1988).

31. *See* *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 930 (9th Cir. 2006) (explaining that the burden lay on *Miranda Alvarado* to show that interrogations involving torture were part of legitimate criminal prosecutions and that he therefore did not assist in persecution based on political opinion).

32. *Handono v. Attorney Gen.*, 226 F. App’x 237, 238 (3d Cir. 2007).

33. *See* *Sanchez v. Attorney Gen.*, 392 F.3d 434, 438 (11th Cir. 2004) (“To qualify for withholding of removal based on persecution by a guerilla group on account of a political opinion, *Sanchez* must establish that the guerillas persecuted her . . . *because of* her actual or imputed political opinion. It is not enough to show that she was or will be persecuted . . . due to her refusal to cooperate with the guerillas.” (emphasis added) (citation omitted)).

34. *In re Rodriguez-Majano*, 19 I. & N. Dec. at 815 (emphasis added) (citing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *modified on other grounds*, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)); *see* *Mohamed v. Ashcroft*, 396 F.3d 999, 1004 (8th Cir. 2005) (accepting the *Rodriguez-Majano* standard).

35. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (explaining that persecution of Jews by Nazis is persecution not on account of political opinion, but rather on account of religion or ethnicity).

III. CASE LAW

All interpretations of the statutory bar to refugee status in section 101(a)(42) of the INA begin with a discussion of *Fedorenko v. United States*,³⁶ the seminal Supreme Court decision concerning the effect of past persecution of others.³⁷ This Part briefly discusses *Fedorenko* and examines the Board of Immigration Appeal's application of *Fedorenko* to the asylum context. It then surveys circuit courts' divergent interpretations of section 101(a)(42).

A. The Supreme Court's Rejection of an Involuntariness Exception to the Displaced Persons Act

In *Fedorenko*, the Court held that past acts of persecution against others were proper grounds for exclusion under the DPA, even when those acts were performed involuntarily.³⁸ The Court revoked Fyodor Fedorenko's United States citizenship, initially granted under the DPA, because he persecuted others as a prison guard at Treblinka.³⁹ The Court relied upon a section of the Act that excludes anyone who has "assisted the enemy in persecuting civil populations" from qualifying as a "displaced person."⁴⁰

Although Fedorenko argued that he served as a guard against his will,⁴¹ the Court rejected this argument, refusing to give any weight to the involuntariness of his actions in determining his status as a displaced person.⁴² Instead, the Court held that the *nature* of the

36. 449 U.S. 490 (1981).

37. See, e.g., *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 n.10 (9th Cir. 2006); *Zhang Jian Xie v. INS*, 434 F.3d 136, 140 (2d Cir. 2006); *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005) (citing *Fedorenko* to support the proposition that "a distinction must be made between genuine assistance in persecution and inconsequential association with persecutors"); *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001).

38. *Fedorenko v. United States*, 449 U.S. 490, 512 (1981). The DPA was drafted to respond not to immigration generally, but particularly to those persons displaced by the Second World War. *Id.* at 495.

39. *Id.* at 518.

40. *Id.* at 496 n.3 (citing Constitution of the International Refugee Organization, annex I, pt. II, § 2, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 18 U.N.T.S. 3 [hereinafter IRO Constitution]). Specifically, the Court divested Fedorenko of his citizenship under the rule that "a naturalized citizen's failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)." *Fedorenko*, 449 U.S. at 514. The Act uses the term "displaced person" instead of "refugee," but the meaning is the same. *Id.* at 495-96. Anyone who meets the definition of "refugee" in the Constitution of the International Refugee Organization of the United Nations (the "IRO Constitution") is a "displaced person" under the DPA. *Id.*

41. *Id.* at 500.

42. *Id.* at 512.

acts committed by Fedorenko was dispositive of the question of past persecution of others.⁴³ In a footnote (now cited in nearly all asylum cases considering the voluntariness of past persecutory acts), the Court stated that:

The solution to the problem perceived by the District Court . . . lies, not in 'interpreting' the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard . . . who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems, but we need decide only this case.⁴⁴

With this footnote, the Court created a continuum of action that lower courts could use to judge the actions of future applicants. Furthermore, the Court forcefully rejected an interpretation of the DPA that would factor in the extent to which an applicant acted under duress.⁴⁵

B. The BIA Increases Fedorenko's Reach

In 1988, the BIA adopted *Fedorenko* in the context of asylum cases under the INA. In *In re Rodriguez-Majano*, the Board cited *Fedorenko* for the proposition that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. . . . It is the *objective effect* of an alien's actions which is controlling."⁴⁶ The Board thus accepted the major premise of *Fedorenko*: consideration of whether an applicant voluntarily persecuted a victim (his internal, subjective mental state) is immaterial; a court should consider solely the external, objective effect of his actions upon others.⁴⁷ Despite rejecting his claim of involuntariness, the BIA granted Rodriguez-Majano asylum, finding that his actions were not properly labeled as "persecution" because they consisted of normal acts of warfare between opposition groups.⁴⁸

43. See *id.* at 512 n.34 (finding that assistance in persecution via the act of serving as a paid, armed guard in uniform who shoots at escaping inmates when ordered makes a person ineligible for a visa regardless of whether the conduct was voluntary).

44. *Id.*

45. See *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 926 (9th Cir. 2006) (referring to the "somewhat cryptic footnote" in *Fedorenko* that courts have since come to view as establishing a "continuum of conduct" against which the culpability of an individual's actions will be judged).

46. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (B.I.A. 1988) (emphasis added).

47. See *supra* note 43 and accompanying text.

48. *In re Rodriguez-Majano*, 19 I. & N. Dec. at 815-16.

C. The Circuit Courts' Interpretations

While circuit courts are not bound by the BIA's decision in *Rodriguez-Majano*,⁴⁹ several have followed that case, applying past precedent regarding the DPA to cases interpreting the INA. This Section will first review the decisions from the Fifth and Seventh Circuits, which have adopted most comprehensively *Fedorenko's* analysis of involuntariness in the INA context. The Section continues by examining the Second Circuit's more nuanced decision, which leaves open the possibility that the court will recognize a duress exception in future cases. It concludes with an examination of the positions of the Eighth and Ninth Circuits, which agree that voluntariness constitutes a relevant factor in assessing past persecution of others.

1. Fifth and Seventh Circuits

The Fifth and Seventh Circuits agree that an alien's "personal motivation" for participating or assisting in persecution is irrelevant in determining her status under section 101(a)(42) of the INA. The Fifth Circuit, in *Bah v. Ashcroft*, held that Amadu Bah was ineligible for asylum because, as a member of the Revolutionary United Front ("RUF") in Sierra Leone, he murdered civilians.⁵⁰ These murders constituted persecution of others based on political opinion.⁵¹ The court rejected Bah's claim that, because he was forced to persecute others upon pain of death, he did not share the persecutory intent of the RUF.⁵² The court, however, declined to phrase its holding in terms of the *involuntariness* of Bah's actions, instead finding that "the alien's *personal motivation* is not relevant . . . Bah participated in persecution, and the persecution occurred because of [the victim]'s political opinions."⁵³ The Fifth Circuit found Bah's lack of subjective intent immaterial; that the objective effect of his actions was persecutory was enough to bar him from seeking asylum under the INA. The Fifth Circuit did not directly address Bah's claim that he committed the persecutory acts under duress.

