# ASYLUM DISCORD: DISPARITIES IN PERSECUTION ASSESSMENTS

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## INTRODUCTION

When reviewing one of the many asylum cases on the Seventh Circuit's docket, Judge Richard Cudahy observed, "While it is distasteful to have to quantify suffering for the purposes of determining asylum eligibility, that is our task."[1] Prior to this observation in 2003, the federal courts and administrative agencies that review immigration matters had already reviewed hundreds of thousands (if not millions) of asylum claims.[2] In the decade since, hundreds of thousands more asylum claims have followed.[3] Quantifying harm is a bitter endeavor, but the stakes could not be higher for the applicants involved. A decision of whether harm rises to the level of persecution could mean the difference between life and death. Despite the ramifications for asylum seekers, the approach of the Executive Office for Immigration Review ("EOIR"), "which reviewing courts have tended to mirror, has continued to be of the 'I know it

[1] Dandan v. Ashcroft, 339 F.3d 567, 574 (7th Cir. 2003); *see also* Abdelmalek v. Mukasey, 540 F.3d 19, 23 (1st Cir. 2008) ("It is never a pleasant task to attempt to quantify an individual's suffering and measure it against the suffering of others.").

[2] Chad C. Haddal, Cong. Research Serv., R40133, Refugee and Asylum-Seeker Inflows in the United States and Other OECD Member States 18 (2009) (providing asylum statistics from 1996 to 2007).

[3] EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at I1 (2013) (documenting more than 200,000 asylum cases between fiscal years 2008 and 2012); U.N. High Comm'r for Refugees, Asylum Levels and Trends in Industrialized Countries, 2007, at 12 (2008) (stating that 275,960 asylum cases were filed in the United States between 2003 and 2007).

when I see it' variety"; EOIR is the immigration agency responsible for adjudicating asylum claims.[4]

The difficulties associated with determining when an applicant has been persecuted are the result of several converging factors. One, of course, is the sheer number of asylum cases. While adjudicators could more readily recognize and deconstruct inconsistencies between dozens of fact patterns, maintaining consistency among thousands of fact-intensive cases is a much harder task.[5]

Additionally, despite the volume of adjudicated asylum applications, there is still very little guidance on what it means to be persecuted. The Immigration and Nationality Act ("INA") does not define what it means to be persecuted, much less the requisite level of harm that rises to the level of persecution.[6] Immigration regulations also leave undefined the threshold level of suffering an applicant must experience to establish persecution.[7] Nor has EOIR filled the void. Immigration judges adjudicate the applications of asylum seekers who are in removal proceedings.[8] These immigration judges are part of EOIR, which is a component of the U.S. Department of Justice.[9] The Board of Immigration Appeals ("Board")—also housed within EOIR—reviews appeals of immigration judges' decisions.[10] Because the U.S. Attorney General appoints Board members to act as his or her delegate for the immigration matters the Board reviews,[11] the Board could use its authority to provide guidance on the level of harm applicants must suffer to establish they were (or will be) persecuted.[12] The federal appellate courts that review Board decisions would have to apply ordinary principles of deference to these general pronouncements.[13] The Board, however, has been reluctant to define more precisely the requisite harm thresh-

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[4] Stanojkova v. Holder, 645 F.3d 943, 949 (7th Cir. 2011).

[5] *See* Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) (noting the diverse and fact-intensive nature of persecution inquiries).

[6] 8 U.S.C. § 1101(a)(42)(A) (2012) (requiring that an applicant establish persecution without providing further detail); *Bocova*, 412 F.3d at 263 (noting the lack of a statutory definition).

[7] 8 C.F.R. § 1208.13 (2014) (focusing on presumptions regarding future persecution, different means of obtaining asylum, and barriers to eligibility).

[8] 8 U.S.C. § 1229a (providing the standards that govern removal proceedings).

[9] *About the Office*, EXECUTIVE OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/orginfo.htm (last visited Oct. 11, 2014).

[10] 8 C.F.R. § 1003.1(a)(1) (placing the Board under the supervision of the EOIR director); *id.* § 1003.1(b) (reviewing the Board's jurisdiction to adjudicate appeals of decisions rendered by immigration judges).

[11] *Id.* § 1003.1(a)(1).

[12] Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) ("Because the word 'persecution' is not defined by statute, it is in the first instance the prerogative of the Attorney General, acting through the [Board], to give content to it.").

[13] Shao v. Mukasey, 546 F.3d 138, 156–57 (2d Cir. 2008) (deferring to the Board's assessment of whether a "categorical application" or "case-by-case review" was preferable under the circumstances); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (requiring the appellate court to apply "the principles of deference described in *Chevron*" because the case implicated the Board's "construction of the statute which it administers").

old for a finding of persecution.[14] As a result of the Board's lack of guidance, the appellate courts that review Board decisions necessarily play a larger role in determining this requisite threshold.[15]

The heightened role of reviewing courts has significantly contributed to the current problems associated with measuring whether harm is persecutory. Appellate courts review thousands of immigration cases every year and nearly half of those cases concern asylum.[16] If an applicant wishes to challenge the Board's asylum denial, the appeal goes directly to the federal appellate court that has jurisdiction over the geographic area where the immigration judge initially adjudicated the asylum application.[17] The party filing the appeal will always be the applicant because the Attorney General will not appeal the decision of the very adjudicatory body it delegated to decide immigration matters.[18] Immigration courts are spread throughout the geographic boundaries of all non-specialized appellate courts except for the D.C. Circuit.[19] Consequently, eleven different appellate courts independently pass judgment on EOIR's assessments of whether harm rises to the level of persecution—a significant number of spoons stirring the persecution pot.

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[14] *See* Orelien v. Gonzales, 467 F.3d 67, 71 (1st Cir. 2006) (remarking how the Board has decided that persecution "is best addressed on a case-by-case basis"); Marquez v. INS, 105 F.3d 374, 379 (7th Cir. 1997) ("The prevailing approach is, perhaps unfortunately, largely ad hoc."). The most notable exception to the Board's ad hoc approach to persecutory harm assessments concerns China's coercive population control policies. 8 U.S.C. § 1101(a)(42)(B) (2012) ("For purposes of determinations under this chapter, 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 . . . ."); *see also, e.g.*, *In re* M-F-W- & L-G-, 24 I. & N. Dec. 633 (B.I.A. 2008) (discussing the forcible insertion of intrauterine devices); *In re* J-H-S-, 24 I. & N. Dec. 196 (B.I.A. 2007) (discussing the impact of family planning policies when an applicant's children were born in China).

[15] Stanojkova v. Holder, 645 F.3d 943, 949 (7th Cir. 2011) ("Responsibility has by default devolved on the courts . . . to try to create some minimum coherence in the adjudication of claims of persecution . . . ."); *see also* Mansour v. Ashcroft, 390 F.3d 667, 681 (9th Cir. 2004) ("The definition of persecution that our court applies is a creature of purely our own case law.").

[16] *See, e.g.*, John Guendelsberger, *Circuit Court Decisions for December 2011 and Calendar Year 2011 Totals*, IMMIGR. L. ADVISOR, Jan. 2012, at 4, 4 [hereinafter Guendelsberger, *2011 Asylum Statistics*] (noting that 1,517 of the 3,123 immigration appeals adjudicated in 2011 concerned asylum matters); John Guendelsberger, *Circuit Court Decisions for December 2012 and Calendar Year 2012 Totals*, IMMIGR. L. ADVISOR, Jan. 2013, at 4, 4 [hereinafter Guendelsberger, *2012 Asylum Statistics*] (noting that 1,292 of the 2,711 immigration appeals adjudicated in 2012 concerned asylum matters).

[17] 8 U.S.C. § 1252(a)(5) (discussing jurisdiction); *id.* § 1252(b)(2) (discussing venue).

[18] Rather, if the Attorney General disagrees with the Board, the Attorney General could certify the question to himself or herself. 8 C.F.R. § 1003.1(h)(1)(i) (2014).

[19] *See EOIR Immigration Court Listing*, EXECUTIVE OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/sibpages/ICadr.htm (last visited Oct. 11, 2014) (reviewing the location of immigration courts).

To be sure, the appellate courts must defer to EOIR's assessment of whether a set of harms establishes persecution.[20] But individual persecutory harm inquiries are typically treated by the courts as questions of fact.[21] Consequently, even though courts defer to EOIR's largely *ad hoc* persecution assessment in any given case, in the absence of generally applicable harm standards from the Board, the courts almost always have the liberty to determine just how severe an applicant's circumstances must be to necessarily cross the persecution threshold—that is, to determine whether EOIR erred by finding that a set of harms failed to establish persecution.[22] Courts' *modus operandi* is simply to compare and contrast to previous persecution cases.[23] And due to differing opinions on what the harm threshold should be, panels are free to emphasize or deemphasize any factual nuance they choose between the cases that they are reviewing and previous cases they have decided.[24]

While courts sometimes express frustration that there exists no uniform standard to determine when harm rises to the level of persecution, EOIR and the appellate courts are largely in the dark about the current state of persecution jurisprudence.[25] Scholarship up to this point has not undertaken a comprehensive assessment of the true extent of inconsistencies among persecution decisions, much less evaluated what the current state of affairs illustrates about the proper way to evaluate harm and foster a more uniform standard.[26] As Judge

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[20] Alvarado-Carillo v. INS, 251 F.3d 44, 49 (2d Cir. 2001) (reciting the oft-repeated deferential standard).

[21] Diallo v. Ashcroft, 381 F.3d 687, 698 (7th Cir. 2004) (noting that both past and prospective persecution findings are "factual determinations").

[22] *See infra* Part III.B (dissecting the extent of differing harm thresholds among the reviewed appellate courts).

[23] *See, e.g.*, Bondarenko v. Holder, 733 F.3d 899, 910 (9th Cir. 2013) (comparing and contrasting to previous cases that concerned physical abuse); Ritonga v. Holder, 633 F.3d 971, 976 (10th Cir. 2011) (reviewing other cases involving Christian Indonesian asylum applicants).

[24] *Compare* Alibeaj v. Gonzales, 469 F.3d 188, 192 (1st Cir. 2006) (citing Susanto v. Gonzales, 439 F.3d 57, 59–60 (1st Cir. 2006) for the proposition that "physical abuse does not necessarily prove persecution"), *with* Chanchavac v. INS, 207 F.3d 584, 589 (9th Cir. 2000) (quoting Duarte de Guinac v. INS, 179 F.3d 1156, 1161 (9th Cir. 1999) to explain that "we have 'consistently found persecution where, as here, the petitioner was physically harmed.' ").

[25] *See* Stanojkova v. Holder, 645 F.3d 943, 949 (7th Cir. 2011) (describing the situation as "capricious adjudication at both the administrative and judicial level, generating extraordinary variance both in grants of asylum in similar cases at the administrative level and in reversals by courts of appeals of denials"); Mihalev v. Ashcroft, 388 F.3d 722, 728 (9th Cir. 2004) (lamenting that "decisions often seem to point in opposite directions on relatively similar facts").

[26] Professors Ramji-Nogales, Schoenholtz, and Schrag surveyed the asylum jurisprudence of the appellate courts over a two-year period. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 361–71 (2007) (reviewing decisions from 2004 and 2005). Due to the voluminous number of decisions that their groundbreaking study entailed—agency decisions as well as appellate court decisions—they were unable to assess each of the reasons why an appellate court did or did not decide to remand

Reena Raggi observed, however, "[a] rational system of law would seem to require consistent treatment of [comparable or] identical claims."[27]

This article seeks to fill this gap in the literature. The subject of this article is a study reviewing appellate courts' persecution inquiries over seventeen years, 1996 through 2013, since the appellate courts began serving as the *de facto* final arbiters of whether harm rises to the level of persecution. As previously noted, certain features of appellate courts' review methods have contributed to the current problem. Nevertheless, a particular aspect of the standard of review applicable to administrative findings of fact, such as persecution assessments, can help provide a greater understanding of how decisionmakers gauge persecution.[28] In 1996, Congress amended the INA to codify the great deference afforded to EOIR's findings of fact.[29] Now, persecution determinations are "conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary."[30] The appellate courts have interpreted this standard to mean that they can only reverse the Board if a determination that the applicant was persecuted is the *only* possible result.[31] Thus, this aspect of the standard of review provides an opening to isolate, explore, and compare those limited circumstances where an appellate court has held that a set of facts necessarily establishes that an applicant has been persecuted.

After a brief overview of asylum law and the adjudication process in Part I, Part II reviews the methodology this study used to identify the cases that depict per se persecutory conduct. The study focuses on asylum claims rather than applications for refugee relief because of the availability and sheer volume of material.[32] The persecution inquiry, however, should be identical in both asylum and refugee claims; the central distinction between the two forms of relief is the

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an asylum claim, much less isolate those cases that addressed the persecution component of the refugee definition. *Id.*

[27] Zhang v. Gonzales, 452 F.3d 167, 174 (2d Cir. 2006).

[28] *See* Marcello v. Bonds, 349 U.S. 302, 309–10 (1955) (holding that the INA supersedes the APA's hearing provisions).