The Seventh Circuit, in *Singh v. Gonzales*, cited *Bah* for the proposition that an alien's personal motivation for persecuting others

49. See *supra* note 22. The BIA's decision in *Rodriguez-Majano* is based upon the statutory interpretation of § 101(a)(42) of the INA, and statutory interpretation is a question of law the circuit courts review de novo. *In re Rodriguez-Majano*, 19 I. & N. Dec. at 815.

50. 341 F.3d 348, 351 (5th Cir. 2003).

51. *Id.*

52. *Id.*

53. *Id.*

is not relevant when he assisted or participated in such persecution.⁵⁴ The court held that Harpal Singh was barred from refugee status because, as a police officer in India, he aided fellow police officers in the persecution of Sikhs.⁵⁵ Although Singh never tortured anyone, he admitted to bringing Sikh suspects in to the police station, observing the religiously motivated beatings, and standing guard while others were beaten.⁵⁶ Singh claimed he did not agree with the persecution, and continued in his job only because of “his need for a steady paycheck and his apparent desire to avoid searching for work with a different employer.”⁵⁷ The Seventh Circuit found that “just because Singh[s] . . . assistance/participation was premised upon pecuniary concerns does not change his fate under section 1101(a)(42)” because personal motivation was irrelevant in a finding of past persecution.⁵⁸

2. Second Circuit

More recently, the Second Circuit addressed the involuntariness issue in *Zhang Jian Xie v. INS*.⁵⁹ The court agreed that *Fedorenko* applied to the asylum context and stated its refusal to recognize an “involuntariness exception” to the statutory bar in section 101(a)(42).⁶⁰ The court also followed *Fedorenko* in basing its decision on the nature of the acts committed: “Where the conduct was active and had direct consequences for the victims, we concluded that it was ‘assistance in persecution.’ Where the conduct was tangential to the acts of oppression and passive in nature, however, we declined to hold that it amounted to such assistance.”⁶¹ In China, Xie worked as a driver who transported pregnant women to doctors who performed forced abortion and sterilization procedures.⁶² Xie claimed that his participation was involuntary, but not in the sense of having been physically coerced into working.⁶³ The court rejected this characterization, noting that Xie “could have declined at any time to participate in the persecution of the women by leaving his employment voluntarily.”⁶⁴ His reason for failing to do so appeared to the court to be purely

54. 417 F.3d 736, 740 (7th Cir. 2005).

55. *Id.* at 737.

56. *Id.*

57. *Id.* at 740.

58. *Id.*

59. 434 F.3d 136 (2d Cir. 2006).

60. *Id.* at 140.

61. *Id.* at 142-43.

62. *Id.* at 143.

63. *Id.* at 140, 143.

64. *Id.* at 143.

economic.⁶⁵ Despite rejecting Xie's claim, the court indicated in dicta that voluntariness might be relevant in cases where the applicant claimed to have been "physically or psychologically coerced" into his persecutory role.⁶⁶ Thus, *Xie* suggests that the Second Circuit is searching for a middle ground between *Fedorenko* and the possibility of excusing persecutory conduct that results from physical or psychological duress rather than mere convenience.

3. Eighth and Ninth Circuits

The Eighth and Ninth Circuits treat voluntariness as not only relevant, but also essential to finding a statutory bar to refugee status under section 101(a)(42). In an early case on the issue, *Hernandez v. Reno*,⁶⁷ the Eighth Circuit remanded Rolando Hernandez's case, finding that the BIA had failed to engage in the "particularized evaluation" of the applicant's conduct required by *Fedorenko*.⁶⁸ In its view, such an evaluation necessarily included "all aspects of Hernandez's testimony," including his claim that the persecutory acts were involuntary.⁶⁹

Hernandez was forcibly recruited into a terrorist group in Guatemala under threat of death and treated as a quasi-prisoner by the group as they compelled him to take part in their operations.⁷⁰ The court listed several factors it deemed relevant in determining whether Hernandez's action amounted to assistance or participation in persecution: that his participation in the persecution was "at all times compelled by fear of death"; that he did not "share any persecutory motives" with those who forced him to commit the acts; and that he escaped from the group as soon as possible.⁷¹ According to the Eighth Circuit, an analysis of Hernandez's internal mental state was not only consistent with, but in fact required by, what it calls *Fedorenko*'s "particularized evaluation" language.⁷²

65. *Id.*

66. *Id.* ("[N]othing in the record indicates that Xie did not have the ability to quit his job as a driver at any time in order to avoid the persecution of women that was part of that job. His reason for not doing so appears to have been the loss of wages he would incur.")

67. 258 F.3d 806 (8th Cir. 2001).

68. *Id.* at 813-15.

69. *Id.* at 815.

70. *Id.* at 809.

71. *Id.* at 815.

72. See *id.* at 813-15 (analyzing *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981)). The BIA has cited *Hernandez* favorably for the proposition that a court should look at "the totality of the relevant conduct in determining whether the bar to eligibility applies," but not in the context of voluntariness. *In re A-H*, 23 I. & N. Dec. 774, 785 (B.I.A. 2005). The BIA has shown no

The Ninth Circuit's more recent decision in *Miranda Alvarado v. Gonzales* established a still more finely tuned view of the bar to refugee status due to the persecution of others.⁷³ According to the court, there are two requirements to establish culpability of the applicant: personal involvement and purposeful assistance.⁷⁴ The second requirement, purposeful assistance, factors in the totality of the surrounding circumstances, including the voluntariness of the applicant's acts.⁷⁵

The *Miranda Alvarado* court stated that where an applicant alleges that she persecuted others involuntarily, *Fedorenko* holds only that this does not absolve her completely of culpability. A less clear case than *Fedorenko* requires the court to consider voluntariness as part of the "particularized evaluation" of each applicant.⁷⁶ The court should include in this analysis factors such as the length of time over which the action occurred, self-defense or "other extenuating circumstances" motivating the action, and "dire physical consequences" that may have resulted from refusal to act.⁷⁷ After this inquiry, the court determined that Roberto Ferrer Miranda Alvarado was barred from refugee status.⁷⁸ However, the court left open the possibility that "there are, after *Fedorenko*, some extreme situations so coercive that, on a totality of circumstances analysis, an individual cannot be said to have 'assisted or otherwise participated in' persecution he was forced to inflict."⁷⁹ Thus, the Ninth Circuit interprets section 101(a)(42) to allow for a consideration of involuntariness but folds this consideration into the *Fedorenko* analysis of whether the action truly amounts to persecution.

The variety of positions circuit courts have taken on the issue of involuntary persecution reveals the extent to which this issue is un-

departure from its position that voluntariness is never relevant when considering past persecution of others.

73. 449 F.3d 915 (9th Cir. 2006). The difference in the development of the respective circuits' theories can no doubt be attributed to the number of asylum cases each court sees in a given year, a number which varies widely based upon the number of applicants in that geographic area. In 2006, the Second and Ninth Circuits issued decisions in 1,595 and 848 cases involving "asylum" respectively (as evidenced by a LEXIS search of that term in their published and unpublished decisions), whereas the Eighth Circuit saw a scant 69 such cases in that year. LexisNexis, <http://www.lexisnexis.com> (under "Federal Court Cases, Combined," search "asylum and COURT (second circuit) and date(geq (1/1/2006) and leq (12/31/2006)").

74. *Miranda Alvarado*, 449 F.3d at 927.

75. *Id.* at 928-29.

76. *See id.* at 927-29 (stating that voluntariness, while important, is not a determinative factor).

77. *Id.* at 929.

78. *Id.* at 933.

79. *Id.* at 929-30.

settled. Part IV of this Note analyzes these decisions and finds that no court offers an ideal interpretation of section 101(a)(42) of the INA.

IV. ANALYSIS

Courts have thus far accepted *Fedorenko* as precedent in the INA context but have sought to limit its holding in a variety of ways. This Part argues that *Fedorenko* cannot be reconciled with the position that voluntariness may be relevant in cases of past persecution. This analysis proceeds with three major arguments: (1) the language of the INA is not sufficiently similar to that of the DPA to assume that *Fedorenko* applies to section 101(a)(42); (2) attempting to distinguish *Fedorenko* on the grounds that its definition of persecution is outdated (and thus that affirmative mental intent to persecute should be required) is misguided; and (3) interpreting *Fedorenko* to allow for the consideration of voluntariness under the guise of a "particularized evaluation" is similarly misguided.

A. Key Differences Between the Displaced Persons Act and the Immigration and Nationality Act

The Immigration and Nationality Act differs from the Displaced Persons Act such that adopting the *Fedorenko* holding in the INA context is unwarranted. The very features of the DPA that the Supreme Court relied upon in *Fedorenko* to hold that involuntariness is irrelevant are absent from the INA. Courts should limit *Fedorenko*'s application to cases involving the DPA and interpret section 101(a)(42) of the INA independently.

In interpreting section 101(a)(42) of the INA, the Board of Immigration Appeals in *Rodriguez-Majano* cited *Fedorenko* for the premise that "[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief."⁸⁰ However, this point of law in *Fedorenko* was based upon the Supreme Court's interpretation of the DPA, not the INA.⁸¹ The DPA defines "displaced person" by incorporating the definition of "displaced person or refugee" from the Constitution of the International Refugee Organization of the United Nations ("IRO Constitution").⁸² Section 2 of the DPA⁸³ excludes

80. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (B.I.A. 1988).

81. See *supra* text accompanying notes 36-39.

82. Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009, amended by Act of June 16, 1950, ch. 262, Pub. L. No. 81-555, 64 Stat. 219, and Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96; see *Fedorenko v. United States*, 449 U.S. 490, 495 n.3 (1981) (citing IRO Constitution, *supra* note 40, annex I, pt. II, § 2(b)).

the following persons, among others, from eligibility for refugee or displaced person status: "Any other persons who can be shown: (a) to have *assisted the enemy* in persecuting civil populations of countries . . . or (b) to have *voluntarily assisted the enemy* forces since the outbreak of the second world war in their operations against the United Nations."⁸⁴ Notably, section 2(a) requires that the applicant only have "assisted" in persecution, whereas 2(b) requires that he or she have "voluntarily assisted" the enemy. Because of this difference in language, the Supreme Court employed the grammatical canon of construction *expressio unius est exclusio alterius*.⁸⁵ That is, it presumed that "the deliberate omission of the word 'voluntary' from section 2(a) compels the conclusion that the statute made *all those* who assisted in the persecution of civilians [under section 2(a)] ineligible for visas."⁸⁶ The court explained that "[t]he plain language of the Act 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."⁸⁷ Although this interpretation was not unanimous (Justices White and Stevens dissented),⁸⁸ it carried the day.

Modern scholarship has called this interpretation of the DPA into question. Most recently, Matthew Happold noted that because the DPA was drafted to conform to the requirements of the IRO Constitution, "arguments from presumed congressional intent do not appear particularly compelling."⁸⁹ Moreover, Happold pointed to a footnote in Article 2(b) indicating that the word "voluntarily" was used to exclude those who might be found to have "assisted" the Nazis by caring for

83. In keeping with the practice of the Supreme Court in *Fedorenko*, "references to [sections] 2(a) and 2(b), rather than referring to [sections] 2(a) and 2(b) of the DPA, follow the designation of the definitional provisions in the IRO Constitution . . . incorporated in [section] 2(b) of the DPA." *Fedorenko*, 449 U.S. at 511 n.31.

84. *Id.* at 495 n.4 (quoting IRO Constitution, *supra* note 40 (emphasis added)); see Displaced Persons Act of 1948 § 2(b) (defining "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization").

85. This is translated as "the omission of one implies the exclusion of the other." *Id.* at 512 (citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)).

86. *Id.* (emphasis added).

87. *Id.* (emphasis added).

88. Justice White noted that "one could argue that the words 'assist' and 'persecute' suggest that § 2 (a) would not apply to an individual whose actions were truly coerced." *Id.* at 527 n.3 (White, J., dissenting). Justice Stevens' view is examined in Section IV.B, *infra*.

89. Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT'L L. REV. 1131, 1160 (2002).

the sick and wounded and not to signal different treatment for those acting freely versus those acting under duress.⁹⁰

Nonetheless, barring Supreme Court reversal, the *Fedorenko* interpretation of the DPA is binding upon the lower courts. A more productive way for circuit courts to proceed is to distinguish *Fedorenko* so that it applies only in the context of the DPA.

Assuming, arguendo, that the *Fedorenko* interpretation of the DPA is correct, the similarity in the language of section 101(a)(42) of the INA to that of section 2(a) of the DPA does not logically compel an identical interpretation. Section 101(a)(42) excludes “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person” from a grant of asylum.⁹¹ Beyond the superficial similarity of the word “voluntary’s” absence from both sections, the differences are striking. Most importantly, there is no section in the INA analogous to DPA section 2(b). Without the juxtaposition of a second section that expressly discusses voluntariness, an interpretation of section 101(a)(42) that hinges upon the absence of that word loses persuasive value. The canon of construction used in interpreting the DPA does not apply to section 101(a)(42), and the section must be interpreted on its own. Therefore, it is far from clear that Congress, in amending the INA in 1980, intended to preclude all consideration of voluntariness. Nothing in the legislative history indicates such a reading, and the superficial similarity of the INA to the DPA does not justify parroting the Supreme Court without an independent interpretation.⁹²

The Second Circuit, while noting the absence of a nearby section in the INA explicitly mentioning “voluntary conduct,” nonetheless found that “inasmuch as the INA and the DPA were enacted for similar purposes—to enable refugees to find sanctuary in the United States in the wake of World War II—we find it unlikely that the phrase ‘assisted in persecution’ implicitly includes a voluntariness re-

90. *Id.* at 1161. Other commentators have questioned the continuing relevance of a paradigm for past persecution created upon so singular and unique an event as the Holocaust. See Lori K. Walls, Comment, *The Persecutor Bar in U.S. Immigration Law: Toward a More Nuanced Understanding of Modern “Persecution” in the Case of Forced Abortion and Female Genital Cutting*, 16 PAC. RIM L. & POL’Y J. 227, 228 (2007) (“The Nazi war criminal/Holocaust victim dichotomy set up a clear-cut—some even argue, simplistic—contrast between persecutor and victim. . . . [T]he persecutor bar does not map well to the political and cultural realities that give rise to modern ‘persecutors.’”).

91. 8 U.S.C. § 1101(a)(42) (2000).

92. The House Conference Report adopts the House amendment which says only that “specifically excluded from the definition [of refugee] are persons who themselves have engaged in persecution.” H.R. REP. NO. 96-781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160, 160.

quirement in one statute but not the other.”⁹³ However, Congress added the definition of “refugee” to the INA as part of a 1980 amendment to the Act; it was not included in the original version.⁹⁴ Although the broad purpose of the two Acts is similar—to aid refugees—there is no reason that this similarity should overcome such a stark textual difference, particularly since it was the one upon which the Supreme Court entirely based its interpretation of the DPA.