[29] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, 3009-607 to -612 (amending INA § 242).

[30] 8 U.S.C. § 1252(b)(4)(B) (2012) (emphasis added).

[31] *See, e.g.*, Ghebremedhin v. Ashcroft, 392 F.3d 241, 243 (7th Cir. 2004) ("[I]f the record evidence *compels* the result that we have reached, then no alternative determination is possible.").

[32] OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 39 (2012) (noting that since 1980, more than 2,600,000 refugees have been admitted into the United States). While the Department of Justice adjudicates asylum applications filed during removal proceedings, the refugee process involves a number of domestic agencies and NGOs collectively working to steer prospective refugees through the process. The Department of State's Bureau for Population, Refugees, and Migration oversees the U.S. Resettlement Program. U.S. Citizenship and Immigration Services interviews the prospective refugees who make it through an arduous screening process. *Refugee Eligibility Determination*, U.S. CITIZENSHIP & IMMIGR. SERVICES, U.S. DEP'T OF HOMELAND SECURITY, http://www.uscis.gov/humanitarian/refugees-asylum/refugees/refugee-eligibility-determination (last visited Oct. 11, 2014).

location of the applicant at the time he or she applies.[33] As to asylum inquiries, there are countless reasons why an appellate court might choose to affirm or remand a Board decision. Consequently, Part II explains how this study sifted through the case law haystack to pinpoint the needles that collectively depict the parameters of what various courts have construed as necessarily persecutory conduct. For example, in many cases, an appellate court will remand the Board's persecution holding because EOIR erred in its decision-making process—by failing to articulate the justification for its conclusion or overlooking relevant evidence.[34] These process flaws must be distinguished from their merits cohorts even though the courts fail to consistently appreciate the distinction.[35]

The findings of this study are the subject of Part III. The results depict several threshold levels of suffering that the examined courts all agree necessarily establish persecutory conduct. It is important to review the areas of agreement because these universally accepted severity thresholds provide the foundation from which to build. Aside from the obvious importance of reporting accurate findings, an exclusive focus on assessment inconsistencies would not be fair to appellate court adjudicators who have had the fateful and unenviable task of reviewing these fact-intensive persecution claims for decades.

Nevertheless, despite these areas of agreement, this study documented an unequivocal chasm in the consistency of persecution decisions that do not fall within one of the universally accepted categories. The remainder of Part III delves into the divergences. For example, the results illustrate how a one-day detention involving electric shock compelled a finding of persecution,[36] while a ten-day detention involving electric shock did not.[37] Similarly, while several *weeks* of psychological suffering necessarily established persecution,[38] several *years* of even greater psychological suffering failed to cross the persecution threshold.[39]

Part IV explores the potential causes of these incredible divergences in persecution outcomes. A review of the data reveals that asylum applicants' ability to avoid deportation may depend on the appellate court jurisdiction they happen to fall under or even the particular judges within a given circuit that happen to

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[33] 8 U.S.C. § 1158(a)(1) (allowing an individual to apply for asylum relief if the individual is "physically present in the United States"); *id.* § 1158(b)(1)(A) (requiring that asylum applicants satisfy the definition of a "refugee").

[34] *See* Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 289 (2d Cir. 2007) (reviewing decisionmaking flaws that include "flawed reasoning" and "a sufficiently flawed fact-finding process").

[35] *Compare* Asani v. INS, 154 F.3d 719, 722–23 (7th Cir. 1998) (remanding for deficiencies in the Board's decisionmaking standard), *with* Dandan v. Ashcroft, 339 F.3d 567, 573 (7th Cir. 2003) (construing the facts in *Asani* as conclusively persecutory).

[36] Quan v. Gonzales, 428 F.3d 883, 888 (9th Cir. 2005).

[37] Khan v. Mukasey, 549 F.3d 573, 575–77 (1st Cir. 2008).

[38] Miljkovic v. Ashcroft, 376 F.3d 754, 755–56 (7th Cir. 2004).

[39] Lim v. INS, 224 F.3d 929, 932–33, 936–37 (9th Cir. 2000).

be assigned to their case. Appellate courts' persecution jurisprudence also makes clear that the staggering inconsistencies between these persecution decisions are caused by disparities in how courts assess and measure harm. Part IV identifies and discusses the problems with courts' current persecution inquiries, and provides several preliminary observations to remedy the current state of affairs. A brief conclusion follows.

## I. THE LAW OF ASYLUM

After the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees,[40] Congress enacted the Refugee Act of 1980[41] to give statutory commitment to its human rights obligations.[42] As interpreted and amended over the last three decades, the Refugee Act provides the substantive requirements that applicants must satisfy to obtain asylum relief.[43] The Refugee Act, subsequent amendments to the INA, and immigration regulations prescribe the process applicants must follow to obtain asylum relief.[44]

### *A. Substantive Law*

Asylum claims require that the applicant satisfy the definition of a "refugee."[45] Three core elements comprise the refugee definition: a well-founded fear of persecution, a nexus between the harm and a protected ground, and government involvement or abdication to the harm.[46] To establish a well-founded fear of persecution, applicants must demonstrate a reasonable possibility that harm will befall them if they are deported to their home country.[47] The harm must be severe enough to rise to the level of persecution, but it can take many forms. Physical abuse, economic harm, and impediments to religious practice

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[40] Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968).

[41] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

[42] S. REP. NO. 96-256, at 1, 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141, 146–47.

[43] *See, e.g.*, 8 U.S.C. § 1101(a)(42)(A) (2012) (statutory definition of a refugee); 8 C.F.R. § 1208.13 (2014) (asylum regulations).

[44] *See, e.g.*, 8 U.S.C. § 1229a (discussing the structure of a hearing before an immigration judge); 8 C.F.R. § 1003.3 (describing the appeals process to the Board).

[45] 8 U.S.C. § 1158(b)(1)(A).

[46] *Id.* § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1), (b)(2)(i) (mandating that applicants establish these three core elements in past persecution and well-founded fear of persecution claims, respectively); *see* Jiang v. Gonzales, 500 F.3d 137, 142 (2d Cir. 2007) (assessing the nexus requirement); Da Silva v. Ashcroft, 394 F.3d 1, 7 (1st Cir. 2005) (discussing the applicant's need to establish the government's inability or unwillingness to protect the applicant from private actors).

[47] INS v. Cardoza-Fonseca, 480 U.S. 421, 431–32, 450 (1987) (discussing the requisite probability of ten percent as the likelihood of persecution that may be sufficient).

are but a few examples.[48] As the "well-founded fear" language makes clear, persecution decisions are, for the most part, ultimately forward-looking.[49] Governments willing to provide asylum protection do so to ensure that applicants do not suffer future persecution as a result of being deported.

Even though applicants must ultimately demonstrate a well-founded fear of persecution, their past experiences are relevant in two ways. For one, these past experiences can help to prove that their fear of persecution in the future is well-founded.[50] Indeed, under many circumstances, one can infer that an applicant previously harmed by a regime that remains in power may be harmed again. Additionally—and more importantly for purposes of this article—past harm may create a presumption that the applicant will be harmed in the future.[51] Specifically, if applicants can establish that they experienced harm that rose to the level of persecution (along with the other two core elements), then they are entitled to a rebuttable presumption that they have a well-founded fear of persecution.[52] Because the rebuttable presumption puts the onus on the government to disprove the well-founded fear, many asylum cases hinge on these past persecution findings.[53]

In addition to establishing a well-founded fear of persecution, applicants cannot satisfy the refugee definition unless they show that the harm feared (or already experienced to receive the presumption) would be dispensed on account of one of five protected grounds.[54] The protected grounds are race, religion, nationality, political opinion, and social group.[55] Consequently, applicants who fear the government will harm them because of their religious beliefs can satisfy this nexus requirement. Conversely, applicants asserting that they fear bandits will rob them to obtain money cannot establish the requisite nexus because the thieves' motive for the robbery is simply financial gain.[56]

The third central element of the refugee definition concerns the role of the State in perpetrating the harm. Applicants satisfy this element if the govern-

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[48] *See* Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 292–310 (providing a taxonomy of harm).

[49] As noted subsequently, there are limited exceptions when an applicant experiences past harm that is severe enough to establish eligibility for asylum relief in the absence of a fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(iii)(A).

[50] *See* Boykov v. INS, 109 F.3d 413, 416 (7th Cir. 1997) (explaining how "unfulfilled threats" can be "viewed as indicative of the danger of future persecution").

[51] Capric v. Ashcroft, 355 F.3d 1075, 1084–85 (7th Cir. 2004); Melgar de Torres v. Reno, 191 F.3d 307, 311 (2d Cir. 1999).

[52] 8 C.F.R. § 1208.13(b)(1).

[53] The importance of past persecution findings are also readily apparent when reviewing appellate courts' reluctance to find that the government rebutted the presumption of future persecution. *See, e.g.*, Mihaylov v. Ashcroft, 379 F.3d 15, 23 (1st Cir. 2004) (faulting the agency's changed country conditions analysis).

[54] 8 U.S.C. § 1101(a)(42)(A) (2012).

[55] *Id.*

[56] *See* Sinha v. Holder, 564 F.3d 1015, 1020–21 (9th Cir. 2009) (distinguishing random harm from harm perpetrated on account of a protected ground).

ment, or an arm of the State, is responsible for the harm.[57] If, however, private actors are the alleged perpetrators, then applicants must show that the government is either unable or unwilling to protect them.[58]

Aside from these main elements of the refugee definition, the INA and immigration regulations provide additional barriers for applicants seeking asylum. For example, applicants may not be granted asylum if they could avoid future harm by relocating to a different part of their home country.[59] Additionally, applicants are often not permitted to even apply for asylum unless they file their applications within one year of entering the United States.[60] Further, under the so-called "persecutor bar," applicants cannot obtain asylum if they persecuted others.[61]

Mitigating slightly these asylum relief hurdles, immigration law broadens in several ways the circumstances under which applicants can obtain asylum. For one, applicants can still be eligible for humanitarian asylum relief in the absence of a well-founded fear of future persecution if the past harm experienced was incredibly severe.[62] Additionally, even if applicants cannot show that they will be singled out for persecution upon return to their home country, regulations deem sufficient a pattern or practice of persecution against a group to which the applicants belong.[63]

Thus, there are many circumstances that adjudicators must take into account when assessing the viability of an asylum claim. One certainty, however, is that applicants cannot obtain asylum relief unless they establish the requisite persecution. The harm assessments reviewed in this study represent the central component of what it means to be persecuted, and persecution is the "fundamental concept at the core of the refugee definition."[64]

### *B. The Asylum Process*

Asylum seekers may file applications affirmatively or defensively. An application is affirmative when the applicant files it before the government places him or her in removal proceedings.[65] If the applicant seeks asylum after the

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[57] Vahora v. Holder, 707 F.3d 904, 908 (7th Cir. 2013).

[58] Gutierrez-Vidal v. Holder, 709 F.3d 728, 732–33 (8th Cir. 2013) (reviewing whether the Peruvian government was able to protect the applicant against the Shining Path guerrilla organization).

[59] 8 C.F.R. § 1208.13(b)(1)(i)(B) (2014).

[60] 8 U.S.C. § 1158(a)(2)(B), (D) (barring late-filed applications in the absence of a change in circumstance). Applicants do not face a similar time limitation when they apply for withholding of removal. *See id.* § 1231(b)(3)(A).

[61] *Id.* § 1158(b)(2)(A)(i) (persecutor bar provision); *see also* Negusie v. Holder, 555 U.S. 511 (2009) (analyzing the persecutor bar).

[62] 8 C.F.R. § 1208.13(b)(1)(iii)(A); *In re* Chen, 20 I. & N. Dec. 16, 21 (B.I.A. 1989) (providing the subsequently codified humanitarian asylum standard).

[63] 8 C.F.R. § 1208.13(b)(2)(iii)(A)–(B).

[64] *In re* T-Z-, 24 I. & N. Dec. 163, 167 (B.I.A. 2007).

[65] *See* 8 C.F.R. § 208.2(a).

government places him or her in a removal proceeding, then the application is considered defensive.[66]

For affirmative applications, the applicant files the claim with the Department of Homeland Security's Asylum Office.[67] If the asylum officer does not grant the applicant's claim, the case is referred to the immigration courts housed within EOIR.[68] At this point, the applicant is in a position comparable to those who file defensive applications. The applicant then has a hearing before an immigration judge. The INA and immigration regulations govern immigration judges' authority and the nature of the proceeding, but the adjudication process is comparable to many other administrative hearings.[69] In contrast to the interview with an asylum officer, the administrative hearing is more formal and adversarial; the parties submit relevant documentation, call witnesses to testify, and cross-examine the opposing parties' witnesses.[70]

If the immigration judge denies the asylum application, the applicant can appeal to the Board.[71] From there, an applicant can appeal the Board's decision directly to the federal court of appeals sitting in the applicable venue, which is based on the location of the immigration court that adjudicated the applicant's case.[72] As mentioned previously, it will always be the asylum applicant who appeals a Board decision because the Department of Justice will not try to overturn a decision rendered by the administrative appellate body that the Attorney General designated to determine such matters.[73] The First through Eleventh Circuits all review Board decisions.[74] While an applicant may petition the Supreme Court for certiorari, for all intents and purposes the courts of appeals have the last say with respect to persecution assessments.[75]

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[66] *See id.* § 208.2(b).