In *Bah v. Ashcroft*, the Fifth Circuit defended reading the INA to preclude voluntariness based upon its text alone.⁹⁵ The Court reasoned that “Bah participated in persecution, and the persecution occurred because of an individual’s political opinions. Had Congress wanted to base the withholding of removal on the alien’s intent, it could have enacted a statute that withheld removal only of an ‘alien who, *because of an individual’s political opinion*, ordered, incited, assisted, or otherwise participated in the persecution.’”⁹⁶ The court cited a Second Circuit decision, *Maikovskis v. INS*, that held that under the INA, “the government need not prove that the alien’s assistance to the Nazis in the course of their persecution because of the victims’ political opinion was motivated by the same political animus on the part of the alien.”⁹⁷ However, this interpretation discounts the fact that the second sentence of section 101(a)(42), which includes the bar to refugee status for past persecution of others, was clearly written to mirror the first sentence, which delineates the five accepted grounds for persecution: “persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁹⁸

Moreover, the Fifth Circuit’s argument more specifically addresses the internal motive of the persecutor, rather than her level of voluntariness, as addressed above.⁹⁹ To conflate the two confuses two separate notions: on the one hand, that the applicant need not share the persecutory motive to be guilty of persecution; and on the other, that voluntariness should be a factor in deciding whether an alien should be found culpable for past persecutory acts. As addressed in the following Section, accepting that no persecutory motive is required

93. *Zhang Jian Xie v. INS*, 434 F.3d 136, 141 (2d Cir. 2006) (citing *Fedorenko*, 449 U.S. at 495 (majority opinion)).

94. STEEL, *supra* note 15, § 8:2.

95. 341 F.3d 348, 351 (5th Cir. 2003).

96. *Id.* (emphasis added).

97. 773 F.2d 435, 446 (2d Cir. 1985).

98. See 8 U.S.C. § 1101(a)(42) (2000) (using this language in both the sentence stating the bases for persecution that qualify a person as a “refugee” and the sentence excluding from “refugee” status persons who “ordered, incited, assisted, or otherwise participated in persecution” on these bases).

99. See *supra* Section III.C.1.

is not the same as holding that involuntariness is irrelevant in determining whether persecution of others should bar refugee status.

B. Requiring Subjective Mental Intent to Persecute—A Misguided Attempt to Challenge Fedorenko

Later cases have refined the Supreme Court's dicta defining the scope of persecution in *Fedorenko*. Whereas *Fedorenko* addressed only an objective element, courts now require an applicant to show both objective acts amounting to persecution and a subjective motive on the part of the persecutor.¹⁰⁰ However, it would be misguided for a court to use this difference to challenge a *Fedorenko* analysis of section 101(a)(42). Such a view would require affirmative mental intent to persecute before barring an applicant from refugee status for past wrongful actions. The following section addresses the unintended consequences of such an approach.

1. The Changing Scope of Persecution

The Ninth Circuit has interpreted *Bah v. Ashcroft* to stand for the proposition that, under INA section 101(a)(42), past persecution of others bars eligibility for refugee status regardless of whether the persecutor's actions were voluntary.¹⁰¹ As the Fifth Circuit concisely stated in *Bah*, "the alien's personal motivation is not relevant."¹⁰² This interpretation of the phrase "assisted or participated in persecution" considers only the objective effect of the applicant's actions to be relevant (whether they were persecutory), and not her subjective mental state. This view is derived from the Supreme Court's implicit treat-

100. See *supra* Section II.B (addressing the modern requirements in proving persecution including the necessity of finding a "nexus" between the acts and the statutorily protected grounds).

101. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 n.10 (9th Cir. 2006) ("Aside from *Bah*, courts interpreting the relevant INA provisions have used caution in applying *Fedorenko's* reading of the similarly-worded DPA to mean that 'an individual's service as a concentration camp armed guard—whether voluntary or involuntary—makes him ineligible for relief.' " (brackets omitted)). I disagree with the proposition advanced by the Ninth Circuit in *Miranda Alvarado* that the *Bah* court was addressing voluntariness. See *supra* Section III.C.1. The case avoids the question of voluntariness entirely, instead deciding the case based upon *Bah's* claim that he lacked intent to persecute. Also noteworthy is that nowhere in *Bah* did the Fifth Circuit cite *Fedorenko*. See *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) (relying instead upon *Maikovskis*).

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

ment of the word “persecution” in *Fedorenko*.¹⁰³ Later Supreme Court cases, however, are inconsistent with this reading of “persecution.”¹⁰⁴ In relying only upon *Fedorenko*, and not upon later cases that have augmented the requirements of persecution, courts have oversimplified their interpretation of the INA’s statutory bar.

In the *Fedorenko* footnote, the Court limits its reading of the term “persecution” to objective considerations.¹⁰⁵ The Court states:

[A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard . . . who 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.¹⁰⁶

This footnote establishes a continuum of conduct upon which persecution is defined, but at no point incorporates subjective mental intent. Instead, only the nature of the action, including its effect on the victim of persecution, is relevant.

Justice Stevens criticized this narrow understanding of the term in his *Fedorenko* dissent, noting that “[t]he Court would give the word ‘persecution’ some not yet defined specially limited reading. In my opinion, the term ‘persecution’ clearly applies to [cutting the hair of inmates before execution]; indeed, it probably encompasses almost every aspect of life or death in a concentration camp.”¹⁰⁷ Justice Stevens elaborated, stating his belief that harm-producing conduct “would have to be characterized as assisting in the persecution of other prisoners. In my view, the reason that such conduct should not make [the applicants] ineligible . . . is that it surely was not voluntary.”¹⁰⁸ Justice Stevens would not allow involuntariness to negate the persecutory aspect of the acts, but would instead recognize involuntariness as an excuse that mitigates the blameworthiness of the actor.

Since *Fedorenko*, the Supreme Court has added a subjective element to its definition of persecution. In *INS v. Elias-Zacarias*, the Court held that section 101(a)(42) of the INA “makes motive critical” in determining whether persecution existed, and that an applicant “must provide *some* evidence of it, direct or circumstantial,” to proceed

103. See *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981) (examining “whether particular *conduct* can be considered assisting in the persecution of civilians” and refusing to examine intent (emphasis added)).

104. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (placing importance on the victim’s subjective reason for fearing persecution).

105. See *Fedorenko*, 449 U.S. at 512 n.34 (implementing a line-drawing test based on objective indicia).

106. *Id.*

107. *Id.* at 534 (Stevens, J., dissenting).

108. *Id.* at 535.

on a claim of persecution.¹⁰⁹ Thus, the Court recognized that the persecutor's subjective mental intent is critical to establishing persecution. The BIA previously recognized this principle, holding that "[a] finding of persecution requires some degree of intent on the part of the persecutor to produce the harm that the applicant fears in order that the persecutor may overcome a belief or characteristic of the applicant."¹¹⁰ Thus, a finding of persecution now entails both a subjective and an objective requirement.

2. The Consequences of Requiring Motive to Persecute

At first blush, requiring an applicant to prove that her persecutor had a subjective intent to persecute seems inconsistent with denying the persecutor the ability to disprove the act based upon lack of intent. However, this discrepancy is warranted. Allowing an applicant to refute evidence of past persecution of others based on her lack of intent would fail to bar those who persecuted others while merely "following orders."