[67] *Id.* § 208.9; *see also* Refugee, Asylum, and International Operations Directorate, U.S. Dep't of Homeland Sec., Affirmative Asylum Procedures Manual (AAPM) 4–33 (2013) (describing each step of the affirmative asylum application process).

[68] 8 C.F.R. § 208.14(b)–(c); *see also Office of the Chief Immigration Judge*, EXECUTIVE OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ocijinfo.htm (last visited Oct. 17, 2014) (providing an overview of the immigration courts).

[69] *See* 8 U.S.C. § 1229a (2012) (reviewing the procedures that govern removal hearings); 8 C.F.R. § 1240.1(a) (discussing the authority of immigration judges).

[70] 8 U.S.C. § 1229a(b).

[71] 8 C.F.R. § 1003.1(b) (discussing the Board's appellate jurisdiction); *id.* § 1003.3 (describing the procedures to appeal to the Board).

[72] 8 U.S.C. § 1252(a)(5) (providing appellate courts with exclusive jurisdiction over asylum appeals of Board decisions); *id.* § 1252(b)(2) (discussing venue).

[73] 8 C.F.R. § 1003.1(a)(1) (providing a fifteen-member Board with authority to act on behalf of the Attorney General).

[74] *See EOIR Immigration Court Listing*, *supra* note 19 (providing immigration court locations that do not include the District of Columbia).

[75] While the fact-heavy nature of typical persecution inquiries does not ordinarily garner Supreme Court attention, the Court has passed judgment on the requisite likelihood that applicants will be persecuted if returned to their home countries. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 431–32, 450 (1987) (finding that an applicant does not have to show a probability of persecution to qualify as an asylee); INS v. Stevic, 467 U.S. 407, 429–30 (1984)

## II. METHODOLOGY

This study sought to identify cases that adjudicators have found to necessarily establish persecution. Identifying such cases permits an assessment of any agreed upon harm thresholds. It also illuminates any divergent holdings concerning what it means to be persecuted. To identify these cases, Part II first explains why certain appellate court holdings establish necessarily persecutory conduct. It will then review the initial asylum case pool that contained the germane persecution assessments. The initial case pool, however, also included numerous cases that did not pertain to this article's ultimate inquiry. Accordingly, Part II will review how this study categorized and eliminated the cases that did not determine whether a set of harms necessarily established persecution. A discussion of the final case sample follows.

### *A. Using Standards of Review to Isolate Persecution's Threshold*

The Administrative Procedure Act ("APA") requires courts to apply the substantial evidence standard of review to an agency's findings of fact in a formal proceeding.[76] Immigration proceedings, however, are governed by the INA rather than the APA.[77] Nevertheless, the two statutes' procedural requirements share many similarities because Congress modeled the INA's hearing provisions on the APA.[78] The INA previously provided that the agency's findings of fact are conclusive "if supported by reasonable, substantial, and probative evidence on the record considered as a whole."[79] The courts almost universally interpreted this provision to require them to apply the traditional substantial evidence standard of review to factual findings, such as the harm required to establish persecution.[80] Such interpretations were well-grounded, as the substantial evidence review standard requires appellate courts to assess whether such evidence exists that "a reasonable mind might accept as adequate to support a conclusion."[81] Under the familiar principles of *Universal Camera*, courts review the reasonableness of the agency's determination against the

(holding that an applicant must show persecution is "more likely than not" to qualify for withholding of deportation).

[76] 5 U.S.C. § 706(2)(E) (2012).

[77] *See* Marcello v. Bonds, 349 U.S. 302, 310 (1955) (finding that the APA does not govern immigration hearings); Giambanco v. INS, 531 F.2d 141, 144 (3d Cir. 1976) (holding that court review of the Board's deportation orders are exempt from the APA).

[78] *Marcello*, 349 U.S. at 307–08 (noting that the APA served as a model for the INA).

[79] 8 U.S.C. § 1105a(a)(4) (1994).

[80] Melendez v. U.S. Dep't of Justice, 926 F.2d 211, 216–17 (2d Cir. 1991) (pointing to the Third Circuit as the only circuit to unambiguously employ an abuse of discretion standard of review); *see also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (contending that substantial evidence and arbitrary and capricious review are "essentially the same").

[81] Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *see also* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 147–50 (2010) (discussing the reasonableness standard for findings of fact).

backdrop of the administrative record as a whole.[82] Substantial evidence review is incredibly deferential,[83] although the extent of deference—like most aspects of agency review standards—has been the subject of differing opinions.[84]

For many immigration issues, the way appellate courts characterize their standard of review for factual findings, such as persecution, changed in 1992 when the Supreme Court decided *INS v. Elias-Zacarias*.[85] In *Elias-Zacarias*, Justice Scalia, writing for the Court, observed in a footnote, "[t]o reverse the [Board's] finding we must find that the evidence not only *supports* that conclusion, but *compels* it."[86] From this off-the-cuff observation—which was merely a response to an argument made by the dissent—came a 1996 amendment to the INA that essentially codified this footnote as the standard of review for factual findings in immigration proceedings. Specifically, the INA now states, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[87]

*Elias-Zacarias* and Congress might have intended to alter the previously-applied substantial evidence standard of review or they merely could have been paraphrasing the standard's core reasonableness requirement. Regardless of their intention, supplementing the standard of review with a phrase couched in negative rather than positive terms has affected how appellate courts interpret their review standard. The way the Seventh Circuit phrased its review standard in *Ghebremedhin v. Ashcroft* is illustrative of how appellate courts now apply the codified standard of review for findings of fact: "[I]f the record evidence *compels* the result that we have reached, then *no alternative determination is possible*."[88] The case law is replete with comparable descriptions among the appellate courts.[89] As a result of the way courts generally assess factual findings, when an appellate court reverses a persecution determination because the

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[82] Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

[83] Singh v. BIA, 435 F.3d 216, 219 (2d Cir. 2006); Adefemi v. Ashcroft, 386 F.3d 1022, 1026–27 (11th Cir. 2004).

[84] *See* Tex. World Serv. Co. v. NLRB, 928 F.2d 1426, 1430 (5th Cir. 1991) (describing the difficulties applying the substantial evidence standard); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78 (2011) (reviewing empirical studies on courts' application of the six administrative law doctrines).

[85] INS v. Elias-Zacarias, 502 U.S. 478 (1992).

[86] *Id.* at 481 n.1.

[87] 8 U.S.C. § 1252(b)(4)(B) (2012).

[88] Ghebremedhin v. Ashcroft, 392 F.3d 241, 243 (7th Cir. 2004) (second emphasis added).

[89] *See, e.g.*, Dong v. Holder, 696 F.3d 121, 125 (1st Cir. 2012) ("[R]eversal is appropriate only when the record evidence points unerringly to a conclusion different from that reached by the [Board]." (quoting Ruiz v. Mukasey, 526 F.3d 31, 35 (1st Cir. 2008))). Given this incredibly deferential standard, it is not surprising that several decisions equate a reversal to a finding of persecution as a matter of law. Bejko v. Gonzales, 468 F.3d 482, 486 (7th Cir. 2006) (analyzing whether "the circumstances [rose] to the level of past persecution as a matter of law"); Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) ("[T]he question reduces to whether, given those facts, the [Board] was compelled, as a matter of law, to find that the petitioner had established . . . persecution.").

record compels a contrary conclusion, then the court is holding that the *only* conclusion that can be drawn from the record is that the harms alleged by the applicant establish persecutory conduct.[90] Consequently, the current standard of review can be employed as a vehicle to isolate the cases that elucidate necessarily persecutory conduct.[91] The cases depicting per se persecutory conduct are the ones that this study sought to ultimately identify. Classifying such cases will permit this study to assess the level of harm that courts believe are unquestionably sufficient to establish persecution, as well as any inconsistencies in courts' persecution holdings. With this threshold goal in mind, the remainder of Part II will review how this study sifted through the myriad asylum cases adjudicated in the courts of appeals to find the decisions that squarely addressed whether a set of harms necessarily established persecution.

### *B. The Initial Scope of Cases Reviewed*

As previously noted, the First through Eleventh Circuits review asylum appeals from Board decisions. This study chose four circuit courts to evaluate: the First, Second, Seventh, and Ninth. The Second and Ninth Circuits were chosen because they hear the vast majority of immigration appeals filed in federal court;[92] asylum cases make up roughly half of all immigration appeals.[93] Of the approximately twenty-seven thousand immigration cases adjudicated by federal appellate courts from 2006 to 2011, for example, the Second and Ninth Circuits adjudicated roughly two-thirds of them.[94] This study chose to include cases adjudicated by the First and Seventh Circuits because decisions from these circuits are representative of the outer parameters of appellate court remand rates for asylum cases. Historically, the Seventh Circuit has one of the highest remand rates while the First Circuit has one of the lowest.[95]

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[90] The findings of EOIR that courts construe as questions of fact ordinarily include both the allegations of what happened to the applicant and the ultimate determination of whether those facts establish persecution.

[91] Kumar v. Gonzales, 439 F.3d 520, 527 (9th Cir. 2006) (Wardlaw, J., dissenting) (noting the court's need to interpret whether a set of facts "necessarily constitute[] persecution").

[92] Guendelsberger, *2011 Asylum Statistics*, *supra* note 16, at 4–5.

[93] *See, e.g.*, Guendelsberger, *2012 Asylum Statistics*, *supra* note 16, at 4–5 (noting that 1,292 of the 2,711 immigration appeals adjudicated in 2012 concerned asylum matters); Guendelsberger, *2011 Asylum Statistics*, *supra* note 16, at 4–5 (noting that 1,517 of the 3,123 immigration appeals adjudicated in 2011 concerned asylum matters).

[94] Guendelsberger, *2012 Asylum Statistics*, *supra* note 16, at 4–5; Guendelsberger, *2011 Asylum Statistics*, *supra* note 16, at 4–5; *see also Virtual Law Library: Immigration Law Advisor*, EXECUTIVE OFFICE FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/vll/ILA-Newsleter/lib_ila.html (last visited Oct. 17, 2014) (providing comparable annual statistics from 2006 through 2013).

[95] Guendelsberger, *2012 Asylum Statistics*, *supra* note 16, at 5. From 2006 through 2012, the Seventh Circuit's average remand rate was 19.2 percent. *Id.* The average remand rate for the First Circuit during this time period was 8.4 percent. *Id.* While several appellate courts have remand rates as low, or slightly lower, than the First Circuit, *id.*, the First Circuit's assessment methodology of potentially persecutory conduct sets it apart from many other cir-

The sampling of cases within these four circuits was further narrowed in several ways. First, unpublished cases were excluded to ensure the study only encompassed binding precedent of persecution assessments. Additionally, the study limited the evaluated cases to those decided during or after 1996. Because 1996 was the year when Congress codified the *Elias-Zacarias* standard of review for findings of fact,[96] almost entirely limiting the case pool to those cases adjudicated after the codification date diminishes the likelihood that the cases will assess persecution findings under a standard that deviates from the one courts currently employ.[97]

Narrowed by the aforementioned criteria, the study used a WestlawNext advanced search to generate a list of cases that mention the words "persecut!"[98] and "asylum." This search generated a necessarily over-inclusive list that provided the foundation for additional refinement. At this stage, the results yielded approximately nine hundred cases.

### *C. Further Narrowing the Case Sample*

A significant challenge for this study was to isolate those cases where the courts assessed whether a set of harms necessarily rose to the level of persecution—and whether courts did so in a manner that illuminates the requisite level of harm they believe applicants must show to establish persecution. While the approximately nine hundred cases generated in the initial search all mentioned "asylum" and a derivation of "persecution," most of these decisions did not engage in the persecution assessment this study sought to isolate. Consequently, the study had to examine each of these cases to eliminate the ones that were not instructive. For many of these cases, there are straightforward reasons why they were not useful, such as decisions where persecution was not discussed because applicants waived the issue.[99] As this section will review, however, the study eliminated other decisions from the final case pool for reasons that are less apparent; for this reason, a more detailed justification for excluding them is war-

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cuits—a point discussed further *infra* Part IV. Thus, this study also included cases from the First Circuit so that the sample is reflective of the range of assessment methodologies applied throughout the appellate courts when they determine whether conduct rises to the level of persecution.

[96] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, 3009-608; *see also* 8 U.S.C. § 1252(b)(4)(B) (2012) (codification of amendment to INA § 242).

[97] The study does include several cases that courts issued in the months preceding IIRIRA's enactment. These cases, however, employ language comparable to the codified standard. *See, e.g.*, Rodriguez-Matamoros v. INS, 86 F.3d 158, 160 (9th Cir. 1996) (holding that "any reasonable factfinder" would reach a contrary conclusion); Gonzalez v. INS, 82 F.3d 903, 910 (9th Cir. 1996) (finding the record compelled a contrary conclusion).

[98] The "!" root expander generates results that include derivations of "persecut," such as persecute, persecuted, and persecution.

[99] *E.g.*, Zhao v. Mukasey, 540 F.3d 1027, 1030 n.3 (9th Cir. 2008) (waiver of past persecution).

ranted.[100] In all, approximately seven hundred cases from the initial case pool of nine hundred were eliminated.[101] This study documented no fewer than thirty bases for court actions on asylum cases that led to the elimination of these seven hundred cases.[102] These approximately thirty bases can be broken down into five categories that will now be reviewed in turn.

### *1. Elements or Requirements Other than Persecutory Harm Assessments*

Many asylum cases focus on elements of the refugee definition other than persecution. Thus, irrelevant to this study are decisions based on the nexus requirement[103] and those that focus on whether the government was (or will be) either responsible for the harm or unable or unwilling to protect the applicant from the harms perpetrated by private actors.[104] If the appellate court's decision rendered ambiguous the specific element forming the basis of the decision, then it was omitted from consideration.[105]

Aside from the core elements of the refugee definition, asylum law provides additional eligibility requirements. Decisions based on any of these additional requirements were also discarded. These excluded categories of cases include: whether the applicant resettled in a third country prior to arriving in the

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[100] *See infra* Part II.C.3 (discussing the need to exclude most decisions that were based on whether an applicant established a well-founded fear of persecution).

[101] See Supplement Schedule S6, at http://scholars.law.unlv.edu/nlj/vol15/iss1/6/, for a representative sample of the seven hundred eliminated cases. I did not record each case that fell within each category once I amassed a core set of examples that illustrate the basis for eliminating cases that fell within a given category. I approximated the eliminated cases at seven hundred by taking the number of cases generated by the initial search—approximately nine hundred—and subtracting the approximately two hundred cases, *see infra* Part II.D, where the court did specifically assess whether the harm alleged by the applicant compelled the conclusion that the applicant was persecuted. The appendix includes a comprehensive list of the cases in which the court determined whether the record compelled the conclusion that assailants persecuted the applicant.

[102] Cases do not necessarily fall exclusively into one category. For example, a court may premise its holding on the applicant's failure to negate that there has been a fundamental change in circumstances in the applicant's home country while also determining that the applicant is not eligible for humanitarian asylum. *See* Lecaj v. Holder, 616 F.3d 111, 119–20 n.9 (2d Cir. 2010); Waweru v. Gonzales, 437 F.3d 199, 205 (1st Cir. 2006).

[103] *E.g.*, Regalado-Escobar v. Holder, 717 F.3d 724, 728, 730 (9th Cir. 2013); Sugiarto v. Holder, 586 F.3d 90, 95 (1st Cir. 2009).

[104] *E.g.*, Doe v. Holder, 736 F.3d 871, 873 (9th Cir. 2013) (finding the government unwilling or unable to control the persecutory actions of non-governmental assailants); Khan v. Holder, 727 F.3d 1, 8 (1st Cir. 2013) (noting that government setbacks do not necessarily equate to an inability to protect).

[105] In many cases, a court will discuss multiple elements concurrently and phrase its holding in a manner that leaves open to interpretation whether the ultimate holding is based on one or two elements. *See, e.g.*, Uwais v. U.S. Att'y Gen., 478 F.3d 513, 518–19 (2d Cir. 2007) (reviewing errors in both the persecution and nexus elements); Boci v. Gonzales, 473 F.3d 762, 767 (7th Cir. 2007) (same).

United States,[106] whether the applicant could safely reside in a different area of the home country,[107] whether a change in country conditions negated any fear the applicant might reasonably harbor,[108] whether the applicant's claim was credible,[109] whether the applicant adequately corroborated the asylum claim,[110] and whether the applicant was barred from applying for asylum because he or she failed to timely file the application.[111]

In its asylum decisions, EOIR often provided multiple reasons for denying a claim where one of the reasons for the denial hinged on a persecution assessment. In several instances, however, an appellate court declined to review the persecution assessment because it believed that the erroneous aspects of EOIR's decision necessarily infected the persecution finding.[112] As a result of appellate courts' failure to review such persecution determinations on the merits, these cases were omitted as well.

Finally, because asylum determinations are technically discretionary, an immigration judge can deny in his or her discretion an applicant's claim even if the applicant is statutorily eligible for asylum.[113] While such denials are rare,

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[106] *E.g.*, Liao v. Holder, 558 F.3d 152, 154 (2d Cir. 2009) (finding the agency erroneously concluded that the applicant had firmly resettled); *see also* 8 C.F.R. §§ 1208.13(c)(2)(i)(B), 1208.15 (2014) (defining firm resettlement and prohibiting a grant of asylum to applicants who have firmly resettled).

[107] *E.g.*, *Khan*, 727 F.3d at 9 (finding the applicant failed to prove he could not internally relocate within Pakistan); Cardenas v. INS, 294 F.3d 1062, 1067 (9th Cir. 2002) (finding the agency erred when it determined that the applicant could reside safely in a different part of Peru); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(B) (stating that an applicant's ability to relocate is a basis to deny an asylum claim).

[108] *E.g.*, Mihaylov v. Ashcroft, 379 F.3d 15, 23 (1st Cir. 2004) (remanding for deficiencies in the decisionmaking process and a faulty changed country conditions analysis); Toptchev v. INS, 295 F.3d 714, 721 (7th Cir. 2002) (finding a change in country conditions even if past persecution were presumed); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(A) (stating that a "fundamental change in circumstances" can support a denial of asylum relief).

[109] *E.g.*, Siewe v. Gonzales, 480 F.3d 160, 162 (2d Cir. 2007); Huang v. Gonzales, 453 F.3d 942, 943 (7th Cir. 2006); *see also* 8 U.S.C. § 1158(b)(1)(B)(iii) (2012) (codified credibility standards).

[110] *E.g.*, Rapheal v. Mukasey, 533 F.3d 521, 524 (7th Cir. 2008); Diallo v. Gonzales, 439 F.3d 764, 765 (7th Cir. 2006); *see also* 8 U.S.C. § 1158(b)(1)(B)(ii) (codified corroboration standards).

[111] *E.g.*, Chen v. U.S. Dep't of Justice, 471 F.3d 315, 321–22 (2d Cir. 2006) (assessing whether the court had jurisdiction to consider an exception to the one-year filing requirement); *see also* 8 U.S.C. § 1158(a)(2)(B) (prohibiting untimely applications unless an exception applies).

[112] *E.g.*, Huang v. Mukasey, 520 F.3d 1006, 1008 (9th Cir. 2008) (faulting the Board for conflating adverse credibility with a decision on the merits); Diallo v. Ashcroft, 381 F.3d 687, 698 (7th Cir. 2004) (determining that an erroneous credibility determination infected the agency's persecution finding).

[113] 8 C.F.R. § 1208.13(b)(1)(i). Asylum is discretionary because the relief provides the applicant with an opportunity to subsequently obtain permanent resident status. Nevertheless, asylees are ordinarily entitled to withholding of removal under the INA, which is mandatory but does not provide comparable adjustment of status opportunities. *See* INS v. Cardoza-

this study omitted appeals that hinged solely on the discretionary component because the reviewing court does not consider whether a set of harms necessarily rises to the level of persecution.[114]

*2. Vague or Non-Binding Harm Determinations*

Some opinions that expressly held that an applicant established past persecution failed to provide any indication of the harms that formed the basis for the conclusion.[115] Such opinions were discounted because they provide no inherent value to gauging what conduct constitutes persecution. In addition to ambiguous holdings, this study also omitted from consideration harm assessments that were merely dicta. In numerous cases, the appellate courts discussed in passing whether the alleged harms rose to the level of persecution, but their ultimate holdings were based on a different asylum element.[116] Similarly, regardless of its once binding effect, a persecution assessment loses its utility when a court subsequently vacates the opinion.[117] For its comparable non-definitive effect, this study also discounted cases where the agency assumed *arguendo* that assailants persecuted the applicant.[118] Such assumptions negate the appellate courts' need to determine whether the experienced harm necessarily established persecution.

*3. Decisions that Use Different Standards of Assessment*

Due to differing standards of assessment, decisions are largely unhelpful in discerning the threshold for persecutory conduct when they derive from motions to reopen, address the persecutor bar, or, to a large extent, when they concern humanitarian asylum or are exclusively based on whether an applicant's fear of being persecuted is well-founded. When applicants file motions to reopen based on asylum claims, they merely need to prove that their claims are "plausible," demonstrate the existence of a decisionmaking error, or otherwise establish an abuse of agency discretion.[119] As such, the appellate courts need

Fonseca, 480 U.S. 421, 428 n.6 (1987) (reviewing the distinctions between asylum and statutory withholding of deportation).

[114] *E.g.*, Kalubi v. Ashcroft, 364 F.3d 1134, 1135 (9th Cir. 2004).

[115] *E.g.*, Astrero v. INS, 104 F.3d 264, 265–66 (9th Cir. 1996); Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996).

[116] *E.g.*, Kadia v. Holder, 557 F.3d 464, 467 (7th Cir. 2009) (noting that the conduct alleged "would seem to establish harm above the level of mere harassment"); Mukamusoni v. Ashcroft, 390 F.3d 110, 120 (1st Cir. 2004) (stating that the record would likely compel a persecution finding if the agency had found the applicant credible).

[117] *E.g.*, Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 183, 187 (2006) (per curiam); Baballah v. Ashcroft, 335 F.3d 981, 987–88 (9th Cir. 2003), *amended by* 367 F.3d 1067 (2004).

[118] *E.g.*, Castañeda-Castillo v. Holder, 638 F.3d 354, 362 (1st Cir. 2011); Passi v. Mukasey, 535 F.3d 98, 101 (2d Cir. 2008).

[119] INS v. Abudu, 485 U.S. 94, 96 (1988) (confirming that an abuse of discretion standard applies for motions to reopen); Boika v. Holder, 727 F.3d 735, 742 (7th Cir. 2013) (remand-

not determine whether the record compels a particular conclusion concerning the applicants' persecution claims.

Immigration law reasonably precludes applicants from obtaining asylum relief when applicants themselves engaged in persecutory acts against others.[120] While the act of persecuting and being persecuted might appear to involve comparable inquiries, the analysis applicable to persecutor bar cases contain several distinctions that ordinarily warrant excluding them from the pool of persecution cases ultimately analyzed.[121] For example, persecutor bar cases often entail an inquiry into whether the applicant "assisted" in the persecution of others,[122] had the requisite level of "personal involvement,"[123] or had the requisite mental state needed to establish the applicant's role as a persecutor.[124]

The standards applicable to humanitarian asylum claims also differ from regular persecution inquiries. Because a grant of humanitarian asylum does not require applicants to establish an objective fear of future harm, the harm alleged must be incredibly severe—more severe than the conduct needed to simply establish past persecution.[125] Accordingly, including court decisions that are grounded in an assessment of humanitarian asylum would obscure the true baseline threshold of persecutory conduct in certain instances. Specifically, including such cases would obscure the threshold when an appellate court determines that the record does not compel the conclusion that the applicant was harmed to a level that would necessitate a finding of humanitarian asylum.[126] After all, harm may rise to the level of persecution even if the harm is not egregious enough to pierce the humanitarian asylum threshold. Conversely, if an appellate court were compelled to find that a set of harms is severe enough to satisfy the humanitarian asylum threshold, then such harms would necessarily rise to the level of persecution. As such, this study did not eliminate cases where the appellate court found that the record compelled the conclusion that

ing due to the Board's faulty determination that the applicant failed to establish changed country conditions); Siong v. INS, 376 F.3d 1030, 1039–40 (9th Cir. 2004) (holding that the applicant proffered a "plausible" asylum claim).

[120] 8 U.S.C. § 1158(b)(2)(A)(i) (2012) (setting out the persecutor bar).

[121] *See* Balachova v. Mukasey, 547 F.3d 374, 386 (2d Cir. 2008) (noting that the agency "confused illegality with persecution" when it assessed whether the persecutor bar applied).

[122] Lin v. Holder, 584 F.3d 75, 81–82 (2d Cir. 2009) (reviewing the persecutor bar in relation to forced abortions in China); Xie v. INS, 434 F.3d 136, 143 (2d Cir. 2006) (assessing whether the applicant "assisted" in the persecution of others).

[123] Kumar v. Holder, 728 F.3d 993, 998 (9th Cir. 2013).

[124] Negusie v. Holder, 555 U.S. 511, 517–18 (2009) (reviewing whether coercion is a viable defense); *cf.* Annachamy v. Holder, 733 F.3d 254, 258–66 (9th Cir. 2013) (discussing the material support bar).

[125] 8 C.F.R. § 1208.13(b)(1)(ii) (2014).