For example, a woman alleging that she was persecuted because of religion must provide some evidence that her persecutors targeted her because of her religion—this is the subjective component of persecution. However, a court would deem irrelevant that the woman's same persecutors could prove definitively that they did not target her because of her religion, but rather because they were following the orders of their commanders. The combination of these notions seems to produce the absurd result that the person whom an applicant "persecutes" is not in fact the victim of persecution at the applicant's hands. This seeming inconsistency is in fact supported by strong policy objectives.

As another example, consider the case of Rolando Hernandez.¹¹¹ Guatemalan terrorists "recruited" Hernandez by kidnapping him and sequestering him in a remote guerilla camp.¹¹² Surrounded by a group of fifty guerillas and placed under guard to prevent his escape, Hernandez was taken to a village and forced to shoot at civilians.¹¹³ The commander of the group stood directly behind him while Hernandez shot and examined his rifle magazine afterwards to make

109. 502 U.S. at 483.

110. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (B.I.A. 1988) (citing *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *modified*, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)).

111. *Hernandez v. Reno* 258 F.3d 806 (8th Cir. 2001). Although the Eighth Circuit remanded Hernandez's case to the BIA, it is very probable that had his case been appealed to the Fifth Circuit instead, the court would have affirmed his denial of refugee status under *Bah*.

112. *Id.* at 809.

113. *Id.*

sure he had followed orders.¹¹⁴ Hernandez testified that he tried to aim away from the villagers and did not think that he hit anyone, but could not be sure because ten other guerillas were instructed to shoot at the same time, and all the villagers were killed.¹¹⁵

Suppose that Hernandez had in fact wounded a villager, and the villager applied for asylum on account of past persecution. After proving that he was targeted on the grounds of his political opinion,¹¹⁶ the villager would have to prove that Hernandez intended to harm him because of his political beliefs.¹¹⁷ Yet, as the story is presented in the preceding paragraph, the villager could not meet this requirement by reference to Hernandez, who shot at the villager not because of the villager's political opinion, but because of his own fear of death.¹¹⁸ To find persecutory intent, the court would need to look to Hernandez's commander, who in fact harbored the intent to harm the villager on account of the villager's political opinion. Thus, Hernandez would be guilty of persecuting the villager, but the villager would not have been persecuted by Hernandez.

Such a reading seems to undermine the soundness of excluding consideration of intent to persecute in Hernandez's case. In other words, the example above seems to indicate that a court should allow Hernandez to refute evidence of his past persecution of others by proving lack of motive. However, such a result would instead work greater injustice. Hernandez's situation seems unjust not because he lacked the intent to persecute on account of political opinion. Had Hernandez claimed that he willfully shot the villager, but only because he was indifferent to his politics and liked to shoot at people, we would not be persuaded that he should be absolved of blame. Instead, Hernandez's situation seems unfair because he is not allowed to excuse his conduct on the basis of coercion.

If courts allowed lack of intent to persecute on one of the five enumerated grounds to defeat the bar to refugee status, courts would grant asylum to scores of applicants who were "only following orders." Any person, even one intimately involved in persecution, could claim that despite the harm her actions caused, she did not engage in "persecution" because she did not harbor the intent to target anyone due to the person's race, religion, nationality, membership in a particular

114. *Id.*

115. *Id.*

116. The guerilla group told Hernandez that the targeted villagers were "government informants." *Id.*

117. *E.g., In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (B.I.A. 1988) (requiring proof of intent).

118. *See Hernandez*, 258 F.3d at 809 (describing reasons for Hernandez's fear of death).

social group, or political opinion. The problem is that just as much culpability often lies with those who participate in wrongful acts, even when they do not share the motive that makes those acts wrong.

The *Singh* case from the Seventh Circuit is illustrative.¹¹⁹ Singh claimed that he personally never harmed anyone in his capacity as a police officer.¹²⁰ However, Singh did admit that he brought suspects in to be beaten, observed the beatings, and stood guard while others were beaten.¹²¹ In his defense, Singh claimed that he personally did not agree with the persecution imposed by others in the police force, and that “he refused to quit the police force due to his need for a steady paycheck and his apparent desire to avoid searching for work with a different employer.”¹²²

Although Singh did not participate in the persecution of Sikhs because of their religion and thus lacked the requisite “persecutory motive” to harm them, we have no qualms holding Singh accountable for these acts. This view is justified by looking at the potential impact of refusal to participate in the beatings upon Singh’s life. According to his own testimony, had Singh refused to take part in persecution, he would have been fired.¹²³ In valuing his own economic comfort above the physical well-being of the victims, Singh was morally blameworthy for those actions. However, if refusal to participate in persecution endangered Singh’s life, a different issue would be raised, one more like that presented in *Hernandez*. Valuing one’s own life above the physical well-being of others is something we, as a society, feel less comfortable condemning as morally blameworthy.¹²⁴

Insofar as *Fedorenko* defines persecution only by reference to the objective effect of the acts on the victim, it is at odds with the modern definition of persecution. The Court has since made clear that a subjective component is also necessary to prove persecution. Yet concluding from this addition that subjective mental intent should therefore factor into a finding of persecution of others is a misguided attempt to resolve the dilemma raised by cases such as *Hernandez*. Some actors are barred properly by the persecution of others clause in section 101(a)(42), and reinterpreting that provision to allow them to gain asylum will cause more injustice overall. The solution outlined in Part V proposes a method whereby courts can excuse duress, but simultaneously distinguish between situations presented by applicants

119. *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005).

120. *Id.* at 737.

121. *Id.*

122. *Id.* at 740.

123. *See id.* at 737 (“[H]e elected to continue working for the police for financial reasons.”).

124. *See infra* Section V.A (discussing the duress excuse).

like Hernandez and those presented by applicants like Singh. But first, the following Section will analyze a similarly misguided attempt to reconcile *Fedorenko* with a consideration of voluntariness.

*C. Considering Voluntariness through "Particularized Evaluations"—
A Similarly Misguided Attempt to Interpret Fedorenko*

The Eighth and Ninth Circuits interpreted *Fedorenko*'s language on "particularized evaluations"¹²⁵ to require an analysis of voluntariness when presented with a "line-drawing problem." This Section argues that bringing in considerations of duress by appealing to the necessity of conducting "particularized evaluations" is a textually unsound reading of *Fedorenko* that has disturbing implications for the victims of persecution.

In *Hernandez*, the Eighth Circuit refused to accept a literal interpretation of *Fedorenko* that would bar Hernandez from refugee status due to his past persecutory acts. The court remanded the case to the BIA, requiring that it "consider Hernandez's uncontroverted testimony that his involvement with [the guerilla group] was at all times involuntary and compelled by threats of death and that he shared no persecutory motives with the guerrillas."¹²⁶ Although the court accepted *Fedorenko* as precedent, it determined that dissimilarities between the situations faced by Fedorenko and Hernandez created a line-drawing problem under *Fedorenko*.¹²⁷ The court remanded for what it called a "full *Fedorenko* analysis," which it read to require a "particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution."¹²⁸ The court thus read *Fedorenko* to require an assessment of voluntariness in cir-

125. *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981). The decision does not use the phrase "particularized evaluation" but that term is derived from the following passage: "The solution to the problem perceived by the District Court . . . lies, not in 'interpreting' the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether *particular conduct* can be considered assisting in the persecution of civilians." *Id.* (emphasis added) (citation omitted).

126. *Hernandez v. Reno*, 258 F.3d 806, 814 (8th Cir. 2001).

127. *Id.* at 813-14. The dissimilarities relied upon by the Eighth Circuit included that Fedorenko never tried to escape and Hernandez did repeatedly; that Hernandez received no payment from the guerillas whereas Fedorenko did from the Nazis; that Fedorenko served for over a year as opposed to Hernandez's twenty days; that Fedorenko and the other guards far outnumbered the Germans, whereas Hernandez and two others were isolated amongst fifty guerillas; and finally that Hernandez revealed his involvement with the guerillas to the authorities, whereas Fedorenko concealed his past actions. *Id.* at 814.

128. *Id.* at 813, 815.

cumstances where persecution is not as clear-cut as it was in the case of Fedorenko himself.

The Ninth Circuit in *Miranda Alvarado* similarly indicated that a court should consider voluntariness as part of a “particularized evaluation” of conduct under *Fedorenko*.¹²⁹ The court read *Fedorenko* to stand for the proposition that “the kinds of threats used to compel [the] assistance” of the persecutor were relevant in determining culpability. The court noted, “[a]side from *Bah*, courts interpreting the relevant INA provisions have used caution in applying *Fedorenko*’s reading” barring voluntariness. To support this point, the court cited the Eighth Circuit’s decision in *Hernandez* and the Second Circuit’s decision in *Xie*, noting that even though *Xie* rejected a “voluntariness requirement,” it “assess[ed] the petitioner’s voluntariness nonetheless.”¹³⁰ Thus, the Ninth Circuit accepted *Fedorenko* as precedent in the INA context, but interpreted the case to require assessment of voluntariness as part of a particularized evaluation of the applicant’s conduct, much as the Eighth Circuit did in *Hernandez*.

This effort by courts to surreptitiously give weight to voluntariness by way of a “particularized” evaluation of the applicant’s conduct is misguided. *Fedorenko* is clear on this point: the “plain language” of the DPA “mandates . . . the literal interpretation that . . . an individual’s service as a concentration camp armed guard—*whether voluntary or involuntary*—made him ineligible” to seek refuge in the United States.¹³¹ The court explicitly precluded considerations of involuntariness not just in the case of Fedorenko himself, but in every case arising under the DPA, stating that interpreting the Act to include a “voluntariness requirement” was improper.¹³² Particularized evaluations of conduct were noted as the proper way to distinguish cases, *as opposed to* distinguishing them based on whether the action was voluntary: “[t]he solution . . . lies, not in ‘interpreting’ the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians.”¹³³ The Supreme Court thus instructed lower courts to disregard voluntariness and instead determine whether the actions taken by the applicant were properly labeled as “persecution.” And, as noted above, at the time *Fedorenko* was decided, such an assessment focused solely upon the objective effects of the actions, precluding consideration of the subjective compo-

129. *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 927 n.10 (9th Cir. 2006).

130. *Id.*

131. *Fedorenko v. United States*, 449 U.S. 490, 512 (1981) (emphasis added).

132. *Id.* at 512 n.34.

133. *Id.*

ment of persecution.¹³⁴ Thus, a court cannot attempt both to accept *Fedorenko* as precedent in the INA context and to allow involuntariness to weigh against a finding of past persecution of others.

Reading *Fedorenko* to allow a court to consider voluntariness as part of an applicant's particular situation has disturbing implications. The Eighth and Ninth Circuits' position implies that circumstances may exist under which the actions taken by an applicant were involuntary, and thus that she did not engage in persecution as defined by section 101(a)(42). Such a position confuses involuntariness with the lack of affirmative mental intent to persecute, as the *Hernandez* court appeared to do when it considered relevant the fact that Hernandez "shared no persecutory motives with the guerrillas."¹³⁵ As noted above, this line of reasoning risks watering down the INA bar to refugee status to allow those who were merely following orders, like Singh, to claim a lack of motive.¹³⁶

Alternately, such a position minimizes the severe harm experienced by the victim of the acts in question. Under a sound reading of *Fedorenko*, allowing voluntariness to negate a finding that an applicant committed "persecution" denigrates her victims. A court would have to hold that, under a particularized evaluation of the circumstances, Rolando Hernandez did not "persecute" the unarmed villagers when he participated in lining them up and shooting at them.¹³⁷ Such a position is morally repugnant in unfairly and unnecessarily diminishing the pain suffered by his victims.

The "particularized evaluation" rationale is appealing in that it sets no firm rules that bind a judge's hands in determining whether to grant an applicant asylum. Yet failing to delineate a generally applicable rule, and instead granting a court wide discretion to consider each applicant's story, can result in uneven application of the law. Crafting a rule in which coerced action is evaluated the same way every time and acts as an excuse in certain predetermined circumstances increases predictability and ultimately the legitimacy of the entire asylum system.

The current interpretation of section 101(a)(42) of the INA accepts *Fedorenko* as precedent, but in certain cases attempts to interpret the case to allow for consideration of voluntariness of action. Such an approach is flawed, not only in accepting *Fedorenko* as precedent for the INA, but also in failing to put forth a generally applicable rule

134. See *supra* Section IV.B.1 (discussing the holding in *Fedorenko*, which limits analysis of "persecution" to objective considerations).

135. *Hernandez v. Reno*, 258 F.3d 806, 814 (8th Cir. 2001).

136. See *supra* Section IV.B.

137. See *Hernandez*, 258 F.3d at 815.

concerning actions committed under coercion. *Fedorenko* must be limited to the context of the DPA if involuntariness of action is ever to be deemed relevant to a finding of past persecution of others.

V. SOLUTION

The Supreme Court's decision in *Fedorenko* is irreconcilable with recognizing an exception for duress in instances of past persecution of others. As a result, circuit courts should limit that case's holding to the context of the Displaced Persons Act and interpret section 101(a)(42) of the Immigration and Nationality Act independently. The marked dissimilarities between the provisions of the two Acts addressing persecution of others make such an interpretation not merely colorable, but the superior and more textually honest reading of the INA.¹³⁸

Although voluntariness of action is not mentioned explicitly in the text of section 101(a)(42), the statute can be read to include an implicit requirement that any actions taken were of the applicant's own free will.¹³⁹ This interpretation would recognize that the actions taken by the applicant constitute persecution. It would allow courts to weigh involuntariness in the way Justice Stevens urged in his *Fedorenko* dissent: not to preclude a finding that the actions were persecutory, but rather to excuse its blameworthiness.¹⁴⁰

In constructing a duress exception, courts should avoid language implying the requirement of an affirmative mental intent to persecute on the part of an applicant who assisted or participated in persecution. Otherwise, only those who directed the action and formulated the plans for persecution would consistently be held accountable.¹⁴¹ Persecution on a vast scale often requires the assistance and participation of thousands who may not share the same motives as their leaders but are willing to take orders blindly.¹⁴² Moreover, the

138. See *supra* Section IV.A (describing key differences between the two Acts that make application of *Fedorenko* to INA context flawed).

139. In fact, the Supreme Court has read an implicit duress defense into statutes previously. See, e.g., *United States v. Bailey*, 444 U.S. 394, 415-16 (1980) (recognizing an implicit defense of duress in a statute criminalizing escape from federal custody).

140. *Fedorenko v. United States*, 449 U.S. 490, 534-95 (1981) (Stevens, J., dissenting).