[126] Bachkova v. INS, 109 F.3d 376, 378–79 (7th Cir. 1997) (finding the Board did not abuse its discretion by denying humanitarian asylum).

the harm suffered by the applicant was severe enough to satisfy the humanitarian asylum standard.[127]

For persecution assessments, the ultimate determination courts typically must make is whether an applicant established a well-founded fear of persecution.[128] As such, it might seem counter-intuitive to not assess cases that review specifically whether an applicant established a well-founded fear of being persecuted. Excluding many of these cases, however, is warranted because of the prospective nature of the inquiry. The well-founded fear analysis entails a two-part test when it is not presumed because of past persecution.[129] First, the applicant must establish a reasonable likelihood that the proffered harm will occur in the applicant's home country.[130] In this respect, the inquiry is based on the probability of a specific event taking place rather than a description of the particular harmful events themselves. As such, court decisions premised on this probability component are not instructive to an assessment of when conduct rises to the level of persecution.[131]

The second component of the well-founded fear inquiry does concern the harm feared. The appellate courts' discussions of the feared harms, however, are often vague and nondescript.[132] Because the courts are assessing what might take place in the future, the extent of harm findings in this context is often limited to general or obvious observations, such as a fear of "murder" or "torture" qualifying as sufficiently serious harm.[133] This level of generality significantly diminishes the utility of these descriptions.

As a subset of well-founded fear inquiries, this study also generally excluded "pattern or practice" persecution cases.[134] As noted previously, applicants do not need to show they will be singled out for persecution if they can establish a pattern or practice of persecution against a group to which they be-

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[127] Vongsakdy v. INS, 171 F.3d 1203, 1206 (9th Cir. 1999) (finding the past harm egregious enough to satisfy the humanitarian asylum threshold).

[128] *See id.* at 1205 (reviewing how in "most instances" an applicant must establish a well-founded fear of being persecuted in the future).

[129] *See* 8 C.F.R. § 1208.13(b)(1) (discussing the well-founded fear presumption).

[130] *Id.* § 1208.13(b)(2)(i)(B); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (determining that an applicant need not establish that he or she would more likely than not be persecuted upon return to the home country).

[131] Shao v. Mukasey, 546 F.3d 138, 159–62 (2d Cir. 2008) (discussing the probability that the applicant would be subjected to China's population control measures); Canales-Vargas v. Gonzales, 441 F.3d 739, 746 (9th Cir. 2006) (finding the evidence established the requisite probability of future harm).

[132] *See, e.g.*, El Himri v. Ashcroft, 378 F.3d 932, 937 (9th Cir. 2004) (describing the feared harm as "economic discrimination"); Niam v. Ashcroft, 354 F.3d 652, 656 (7th Cir. 2004) (hypothesizing possible future harms).

[133] *See, e.g.*, Melkonian v. Ashcroft, 320 F.3d 1061, 1069 (9th Cir. 2003).

[134] *E.g.*, Avetova-Elisseva v. INS, 213 F.3d 1192, 1201 (9th Cir. 2000) (finding a possibility of "physical harm or death" against Armenians in Russia); Mgoian v. INS, 184 F.3d 1029, 1036–37 (9th Cir. 1999) (construing a prospective harm inquiry as potentially grounded in a pattern or practice of persecution against the applicant's family).

long.[135] The premise of such claims is that widespread abuse of a group to which the applicant belongs itself establishes a reasonable possibility that the applicant will face harm.[136] Consequently, the harm that the applicant claims to fear is just as vague, if not more so, than ordinary singled-out claims.

Given this vagueness within prospective persecution inquires, past persecution findings are most appropriate for assessing the requisite harm needed to establish persecution. For past persecution inquiries, the courts must assess a set of circumstances and harms that are more concrete and specific because, to affirm the evident, they have already happened.[137] The undermining abstraction of prospective inquiries is mitigated by the more detail-heavy evaluation of harms that have already taken place.[138]

As a final point, it should be noted that this study does not comprehensively review cases that concern coercive population control policies. The INA provides that an applicant can establish persecution if the applicant was forced to undergo an abortion or sterilization procedure, or demonstrates "other resistance" to a government's population control policies.[139] The statutory grounding of these claims often requires an analysis that is distinguishable from other persecution assessments.[140]

*4. General Flaws in Procedure*

Immigration courts must provide applicants with an asylum hearing that comports with procedural due process requirements.[141] Appellate courts have ultimately remanded a number of asylum cases for procedural deficiencies un-

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[135] 8 C.F.R. § 1208.13(b)(2)(iii)(A)–(B).

[136] Rasiah v. Holder, 589 F.3d 1, 5 (1st Cir. 2009) (explaining how widespread harm against a particular group creates "a reasonable likelihood of persecution of all persons in the group").

[137] Due to the same issues regarding probability and harm specificity, the ultimate case pool also does not regularly include claims analyzed under the Ninth Circuit's "disfavored group" threshold. *See* Sael v. Ashcroft, 386 F.3d 922, 929 (9th Cir. 2004) (applying the court's disfavored group analysis).

[138] Nevertheless, a well-grounded and consistent understanding of the harms that establish persecution should still drive courts' evaluations of the requisite prospective harm threshold.

[139] 8 U.S.C. § 1101(a)(42)(B) (2012).

[140] For example, coercive population control policies often concern mixed questions of law and fact, as well as analyses of whether an applicant's claim satisfied the particular (and fairly rigid) requirements of the INA's coercive population control provision. *See, e.g.*, Liu v. Holder, 632 F.3d 820, 822 (2d Cir. 2011) (assessing whether the facts alleged by the applicant fell within the other resistance category). The fact that this study does not analyze population control claims in no way implies that these cases are not relevant to understanding persecution or that courts' holdings on this issue are necessarily consistent. *Compare* Jiang v. Holder, 611 F.3d 1086, 1095–96 (9th Cir. 2010) (finding persecution compelled where the applicant's wife was forced to undergo an abortion, authorities made him pay a fine, and he fled the country to avoid arrest), *with* Zhu v. Gonzales, 465 F.3d 316, 318, 320–21 (7th Cir. 2006) (finding persecution was not compelled where the applicant's girlfriend was forced to undergo an abortion and authorities struck the applicant's head with a brick).

[141] Somakoko v. Gonzales, 399 F.3d 882, 883 (8th Cir. 2005).

related to the merits of the case. For example, the courts have remanded cases because the immigration judge exhibited bias or open hostility toward the applicant during the hearing,[142] or prevented the applicant from presenting relevant evidence.[143] Additionally, courts have reversed cases where the Board took administrative notice of non-record facts and rendered decisions without first providing applicants with an opportunity to respond.[144] In addition to procedural deficiencies for which the agency is responsible, applicants' failure to follow procedural requirements can also cause a reviewing court to decline to assess the merits of a persecution decision. Consequently, this study eliminated decisions where the applicant failed to exhaust to the Board,[145] or waived before the court,[146] any challenge to the immigration judge's determination that the applicant failed to establish persecution.

*5. Flaws in EOIR's Decisionmaking Process*

The general principles of administrative law that govern appellate court review under the substantial evidence standard provide the courts with several avenues to remand a persecution determination without first having to decide that the record compels a finding of persecution.[147] The Second Circuit in *Manzur v. U.S. Dep't of Homeland Security* aptly summarized these circumstances when it noted appellate courts' "substantial authority to vacate and remand [Board] and [immigration judge] decisions that result from flawed reasoning, a sufficiently flawed fact-finding process, or the application of improper legal standards."[148] To be sure, applicants do not appeal the decisions of immigration judges directly to appellate courts. Nevertheless, because the Board may summarily affirm or simply supplement the decision of the immigration judge, often the appellate courts directly review the decisions of immigration judges.[149]

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[142] *See, e.g.*, Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) ("[W]hen an [immigration judge's] conduct results in the appearance of bias or hostility such that we cannot conduct a meaningful review of the decision below, we remand.").

[143] *See, e.g.*, Oshodi v. Holder, 729 F.3d 883, 885 (9th Cir. 2013) (en banc); Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004).

[144] *See, e.g.*, Burger v. Gonzales, 498 F.3d 131, 135–36 (2d Cir. 2007).

[145] *E.g.*, Dong v. Holder, 587 F.3d 8, 13 (1st Cir. 2009) (declining to consider a "flight" argument based on a failure to exhaust); Silva v. Gonzales, 463 F.3d 68, 72 (1st Cir. 2006) (noting that the applicant failed to raise a past persecution argument to the Board).

[146] *E.g.*, Zhao v. Mukasey, 540 F.3d 1027, 1030 n.3 (9th Cir. 2008) (finding the applicants waived their challenge to the agency's past persecution holding); Carcamo-Recinos v. Ashcroft, 389 F.3d 253, 257 (1st Cir. 2004) (same).

[147] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 481–82 (1951) (espousing the need to consider the record as a whole); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (precluding the reviewing court from basing its decision on "grounds" not provided by the agency).

[148] Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 289 (2d Cir. 2007).

[149] 8 C.F.R. § 1003.1(e)(4) (2014) (authorizing "[a]ffirmance without opinion"); Chen v. BIA, 435 F.3d 141, 144 (2d Cir. 2006) (discussing how the type of decision rendered by the Board affects the court's scope of review).

Consequently, because the agency errors that *Manzur* pointed to can stem from problematic Board analyses or the Board's failure to correct decisionmaking flaws made by immigration judges, this section will sometimes refer to flaws committed by the "agency," which encompasses both circumstances.

The extensive bases for remand available to appellate courts soften the narrow scope of review that the INA would otherwise mandate for findings of fact.[150] The Seventh Circuit in *Gomes v. Gonzales* succinctly explained the distinction between court decisions to remand for decisionmaking flaws as opposed to remands based on the record compelling a contrary conclusion:

> [I]n order to reverse a finding of past persecution or a well-founded fear of future persecution we must be convinced that the evidence compels a decision contrary to the Board's. In order to earn this degree of deference, however, the [immigration judge] must announce [his or her] decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.[151]

The perception of hearing and thinking about the evidence, rather than merely reacting to it, represents the decisionmaking flaws that appellate courts have authority to assess and remand for correction.[152] These perceived process flaws can serve as threshold considerations before courts are obligated to provide the requisite deference to findings of fact like persecution determinations.

Under their authority to mend errors in the decisionmaking process, the courts have remanded persecution assessments that misapprehend circuit case law[153] as well as previous Board decisions.[154] Even if the Board properly assessed the law when it rendered its decision, the courts have remanded persecution determinations when case law issued subsequent to the Board's decision changed the legal landscape.[155] In some instances, the courts remand because

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[150] *See* 8 U.S.C. § 1252(b)(4)(B) (2012) (precluding reversal unless the record compels a contrary conclusion).

[151] Gomes v. Gonzales, 473 F.3d 746, 756–57 (7th Cir. 2007) (citations omitted) (quoting Diallo v. Ashcroft, 381 F.3d 687, 698 (7th Cir.2004) and Sosnovskaia v. Gonzales, 421 F.3d 589, 592 (7th Cir.2005)) (internal quotation marks omitted).

[152] *See* Singh v. Gonzales, 495 F.3d 553, 556–58 (8th Cir. 2007) (discussing, in the context of credibility determinations, what adjudicators must do to demonstrate that they adequately reviewed the record).

[153] *See, e.g.*, Sumolang v. Holder, 723 F.3d 1080, 1083–84 (9th Cir. 2013) (finding the Board failed to consider how harm to third parties impacted the applicant's asylum claim); Asani v. INS, 154 F.3d 719, 726 (7th Cir. 1998) (remanding because the Board analogized to cases applicable to humanitarian asylum claims).

[154] *See, e.g.*, Delgado v. Mukasey, 508 F.3d 702, 707–08 (2d Cir. 2007) (criticizing the Board's interpretation of whether kidnapping qualifies as persecution).

[155] *See, e.g.*, Kadri v. Mukasey, 543 F.3d 16, 22 (1st Cir. 2008) (remanding to permit the Board to reconsider its economic persecution assessment in light of *In re T-Z-*, 24 I. & N. Dec. 163 (B.I.A. 2007)); Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 295 (2d Cir. 2007) (same).

they believe the Board erred by failing to assess an applicant's persecution claim at all.[156]

Aside from these erroneous interpretations of the law and other agency applications of an incorrect legal framework,[157] the vast majority of cases remanded for decisionmaking process flaws can be broken down into four categories. The first category of cases concerns agency decisions that fail to adequately articulate the reasons for finding no persecution.[158] The premise here is not that the agency's ultimate holding is necessarily incorrect, but rather that the court cannot fully decipher the justifications for the outcome.[159]

The last three categories all concern perceived misapprehensions of record evidence. Within the second category of cases, the courts have regularly remanded agency decisions because the agency failed to consider evidence of record.[160] A reviewing court does not have to provide deference when the agency does not base its decision on the entire record, but the court does have to provide the agency with an opportunity to assess all the evidence in the first instance.[161] As a corollary to the need to consider all relevant evidence, the courts have also remanded cases where the agency's holding is based on an erroneous interpretation of record facts relevant to its persecution assessment.[162] The last category of cases is even more specific. It concerns circumstances where the agency considered all evidence of record, but drew unfounded inferences from the record evidence that it then factored into its persecution assessment.[163]

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[156] *See, e.g.*, Karaj v. Gonzales, 462 F.3d 113, 118 (2d Cir. 2006) (finding "no ambiguity and no language suggesting that the [immigration judge] actually applied or even knew the correct standard for asylum"); Hernandez-Barrera v. Ashcroft, 373 F.3d 9, 22 (1st Cir. 2004) (finding that neither the Board nor the immigration judge specifically addressed past persecution).