141. See *supra* Section IV.B.2 (examining the effect of requiring a finding of motive to persecute).

142. Nowhere, perhaps, is this clearer than in the case of the Holocaust, where the world has come to realize that it was not just the Nazi officials at the highest levels who are culpable for this tragedy, but the millions of who "remain[ed] silent, apathetic, and indifferent in the face of others' oppression." U.S. HOLOCAUST MEMORIAL MUSEUM, TEACHING ABOUT THE HOLOCAUST: A RESOURCE BOOK FOR EDUCATORS 2 (2001), available at <http://www.holocaust-trc.org/uhmmguides.htm>.

INA's language precludes an interpretation that would limit barring only those who are most culpable, for section 101(a)(42) mentions not only those who "ordered" and "incited" persecution, but those who "assisted" and "participated" as well.¹⁴³ The following Section proposes a narrow scope for an implied excuse for duress that carefully balances these considerations.

A. Proposal: A Limited Duress Excuse in Response to Credible Threats of Imminent Death or Severe Bodily Harm to Oneself or Another

An applicant for asylum should not be barred automatically from meeting the definition of a "refugee" in the INA because she participated in past persecution of others. Courts should excuse persecutory acts that would otherwise bar an applicant from seeking asylum when the applicant acted in response to credible threats of imminent death or severe bodily harm to oneself or another.

The proposed duress exception is limited in scope such that only the most compelling circumstances warrant excusing past persecution. To be excused, persecutory acts must be (1) in response to credible threats (2) of imminent death or severe bodily injury (3) to oneself or another. To satisfy the test, an applicant would have to allege more than mere disagreement with the underlying intent of the other persecutors. She would have to prove that she was threatened, explicitly or implicitly, with either death or severe harm. Requiring that the threats be credible, both objectively and subjectively, ensures that the exception will apply only in cases of extreme physical or psychological coercion.

Taking the example presented by *Hernandez v. Reno*, the threats made to Hernandez would meet this requirement of credibility.¹⁴⁴ After kidnapping him and taking him to a secluded guerilla camp, the commander of the guerillas gave Hernandez a gun, ordered him to shoot at villagers, stood directly behind him while he shot, and then examined his weapon "to check whether he had followed orders."¹⁴⁵ Although there is no record of an explicit threat that Hernandez would be killed if he did not follow orders, the circumstances of the situation contained an implied threat, and Hernandez testified that he "understood he would be killed if he did not follow the commander's order."¹⁴⁶ The setting, as well as the fact that he had been abducted, supports the credibility of the threat.

143. 8 U.S.C. § 1101(a)(42) (2000).

144. 258 F.3d 806, 815 (8th Cir. 2001).

145. *Id.* at 809.

146. *Id.*

In addition to being credible, a threat must concern imminent death or severe bodily harm to justify participation or assistance in persecution. Assisting in persecution to avoid economic harm or inconvenience, or merely to fit in, would not fall within the proposed scope of the exception. *Hernandez* again offers a useful example. Hernandez testified that he was told that he would be killed if he failed to obey orders, a threat that clearly meets the required severity of the test.¹⁴⁷ Moreover, the threats involved *imminent* death. Even though threats of death or harm in the distant future may trigger similar psychological responses to more immediate threats, they warrant a different response due to the time the threatened person has to respond to the situation. If a threat is not imminent, it seems more reasonable to expect an actor to assess the situation rationally and find an alternative course of action.

The facts underlying the Seventh Circuit's decision in *Singh* offer another perspective.¹⁴⁸ Singh testified at his hearing that he continued in his employment as a police officer, in which he participated in the persecution of Sikhs, only because of "his need for a steady paycheck and his apparent desire to avoid searching for work with a different employer."¹⁴⁹ Though the threat of being fired was perhaps credible, the consequences of the threat involve only economic harm, which fails to raise the moral dilemma Singh faced to a level at which it is defensible to excuse his actions.

Finally, the threats may be made against either the actor or another person. Acting to save another from death or imminent harm, especially when that other is a close friend or relative, often presents a more compelling motivation to act, even when that act causes harm to others. A credible threat of imminent death or severe harm psychologically pressures the victim to accede to the demands to persecute. Even those who might withstand this pressure when applied solely to themselves may be overwhelmed when the threatened harm would befall another.

This proposed rule is adapted from two sources: the definitions of duress advanced by the United Nations High Commissioner for Refugees ("UNHCR") and the Model Penal Code. The UNHCR imposes "stringent conditions" upon a person alleging a defense of duress, requiring not just "a threat of imminent death or . . . serious bodily harm against that person or another person" but also avoidance of the threat if possible and intent not "to cause a greater harm than the one

147. *Id.*

148. *Singh v. Gonzales*, 417 F.3d 736, 739-40 (7th Cir. 2005).

149. *Id.* at 740.

sought to be avoided.”¹⁵⁰ The Model Penal Code recognizes duress as an excuse when a person is “coerced to [commit the wrongful act] by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”¹⁵¹ Both definitions encompass threats of grave harm and recognize that the threat may be against either the victim of duress or another person.

A duress excuse in the asylum context is built upon the foundation provided by the affirmative defense of duress in criminal law, under which an actor claims that the pressure imposed on her by another makes her more a victim than a willing participant in the actions. Duress “deflects responsibility for a coerced wrongful act from the perpetrator onto the person who coerced it, and so amounts to a claim that fear rendered the perpetrator blameless or undeterrable.”¹⁵² A person is held blameless as a result of duress because it is assumed that any other person “of reasonable firmness” in her position would not have been able to resist and act differently.¹⁵³ The notion of undeterrability underlies the utilitarian rationale behind duress, which recognizes that the threat of criminal punishment that normally deters a person from committing wrongful acts will be of no effect when she is coerced.¹⁵⁴

The Second Circuit, in *Xie*, suggested similar parameters for a duress excuse when it noted that at no time did Xie, whose job it was to drive women to doctors for forced abortion procedures, allege “that he was physically or psychologically coerced . . . [nor that] he could not have obtained alternate employment.”¹⁵⁵ The court cited these three grounds as possible arguments Xie could have raised in claiming involuntariness, implying that it may be amenable to recognizing duress

150. U.N. High Comm’r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, ¶ 69, U.N. Doc. HCR/GIP/03/05 (Sep. 4, 2003), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/open-doc.pdf?tbl=RSDLEGAL&id=3f5857d24>. Such a definition tracks the position of the Supreme Court in *Bailey*, which stated that “[u]nder any definition of [duress] one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail.” *United States v. Bailey*, 444 U.S. 394, 411 (1980) (internal quotations and citation omitted). In an asylum case, such facts would influence the court’s decision as part of an evaluation of all the circumstances surrounding the case.

151. MODEL PENAL CODE § 2.09(1) (1962).

152. KAPLAN ET AL., *supra* note 5, at 560.

153. MODEL PENAL CODE § 2.09(1).

154. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 300 (3d ed. 2001) (discussing that, when coerced, the threat of criminal punishment is ineffective).

155. *Zhang Jian Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006).

in future cases involving physical coercion, psychological coercion, or severe economic harm.¹⁵⁶

B. Potential Criticism and Response

Two major criticisms can be leveled at the proposal that duress should be recognized in limited circumstances as an excuse for past persecution of others. First, one could argue that although duress might excuse certain actions, the most severe and damaging acts—such as murder—should fall outside the recognized scope of the defense per se. Second, one could argue that duress is not compatible with asylum law because, unlike criminal law, which has a legal basis, asylum has a moral underpinning, and thus legalistic excuses such as duress lose their force when applied to it.

Critics might argue that duress should excuse only so much, and that the most morally reprehensible acts, such as murder or torture, should never be excused on grounds of coercion. Many states recognize duress as an affirmative criminal defense but will not allow it to excuse murder.¹⁵⁷ Other states “permit a defense of ‘imperfect duress,’ lowering murder to manslaughter, and a few others excuse accomplices in felony murders, but not intentional killings.”¹⁵⁸ It could be argued that if courts recognize duress in the context of asylum, they similarly should allow it to excuse only some acts (i.e., not the killing of another person). Put another way, this view claims that a person told to kill or suffer death has a duty to choose death and not to value her life more highly than that of another.

This question has been debated for centuries,¹⁵⁹ and this Note will not attempt to provide a full justification for the view that duress should excuse killing another. The duress excuse contemplated by the Model Penal Code makes no distinction between different types of criminal acts.¹⁶⁰ Moreover, the Code commentators have noted that “even homicide may sometimes be the product of coercion that is truly

156. This Note, however, declines to recognize threats of economic harm or retaliation, no matter how severe they may be, as appropriate grounds for a claim of duress. This position tracks that of the MPC and most courts in “requir[ing] at least a threat to personal safety, not to property, as a minimum requirement for the duress defense.” KAPLAN ET. AL., *supra* note 5, at 567. Although severe economic harm may lead to physical harm in some instances—for example, Xie losing his job and being unable to find another may lead him to starve—such a link is attenuated enough that it fails to carry the force of direct physical or psychological pressure.

157. *Id.* at 571.

158. *Id.*

159. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1370-74 (1989) (surveying centuries of scholarship debating whether duress can excuse coerced homicides).

160. MODEL PENAL CODE § 2.09 (1962).

irresistible.”¹⁶¹ As Joshua Dressler has noted, “[i]f a person of reasonable moral strength might comply with a kill-or-be-killed threat (or, perhaps more compellingly, a kill-or-I-will-kill-a-loved-one threat), the case for denying the defense, as a matter of law, is weakened considerably.”¹⁶² This line of reasoning indicates that courts should hold those alleging duress to a standard based upon comparison to an average person and not require that those misfortunate enough to be placed in such a situation act like heroes.

The argument against excusing coerced killing is even weaker in a situation like the *Hernandez* case, where it is clear that the villagers targeted by the guerillas coercing Hernandez would have died no matter what Hernandez chose to do.¹⁶³ Had Hernandez refused to shoot, the guerillas would have killed him in addition to, not instead of, the villagers. In such a situation, the only outcome Hernandez could control was whether he himself lived or died; his refusal to shoot at the villagers would have made him perhaps heroic and morally praiseworthy, but dead nonetheless.

A second potential criticism of the proposed solution challenges a duress excuse in the particular context of asylum law. The argument is usually similar to the following: “[D]uress is a legal excuse, not a moral justification and ‘asylee’ is a moral, not legal, status. Denial of asylum to an applicant who has, under duress, participated in the persecution of others, is acceptable because it is a function of moral culpability, not legal liability.”¹⁶⁴ An applicant for asylum is petitioning this country for a positive legal benefit, not seeking to avoid imprisonment for past acts under criminal law.

Yet this distinction weighs unfairly upon asylum applicants and is more useful in theory than in practice. To require an applicant to reach a standard of behavior that society does not impose upon its own citizens is unjustifiable. The basis of asylum law is not to reward outstanding applicants for their strength of character, but to recognize that in some circumstances the suffering an applicant has faced in her own country is so extreme that she may seek refuge in this country.¹⁶⁵ Asylum is not meant to reward the exceptional, but rather to recognize the misery and persecution endured by many. To deny someone

161. MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 3, at 376 (Official Draft and Revised Comments 1985).

162. DRESSLER, *supra* note 154, at 305.

163. See *Hernandez v. Reno*, 258 F.3d 806, 809 (8th Cir. 2001) (noting that ten other guerillas in addition to Hernandez were ordered to open fire on the villagers).

164. David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 *FORDHAM L. REV.* 2621, 2658 (2006).

165. ANKER, *supra* note 7, at 4.

this benefit because she was placed in a morally difficult situation and chose what society considers to be the “wrong” outcome in saving her own life (or, in an even more compelling case, saving the life of a family member) is unjust.¹⁶⁶

From a utilitarian point of view, the consequences to the criminal defendant and the asylum seeker are “on equal footing,” with the asylee facing what may be an even more desperate situation.¹⁶⁷ Applicants who are denied asylum are forcibly deported to the countries in which they suffered persecution and where they may face a lifetime of additional persecution, torture, or even death.¹⁶⁸ So long as this country recognizes a criminal defense of duress, there is no coherent reason why such a defense should not be recognized in asylum law as well.¹⁶⁹ Accepting that asylum law is based in morality, and that “[m]orally, a refusal [to harm others] might be laudable,” the reason for this is that “it goes *beyond* what might reasonably be expected of a person.”¹⁷⁰ The average person may well accede to pressure. Assuming that the applicant has done nothing to place herself in danger of duress, then it is a matter of chance that she has been the one subjected to this moral quagmire; often, “[p]ersons who have committed crimes under duress are more unfortunate than undeserving.”¹⁷¹ Holding asylum applicants who have the misfortune to have been targeted and coerced into persecutory action to some higher “moral” standard than this country demands of its own citizens is both hypocritical and unjust.

Recognizing an exception to duress in the limited circumstances outlined above will not weaken this country’s legal or moral standards, nor will it result in a torrent of asylum applicants. In the very few cases in which an applicant will satisfy the stringent requirements of the duress exception, such an excuse would allow courts

166. See Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees*, 13 HUM. RTS. BRIEF 28, 31 (2006) (arguing that the lack of a duress defense in asylum law produces an “absurd result” in punishing the victims of terrorism along with “terrorists themselves or those who intentionally and voluntarily support terrorism”); see also Amy Frey, Comment, *The Case for Burma: Inconsistent U.S. Policies, Unjust Application of U.S. Law*, 15 TUL. J. INT’L & COMP. L. 207, 229 (2006) (“[The coerced] individual is most likely ideologically opposed to the group (otherwise, duress would not have been necessary in the first place) and is now traumatized by the entire experience. The United States should not ignore the plight of these victims, and exacerbate their trauma . . .”).

167. Gregory A. Laufer, Note, *Admission Denied: In Support Of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIGR. L.J. 437, 455 (2006).

168. *Id.*

169. Happold, *supra* note 88, at 1163.

170. *Id.* (emphasis added).

171. *Id.*

to exercise leniency toward those who acted under the type of coercion that most would find overwhelming.

VI. CONCLUSION

Courts have struggled to apply the bar to refugee status based on past persecution of others under section 101(a)(42) of the INA when applicants have claimed that they acted involuntarily. Federal courts have for years unquestioningly applied the Supreme Court's interpretation of the Displaced Persons Act in *Fedorenko v. United States* to the context of the Immigration and Nationality Act, but this reading of the INA is unsound. Instead, *Fedorenko* should be limited to the context of the DPA, and courts should interpret the INA to include an implied excuse for actions committed under duress when individuals persecuted others in response to credible threats of imminent death or severe bodily harm to oneself or another. Such a limited definition would excuse those few victims of overwhelming coercion that petition this country for aid and deserve a second chance.

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