[157] *See, e.g.*, Kholyavskiy v. Mukasey, 540 F.3d 555, 570–72 (7th Cir. 2008) (remanding for clarity about the role the applicant's age should play in the persecution assessment); Gjolaj v. Bureau of Citizenship & Immigration Servs., 468 F.3d 140, 143 (2d Cir. 2006) (remanding because the Board failed to consider the applicant's harms cumulatively as the law requires).

[158] *E.g.*, Halo v. Gonzales, 419 F.3d 15, 18–19 (1st Cir. 2005) (remarking on the lack of clarity in the record as to why the facts did not establish persecution); Recinos de Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005) (finding the immigration judge's opinion "literally incomprehensible").

[159] *See* Sosnovskaia v. Gonzales, 421 F.3d 589, 592 (7th Cir. 2005).

[160] *See, e.g.*, Precetaj v. Holder, 649 F.3d 72, 76 (1st Cir. 2011) ("If there is a reason for discounting or ignoring these incidents, it is not explained in either decision."); Kone v. Holder, 620 F.3d 760, 764 (7th Cir. 2010) (concluding that the Board "overlooked a key aspect" of the applicant's claim).

[161] INS v. Ventura, 537 U.S. 12, 16–17 (2002) (affording the Board the opportunity to assess the issue in the first instance).

[162] *See, e.g.*, Marcos v. Gonzales, 410 F.3d 1112, 1120–21 (9th Cir. 2005) (noting that the Board incorrectly interpreted the country report).

[163] *See, e.g.*, Zarouite v. Gonzales, 424 F.3d 60, 63 (1st Cir. 2005) ("[T]he problem here is that the country report does not directly address such behavior at all, so the rationality of the inference is open to question."); Zhang v. Gonzales, 408 F.3d 1239, 1249 (9th Cir. 2005)

### *D. The Final Case Sample*

After discounting cases based on the myriad aforementioned reasons, this study identified 204 cases where the court addressed on the merits whether the record compelled the conclusion that the applicant was persecuted. Within these 204 cases, the appellate courts held that the record compelled a finding of persecution in 66 of them.[164] In the remaining 138 cases, the court determined that the record did not compel the conclusion that the assailants persecuted the applicants.[165]

It is telling that only sixty-six binding cases found that a set of harms compelled the conclusion that assailants persecuted the applicants. The low number demonstrates courts' understanding of the significance of holding that a particular set of harms necessarily qualify as persecutory.[166] Despite this seemingly low number of cases, these decisions (and others, erroneously[167]) provide the basis for comparison in the numerous asylum cases where the threshold for establishing persecution is at issue.

The 138 cases where a finding of persecution was not compelled are relevant to this study in a different way. While persecution-compelled cases necessarily provide a set of facts that establish persecution, the converse does not yield the same result—that is, a determination that a set of harms fails to compel a finding of persecution does not preclude the agency from determining in the future that a comparable set of harms is sufficiently severe.[168] Nevertheless, these 138 cases are germane to assessing the threshold for persecutory conduct because they provide a window into the harms that courts do not believe are *necessarily* sufficient. Consequently, juxtaposing them with persecution-compelled cases allows this study to assess any disparities and inconsistencies among court decisions regarding persecution's threshold.

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(faulting the Board for assuming the applicant could afford a fine the government allegedly imposed on her).

[164] *See* Supplement Schedule S1, http://scholars.law.unlv.edu/nlj/vol15/iss1/6/. The final case list for necessarily persecutory conduct included several cases where the court did not expressly state that the record compelled a contrary conclusion because the holding unambiguously indicated that the court determined that the harm experienced by the applicant rose to the level of persecution. *E.g.*, Miljkovic v. Ashcroft, 376 F.3d 754, 756 (7th Cir. 2004).

[165] *See* Supplement Schedule S2, http://scholars.law.unlv.edu/nlj/vol15/iss1/6/.

[166] The number, of course, would be higher if this study reviewed the decisions of all the appellate courts.

[167] *See supra* Part II.C.5 (discussing ambiguities in courts' bases for remand); *infra* Part IV (noting how courts sometimes misconstrue past cases as establishing necessarily persecutory conduct).

[168] Yasinskyy v. Holder, 724 F.3d 983, 989 (7th Cir. 2013) (faulting the petitioner for failing to make the distinction).

## III. FINDINGS

The case sample depicts salient inconsistencies in the level of suffering that courts require applicants to endure to establish they were persecuted. Despite these inconsistencies, this study documented several threshold levels of suffering that courts appear to universally regard as sufficiently severe. Part III will review these areas of agreement before transitioning to an assessment of the numerous divergences.

### *A. Harm Universally Regarded as Rising to the Level of Persecution*

Within the circuits reviewed, this study concludes that certain types of harms are universally regarded as sufficient to establish persecution. For such harm combinations, the courts in many instances affirmed that they compel a finding of persecution. Even within circuits that have not had an opportunity to address specifically a comparable combination of harms, they have never concluded that analogously perpetrated harm would fail to establish persecution, and a review of the harm thresholds depicted throughout the case law indicates that they likely would not in the future.

The conduct that courts universally regard as persecutory can be divided into five categories based on the severity, type, and frequency of the harm endured. The categories, however, are not always mutually exclusive; in certain instances, particular fact patterns can fall within multiple categories. Thus, for example, a fact pattern may demonstrate a sufficiently severe cumulative set of harms under Category 2, while also depicting a set of harms that fall under Category 3 because they escalate in severity before the applicant flees the country. Nevertheless, recognizing and distinguishing the five patterns of harm and their impact on adjudicators' persecution assessments is warranted because the distinctions between them can impact the overall level of harm an applicant must endure to establish he or she was persecuted.[169]

#### *1. Brutal and Systematic Physical Abuse*

The first class of cases concerns abhorrent and systematic harm that is predominantly or entirely physical; *Tchemkou v. Gonzales* is illustrative.[170] In *Tchemkou*, police threatened the applicant while she attended a rally.[171] After threatening her, officers struck her mouth with a baton, which caused her to lose two teeth.[172] They transported her to the police station and proceeded to beat her further while they interrogated and threatened to kill her.[173] The appli-

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[169] The categorization can potentially impact the requisite level of harm because of what this article refers to as persecution's temporal dimension. *See infra* Part IV.C.

[170] Tchemkou v. Gonzales, 495 F.3d 785 (7th Cir. 2007).

[171] *Id.* at 787.

[172] *Id.*

[173] *Id.*

cant was subsequently detained for three days in a cell too crowded to lay down in.[174] During her detention, police did not provide her with food or water, toilets were not available, and she was forced to clean male prisoners' excrement.[175] Once released, she had to stay in a hospital for two weeks to recover.[176]

Fearing for her safety, she fled temporarily to a neighboring country where she received treatment for her depression.[177] When she returned, the applicant attended a university.[178] During a meeting to discuss the politically-motivated closing of her educational department, police raided the meeting and confiscated a list of attendees.[179] That night, armed men came to her house, interrogated her, gagged and blindfolded her, forced her into a car, and drove her to an isolated area.[180] The armed men then beat and kicked her and tore off part of her ear, which caused her to lose consciousness.[181] She had to spend twenty-four days in a hospital to recover and subsequently obtained psychological counseling.[182] Several years later, she attended two separate demonstrations.[183] During both demonstrations she sustained minor injuries.[184]

The details of *Tchemkou* illustrate a number of core characteristics of the collective harm experienced by an applicant that courts recognize as sufficient to establish persecution.[185] First, the applicant sustained harm on a consistent basis over a prolonged period of time.[186] The appellate courts all view the systematic nature of repeated instances of harm as germane (if not essential[187]) to a persecution finding.[188] Second, the applicant experienced physical harm the se-

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 787–88.
[178] *Id.* at 788.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 788–89.
[184] *Id.*
[185] *See, e.g.*, Narayan v. Ashcroft, 384 F.3d 1065, 1066–67 (9th Cir. 2004) (noting that the applicant was stabbed); *see also* Ivanov v. Holder, 736 F.3d 5, 12 (1st Cir. 2013) (discussing in detail why the repeated physical injuries sustained by the applicant amounted to persecution despite the immigration judge's hesitant conclusion that the applicant likely established he was persecuted); Nuru v. Gonzales, 404 F.3d 1207, 1215, 1224 (9th Cir. 2005) (finding "[twenty-five] days of deprivation, whippings, and beatings" sufficiently severe despite the agency's proportionality determination).
[186] *Tchemkou*, 495 F.3d at 787–89 (recounting incidents that occurred between 1993 and 2001).
[187] Decky v. Holder, 587 F.3d 104, 111 (1st Cir. 2009) (listing the lack of systematic mistreatment as the "critical factor driving our determination").
[188] *See, e.g.*, Gomes v. Gonzales, 473 F.3d 746, 754 (7th Cir. 2007) (noting that repeated abuse "create[s] a more compelling case for finding persecution" but it is not required) (quoting Dandan v. Ashcroft, 339 F.3d 567, 573 (7th Cir. 2003)).

verity of which a reviewing body can readily assess. As opposed to a generic "beating" or other nondescript recollections, a description that includes the loss of teeth and part of an ear allows courts to more readily quantify the extent of harm suffered.[189] Relatedly, the applicant reported a prolonged hospital stay that served to buttress the gravity of harm she suffered.[190] The appellate courts regularly survey the extent of any subsequent medical treatment when assessing the severity of harm.[191]

*2. Sufficiently Recurrent Combination of Cumulatively Severe Harms*

Physical harm has been viewed as central to what it means to be persecuted,[192] but it is by no means the only type of harm relevant to a persecution assessment. Relevant non-physical harms include surveillance, unauthorized searches of places and persons, economic impediments, psychological harm such as death threats, and restrictions on fundamental beliefs and practices such as religious worship.[193] Published cases have not yielded any circumstances where searches and surveillance alone are sufficient to establish persecution.[194] While the deliberate imposition of substantial economic disadvantage can itself suffice to establish persecution,[195] the appellate courts have not rendered consistent opinions on the extent of debilitating conditions that would suffice;[196] a total loss of all economic opportunity and means of support appears to be the

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[189] *See Dandan*, 339 F.3d at 574 (faulting the applicant's vague description of the harm he suffered); *see also* Ahmed v. Keisler, 504 F.3d 1183, 1188 (9th Cir. 2007) (noting the applicant sustained scars from the physical degradation).

[190] *Tchemkou*, 495 F.3d at 787–88 (documenting two hospital stays totaling thirty-eight days).

[191] *See, e.g.*, Ouk v. Keisler, 505 F.3d 63, 67 (1st Cir. 2007) (factoring into its decision the applicant's failure to seek medical treatment); Topalli v. Gonzales, 417 F.3d 128, 132 (1st Cir. 2005) (same); *see also* Baba v. Holder, 569 F.3d 79, 82 (2d Cir. 2009) (mentioning that the applicant had to seek medical treatment).

[192] Kambolli v. Gonzales, 449 F.3d 454, 457 (2d Cir. 2006) (citing a "lack of physical harm" as a basis for denying the petition); Chand v. INS, 222 F.3d 1066, 1073 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution.").

[193] Ayele v. Holder, 564 F.3d 862, 871 (7th Cir. 2009) (discussing alleged surveillance of the applicant's father); Li v. Att'y Gen. of the U.S., 400 F.3d 157, 169 (3d Cir. 2005) (reviewing economic harm); Muhur v. Ashcroft, 355 F.3d 958, 960–61 (7th Cir. 2004) (discussing deprivations of religious freedom).

[194] *See, e.g.*, Gui v. INS, 280 F.3d 1217, 1229 (9th Cir. 2002) (characterizing "searches" and "phone taps" as "harassment"); Lwin v. INS, 144 F.3d 505, 509 (7th Cir. 1998) (finding no persecution where authorities searched the applicant's home three times).

[195] *In re* T-Z-, 24 I. & N. Dec. 163, 170–75 (B.I.A. 2007).

[196] The inconsistencies among appellate courts are caused, in part, by conflicting interpretations of economic persecution standards. *Compare* Mirzoyan v. Gonzales, 457 F.3d 217, 223 (2d Cir. 2006) (providing three different potential standards for assessing economic persecution claims), *with* Vicente-Elias v. Mukasey, 532 F.3d 1086, 1088–89 (10th Cir. 2008) (applying the "life or freedom" test to distinct circumstances).

extent of agreement.[197] Indeed, courts rarely confront such circumstances because other forms of harm usually accompany economic hardships.[198] Similarly, while courts proffer the possibility that certain threats may themselves rise to the level of persecution,[199] there is no accepted threshold of threatening circumstances that adjudicators deem sufficient.[200] Thus, the relevance of many forms of harms to persecution assessments depends upon their cumulative effect on applicants' past experiences as a whole.

A plethora of different harm combinations comprise courts' persecution assessments, but several harm combinations exemplify the cumulative level of suffering that courts have determined compel a persecution finding.[201] One such case is *Smolniakova v. Gonzales*, where a combination of menacing behavior, substantiated threats, physical harm, and curtailment of religious freedom compelled the court to conclude that the applicant had been persecuted.[202] The applicant experienced "anti-Semitic profanities scribbled on the walls of her apartment entryway, human feces smeared on her mailbox, fires set in her mailbox, and repeated slashings of her front door."[203] Over a three-year period, she was forced to practice her religion in secret with a group of other Russian Jews.[204] Several members of her group were stabbed to death and the perpetra-

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[197] *Compare* Baballah v. Ashcroft, 367 F.3d 1067, 1075–76 (9th Cir. 2004) (finding the applicant established he was persecuted where the perpetrators' actions made it "virtually impossible" to earn a living), *with* Ubau-Marenco v. INS, 67 F.3d 750, 755 (9th Cir. 1995) (determining that the confiscation of the family business without compensation might not be sufficiently severe).

[198] *See, e.g.*, Krotova v. Gonzales, 416 F.3d 1080, 1087 (9th Cir. 2005) (discussing "economic pressure" as a factor).

[199] Gonzales-Neyra v. INS, 122 F.3d 1293, 1296 (9th Cir. 1997) (finding death threats sufficient).

[200] *See infra* Part III.B.2–3 (discussing appellate courts' inconsistent assessments of threats and other psychological harms); *see also* Lim v. INS, 224 F.3d 929, 937 (9th Cir. 2000) ("If mere threats, without more, were enough to constitute past persecution, then it is not clear what would be left of the [well-founded fear] category.").

[201] *See, e.g.*, Bondarenko v. Holder, 733 F.3d 899, 902–04, 908–09 (9th Cir. 2013) (holding that the applicant was persecuted because he was fined five months' salary, expelled from school, detained on three occasions, and beaten twice); Cecaj v. Gonzales, 440 F.3d 897, 899–900 (7th Cir. 2006) (finding the applicant was persecuted based on "two detentions with beatings, a gunshot intended to intimidate, threatening phone calls, the kidnapping of a child, and another threat"); Maini v. INS, 212 F.3d 1167, 1171–72, 1174 (9th Cir. 2000) (finding persecution compelled where the applicant was stabbed, threatened with death, and rendered unconscious); Vongsakdy v. INS, 171 F.3d 1203, 1206–07 (9th Cir. 1999) (finding humanitarian asylum compelled where the applicant suffered, among other harms, extended physical and psychological abuse, permanent medical ailments after assailants denied him treatment, and forced "reeducation"). The harm experienced by the applicant in *Bondarenko* arguably rises to a level of harm accepted as sufficient within each evaluated appellate court, but the context of the protests that led the applicant to sustain the harms render the universal acceptance of this type of suffering less than certain for reasons that are beyond the scope of this article.

[202] Smolniakova v. Gonzales, 422 F.3d 1037, 1048–49 (9th Cir. 2005).

[203] *Id.* at 1041.

[204] *Id.*

tors threatened the same fate for other Jews.[205] The perpetrators carried through on their threats on at least one other occasion, killing another member of her group.[206] Subsequently, assailants grabbed the applicant on the street and strangled her while one called her a "Jewish Bitch."[207] Six months after the strangling, assailants pounded on her door and threatened to kill her if she did not let them into the "Jewish snake nest."[208]

*Mamouzian v. Ashcroft* provides another set of harm combinations that illustrate the threshold of necessarily persecutory conduct. The court held that the record compelled a finding that the applicant was persecuted based on a history of physical injury, detention, diminished economic opportunities, searches and surveillance, and threats.[209] The applicant was arrested and detained for one week, during which time police beat her until she lost consciousness.[210] The police only released her because she agreed to pay a fine.[211] Her boss subsequently fired her, and she was unable to secure another job.[212] The following year, police beat her during a political demonstration and then arrested her.[213] A judge subsequently ordered her to remain in the country for two years and she was again forced to pay a fine to secure her release.[214] Throughout the following months, authorities followed her and occasionally threatened her.[215] She decided to flee after police searched her house, slapped and kicked her, and threatened to jail her again.[216] As this case and *Smolniakova* illustrate, courts will find persecution compelled based on an ongoing pattern of physical, psychological, and other types of harm, as long as the harms cumulatively establish a sufficiently high level of severity.

*3. Recurrent Injury Preceding a Harm Crescendo*

The courts have found that multiple incidents of relatively severe harm establish persecution when the applicant's experience in his or her home country culminates in particularly egregious harm. An example is *Bace v. Ashcroft*, where the applicant was physically harmed four times over the course of two months.[217] Initially, eight assailants beat the applicant and slashed him with a

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[205] *Id.*
[206] *Id.*
[207] *Id.* at 1042.
[208] *Id.*
[209] Mamouzian v. Ashcroft, 390 F.3d 1129, 1134 (9th Cir. 2004).
[210] *Id.* at 1132.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] Bace v. Ashcroft, 352 F.3d 1133, 1135–36 (7th Cir. 2003); *see also* Ly v. Mukasey, 524 F.3d 126, 130, 132 (1st Cir. 2008) (considering the culminating event of the applicant's husband being killed even though the murder occurred after the applicant fled); *cf.* Nakibuka v.

razor.[218] Shortly thereafter, a group of men beat the applicant, and two days later the applicant was again accosted and beaten.[219] Finally, nearly one month later, armed men forced their way into the applicant's home, hit him with the butt of a rifle, struck his father, beat him further when he tried to come to his father's aid, and then raped his wife in front of him and his family while the intruders taunted him.[220] The applicant and his wife fled shortly thereafter.[221]

Unlike the lurid details of the physical attacks and ailments recounted by the applicant in *Tchemkou*, the applicant in *Bace* did not provide the specifics of each beating nor did he indicate that his injuries required recovery time, much less formal medical attention.[222] Nevertheless, these comparatively less severe physical injuries culminated in a particularly horrid form of harm. While the harm experienced by the applicant was not predominantly physical, the psychological pain caused by having to watch his wife raped was sufficient. This culminating incident is merely illustrative of what this article labels the *crescendo effect*: a series of harms that culminate in a particularly egregious and impactful harm which occurs at the end of an applicant's past experiences in his or her home country.[223]

Past experiences of a requisite severity that culminate in such crescendos demonstrate persecutory conduct for several reasons. First, a crescendo event necessarily requires multiple harms over a period of time, which supports the systematic quality of harm that courts universally accept as germane.[224] Second, it provides an objectively reasonable justification for the applicant to flee, as the escalating nature of the harms leads to the reasonable inference that additional harm would only continue to be more severe.[225] Third, it validates the seriousness of the harms experienced by the applicant prior to the crescendo

Gonzales, 421 F.3d 473, 478 (7th Cir. 2005) (characterizing the threats against the applicant as "escalating").

[218] *Bace*, 352 F.3d at 1135.

[219] *Id.* at 1135–36.

[220] *Id.* at 1136.

[221] *Id.*

[222] If the applicant did provide such detail, the court did not find it relevant enough to include in its review of the facts. *See id.* at 1134–36.

[223] *See, e.g.*, Rios v. Ashcroft, 287 F.3d 895, 899–900 (9th Cir. 2002) (applicant's past experiences culminated in the kidnap and murder of her husband).

[224] Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) ("An important factor in determining where a specific case falls along this continuum is whether the mistreatment can be said to be systematic rather than reflective of a series of isolated incidents."); Dandan v. Ashcroft, 339 F.3d 567, 573 (7th Cir. 2003) ("Although the frequency issue is not dispositive, it does figure significantly in the analysis.").

[225] Objective criteria that support the level of psychological suffering experienced by the applicant before fleeing is a distinct issue from the question of whether the assailant's actions increase the likelihood that the applicant would be harmed if deported to his or her home country. The latter is only relevant to the prospective "well-founded fear" analysis. *Compare* Boykov v. INS, 109 F.3d 413, 416 (7th Cir. 1997) (linking unfulfilled threats to "the danger of future persecution"), *with* Del Carmen Molina v. INS, 170 F.3d 1247, 1249 (9th Cir. 1999) (factoring threats into its past persecution assessment).

event. An applicant might claim that past events caused him to live in a constant state of fear for himself and his family (and such psychological suffering is relevant[226]), but the culminating event provides objective corroboration that such fear reasonably existed. Thus, the applicant's prior experiences are not merely isolated instances of abuse. Rather, they are the physical abuse component of a continuous experience of physical and psychological anguish that, given the requisite level of severity, is sufficient to establish persecution.[227]

*4. Sufficient Harm Preceding a Substantiated Flight Precipitator*

While a series of incidents culminating in particularly acute harm establishes persecution when the harm experienced is analogous in severity to *Bace*, a culminating incident might be sufficient even if it is not the most severe event the applicant experienced. In such circumstances, a credible and substantiated event causes the applicant to flee before the perpetrators can dispense an anticipated egregious harm that they have the means (and desire) to perpetrate. In *Salaam v. INS*, for example, the applicant was arrested and "flogged" on four separate occasions.[228] While the court did not specify the details of the harm inflicted, the record did reflect that the perpetrated physical harms left visible scars on multiple locations of the applicant's body.[229] At some point after authorities released the applicant from his fourth arrest, the applicant learned that police sought to arrest him again.[230] Upon learning of the authorities' intention, the applicant evaded government officials until he was able to flee the country.[231] Thus, authorities' attempt to arrest the applicant for the fifth time served as the flight precipitator.

Flight precipitators can be verbal or action-based, and either direct or indirect. The most common verbal flight precipitator is a direct threat, where the assailant threatens the applicant with severe harm or death, either as an inevitable reality in the near future or if the applicant fails to leave the country.[232] A threat is indirect if the applicant learns about it through a third party rather than

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[226] *See* Makhoul v. Ashcroft, 387 F.3d 75, 80 (1st Cir. 2004) (recognizing threats as potentially actionable psychological harm).

[227] *See* Rempell, *supra* note 48, at 319–23 (advocating a model to gauge harm that assesses the applicant's continuous experience in his or her home country).

[228] Salaam v. INS, 229 F.3d 1234, 1236 (9th Cir. 2000) (per curiam).

[229] *Id.*

[230] *Id.* at 1236–37.

[231] *Id.* at 1237.

[232] *See, e.g.*, Karapetyan v. Mukasey, 543 F.3d 1118, 1123, 1125 (9th Cir. 2008) (reviewing how assailants threatened to kill the applicant if he failed to leave the country); Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007) (stating that authorities threatened to kill the applicant the next time they caught him protesting); Bandari v. INS, 227 F.3d 1160, 1164, 1168–69 (9th Cir. 2000) (noting that the applicant fled after police officers beat him and told him to leave the country).

the assailants themselves.[233] *Salaam* provides an example of an action-based precipitator.[234] Although the assailants in *Salaam* did not threaten to arrest and harm the applicant, their very act of trying to arrest him, combined with the consequences of prior arrests, leads to the same reasonable inference: that a failure to flee will cause the assailants to severely harm the applicant.[235] In this case, the implicit consequences are substantiated by a pattern of prior harm doled out by the assailants. The relevance of explicit or implicit threats diminishes considerably if the surrounding circumstances do not substantiate the likelihood of future harm.[236]

Flight precipitator fact patterns have a special place in the lexicon of persecution-compelled cases because they epitomize the quintessential refugee narrative—that is, the image of individuals who are forced to flee their home countries in great haste to escape looming atrocities nipping at their coattails.[237] To be sure, the precipitating event does itself cause harm, even if it is mainly fear-based psychological harm experienced by applicants as they contemplate the fate in store for them.[238] Applicants, however, do not necessarily establish past persecution simply because a threat caused them to flee. Rather, an applicant who manages to flee before the assailant has an opportunity to act on the threatened harm is more likely to successfully use this event as proof that he or she has a well-founded fear of being persecuted if returned to the home country.[239] Because courts regularly link past threats to the objective reasonableness of an applicant's well-founded fear of being persecuted, asylum cases that concern a harm precipitator without sufficient previous events have not been con-

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[233] Liao v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002) (recounting that the applicant's neighbor informed him that two individuals were searching for him).

[234] *Salaam*, 229 F.3d at 1237; *see also* Baba v. Holder, 569 F.3d 79, 82 (2d Cir. 2009) (mentioning that the applicant fled because the government was looking for individuals who protested during an event he attended); Soumahoro v. Gonzales, 415 F.3d 732, 735 (7th Cir. 2005) (recounting that the applicant went to several different places to avoid detection).

[235] *Salaam*, 229 F.3d at 1236–37; *cf.* Touch v. Holder, 568 F.3d 32, 39–40 (1st Cir. 2009) (finding that the time the applicant spent in the country without incident before he left diminished his claim).

[236] *See* Ci Pan v. U.S. Att'y Gen., 449 F.3d 408, 412–13 (2d Cir. 2006) (reviewing cases that discounted "unfulfilled threats").

[237] *See* Barbara Frey & Deepika Udagama, *Assisting Indigent Political Asylum Seekers in the United States: A Model for Volunteer Legal Assistance*, 13 HAMLINE L. REV. 661, 665 (1990) (discussing the situation of "asylum applicants who fled their countries with virtually nothing more than the clothes on their backs"); Whitney A. Reitz, *Reflections on the Special Humanitarian Parole Program for Haitian Orphans*, 55 N.Y.L. SCH. L. REV. 791, 796 (2011) (recalling the plight of refugees who are "generally running for their lives, with nothing but the clothes on their backs").

[238] *See* Pathmakanthan v. Holder, 612 F.3d 618, 623 (7th Cir. 2010) ("To live, day after day, knowing that government forces might secretly arrest and execute you is itself a form of mental anguish that can constitute persecution.").

[239] *Touch*, 568 F.3d at 40 ("Unfulfilled threats [are] construed more naturally as evidence of a well-founded fear of future persecution."); Gui v. INS, 280 F.3d 1217, 1229 (9th Cir. 2002) (linking past threats to "the reasonableness of a fear of future persecution").

sistently found to qualify as persecution.[240] While the circumstances in numerous cases concern harm culminating in a flight precipitator, *Salaam* is illustrative of the particular level of harm severity and threat substantiation that will necessarily lead to a finding of persecution.[241]

*5. Sufficiently Severe or Recurring Sexual Abuse*

As the *Bace* court's assessment of witnessing sexual abuse exemplifies, courts recognize sexual abuse as a particularly egregious and serious form of harm in their persecution assessments. In *Boer-Sedano v. Gonzales*, for example, the applicant experienced repeated sexual abuse and threats.[242] On one occasion, a police officer detained the applicant for twenty-four hours, even though he had not committed any crime.[243] Subsequently, on nine separate occasions, the officer forced the applicant to perform oral sex on him.[244] During these encounters, the officer would hit the applicant and taunt him by threatening that no one would care if the applicant was murdered.[245] During one of the forced encounters, the officer held a loaded gun to the applicant's head.[246]

No court decision researched for this article indicated that sexual abuse of the severity and frequency experienced by the applicant in *Boer-Sedano* is not sufficient to establish persecution.[247] Nevertheless, persecution based on sexual abuse does not necessarily require multiple incidents. Because of the physical and psychological harms associated with sexual abuse, the sampled courts appear to believe that even a single instance of rape is sufficiently severe, although many of these statements are dicta or otherwise non-definitive.[248] Courts' analyses concerning rape and persecution are often dicta because the

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[240] *See, e.g.*, *Ci Pan*, 449 F.3d at 412–13 (collecting cases); Lim v. INS, 224 F.3d 929, 936–37 (9th Cir. 2000) (finding the threats insufficient to establish past persecution).

[241] *Compare* Salaam v. INS, 229 F.3d 1234, 1236–37 (9th Cir. 2000) (per curiam) (persecution compelled), *with* Liao v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002) (minimizing the significance of the threat that caused the applicant to go into hiding), *and* Mekhoukh v. Ashcroft, 358 F.3d 118, 123, 126 (1st Cir. 2004) (noting that the applicant received several military draft notices and that he did not even allege that he suffered past persecution).

[242] Boer-Sedano v. Gonzales, 418 F.3d 1082, 1086 (9th Cir. 2005).

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084, 1097 (9th Cir. 2000) (finding an officer persecuted the applicant based on two sexual assaults), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).

[248] *E.g.*, Balachova v. Mukasey, 547 F.3d 374, 386–87 (2d Cir. 2008) (expressing in dicta "no doubt that rape is sufficiently serious to constitute persecution"); Nakibuka v. Gonzales, 421 F.3d 473, 477 (7th Cir. 2005) (citing *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996), for the proposition that "rape [on account of a protected ground] is a form of persecution"); Ochave v. INS, 254 F.3d 859, 864 (9th Cir. 2001) (indicating that rape "may support a finding of past persecution" with the requisite nexus). For additional cases addressing this issue, see Supplement Schedule S7, http://scholars.law.unlv.edu/nlj/vol15/iss1/6/.

vast majority of such cases at the appellate court level only concern the nexus and government involvement prongs of the refugee definition;[249] immigration judges and the Board are correctly hesitant to find that rape is not a sufficiently severe harm.

Not all instances of sexual abuse, however, are consistently accepted as sufficient to establish persecution. In *Decky v. Holder*, the court found that sexual harassment and groping did not compel a finding of persecution.[250] In other cases, the courts have even held that a combination of circumstances did not compel a finding of persecution when the applicant was sexually abused on one occasion.[251]

Akin to the protection against many instances of sexual abuse, courts similarly find persecution established based on certain harms to genitalia or those that impede or end pregnancy. By statute, forced abortions and sterilizations are per se persecutory.[252] While not mandated by statute, the courts universally accept that female genital mutilation establishes persecution.[253]

### *B. Inconsistent Assessments of Persecution's Threshold*

The previous section discussed categories of cases that represent the extent of agreement among the appellate courts regarding the type, frequency, and severity of conduct that necessarily constitutes persecution. Most asylum cases, however, do not concern persecution claims that fall within these parameters. The vast majority of persecution holdings entail divergent and inconsistent interpretations of the harm needed to establish persecution. To illuminate these inconsistencies, the study isolated distinct categories of analogous cases to

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[249] *See, e.g.*, Pheng v. Holder, 640 F.3d 43, 47 (1st Cir. 2011) (nexus); Castillo-Diaz v. Holder, 562 F.3d 23, 27–28 (1st Cir. 2009) (government involvement); Shoafera v. INS, 228 F.3d 1070, 1074, 1078 (9th Cir. 2000) (nexus).

[250] Decky v. Holder, 587 F.3d 104, 108, 111–12 (1st Cir. 2009) (noting that the incidents centered around her childhood years).

[251] Cendrawasih v. Holder, 571 F.3d 128, 129, 131 (1st Cir. 2009) (describing the sexual assault as an "isolated incident[]"); *see also* Budiono v. Mukasey, 548 F.3d 44, 46, 48–49 (1st Cir. 2008) (finding no persecution where the applicant was groped and she found her friend's naked body after she was sexually assaulted).

[252] 8 U.S.C. § 1101(a)(42)(B) (2012). However, applicants cannot automatically establish persecution based on a forcible sterilization or abortion being performed on a spouse. Liu v. Holder, 632 F.3d 820, 821–22 (2d Cir. 2011).

[253] *See, e.g.*, Kone v. Holder, 620 F.3d 760, 765 n.5 (7th Cir. 2010) ("It is clear that FGM constitutes persecution . . . ."); Benyamin v. Holder, 579 F.3d 970, 976 (9th Cir. 2009) (noting the court's "well-settled" belief that FGM constitutes persecution); Abankwah v. INS, 185 F.3d 18, 23 (2d Cir. 1999) (stating that FGM's "grave harm" constitutes persecution); *see also In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (discussing the viability of FGM-based asylum claims). Like the courts' characterizations of rape, some of the courts' statements on whether FGM qualifies as persecution can be characterized as dicta because FGM disputes at the appellate level often concern whether the government can rebut the presumption that the applicant will be harmed in the future. *See* Bah v. Mukasey, 529 F.3d 99, 112–15 (2d Cir. 2008) (discussing cases that assumed past persecution for the sake of argument).

compare. Apples-to-apples comparisons help make the inconsistencies strikingly apparent and provide greater insight into the different manner by which adjudicators perceive and measure harm. Since most persecution inquiries involve distinct fact patterns, this section also compares cases that fall outside the distinct categories of analogous cases but nevertheless depict inconsistent holdings.

*1. Single Instance of Physical Abuse and Detention*

For cases that concern a single instance of abuse and detention, the courts do not need to determine whether a combination of harmful events establish persecution. Additionally, the physical nature of the harm is more tangible to evaluate than psychological harm. Consequently, a single instance of physical abuse and detention provides one of the best opportunities to isolate divergent harm thresholds.

In *Bejko v. Gonzales*, the court held that the applicant's detention did not compel the conclusion that he was persecuted.[254] The applicant was detained for two weeks in a "small cell" under "primitive conditions" that included inadequate food and water and only one opportunity each day to use the bathroom.[255] The facts compelled a different conclusion in *Mihalev v. Ashcroft*, where police detained the applicant for ten days, during which time they forced the applicant to work at a construction site and hit the applicant each day with bags of sand.[256] The applicant was never hit in the face and "suffered no significant injury."[257] The court held that these facts compelled the conclusion that the applicant was persecuted even though he "suffered no serious bodily injury and required no medical attention."[258]

*Bejko* and *Mihalev* both concerned detentions that lasted for about two weeks. The courts reached opposite results, however, so the detention length cannot be traced as the determinative factor. Turning to the harm endured, forced construction work is not appreciably harsher than doing nothing in a jail cell other than holding one's bowel movements between once-daily bathroom trips. The harm experienced by the applicant in *Mihalev* apparently crossed the persecution threshold because authorities hit his body with bags of sand.[259] Thus, at this point, persecution's threshold can be expressed as a ten-day detention where, in addition to consistent general discomfort, there is recurrent mild physical harm that does not cause significant injury.

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[254] Bejko v. Gonzales, 468 F.3d 482, 486 (7th Cir. 2006). The court also noted several additional minor instances that did not alter its severity calculus. *Id.*

[255] *Id.* at 484.

[256] Mihalev v. Ashcroft, 388 F.3d 722, 725 (9th Cir. 2004).

[257] *Id.*

[258] *Id.* at 730. Although police arrested the applicant on other occasions, the court did not consider them in its persecution assessment because the applicant failed to establish that they were sufficiently tethered to a protected ground. *Id.* at 727–28.

[259] *Id.* at 725.

Regardless of whether getting hit with sandbags should be outcome determinative, other cases have, in any event, directly contradicted such harm as the threshold of persecutory conduct. Consider *Khan v. Mukasey*, where, as in *Mihalev*, authorities detained the applicant for ten days.[260] The First Circuit found that the applicant's experience did not necessarily establish that he was persecuted even though he was "beaten with wooden sticks and shocked with electrical wires" during his detention.[261] Thus, harm significantly more severe than that suffered from sandbag blows did not compel a finding of persecution, while less severe harm did.

The appellate courts have even reached divergent conclusions when assessing the severity of electrocution. In *Quan v. Gonzales*, the Ninth Circuit found persecution compelled when, as in *Khan*, police administered electric shock on the applicant.[262] Specifically, in addition to pushing and shaking her head repeatedly,[263] the applicant in *Quan* was "poked once with an electric prod in her shoulder/neck area,"[264] which caused a "severe headache," dizziness, "blurry vision," heavy perspiration, and almost made her pass out.[265] The court found these injuries sufficient even though authorities only detained the applicant for less than a day.[266]

In both *Khan* and *Quan* the applicants were detained and received at least one electric shock. Neither sought medical treatment after their releases.[267] The main distinction is the length of detention, but only the much *shorter* detention compelled the court to conclude that the applicant's experience established persecution. Although the applicant in *Quan* provided more detail about the effects of the electric shocks than the applicant in *Khan*, the symptoms she noted were short-lived.[268] Thus, the courts found that the seemingly less severe instance of harm necessarily constituted persecution while the more severe event did not.

Aside from decisions involving electric shock, the courts reached inconsistent results in several cases when the circumstances concerned comparable harm over the span of nearly identical time periods. In *Guo v. Ashcroft*, the Ninth Circuit held that the record compelled a finding of persecution based on a

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[260] Khan v. Mukasey, 549 F.3d 573, 575 (1st Cir. 2008); *Mihalev*, 388 F.3d at 725.

[261] *Khan*, 549 F.3d at 575–77.

[262] Quan v. Gonzales, 428 F.3d 883, 889 (9th Cir. 2005).

[263] *Id.* at 888.

[264] *Id.* at 892 (O'Scannlain, J., dissenting). The majority opinion did not summarize each detail from the case. *Id.* at 886–89 (majority opinion).

[265] *Id.* at 889 (majority opinion).

[266] *Id.*; *see also id.* at 892 (O'Scannlain, J., dissenting). The court also noted that the applicant was fired from her job, but this was not the focus of the court's holding, nor does it impact the discrepancy between the courts' holdings in *Quan* and *Khan*. *Id.* at 889 (majority opinion).

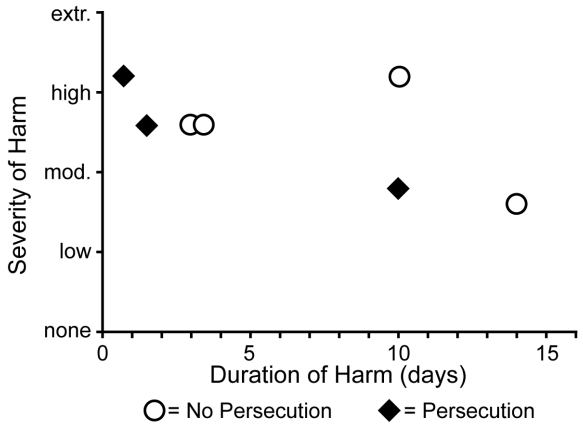
[267] *Id.* at 888 (majority opinion); Khan v. Mukasey, 549 F.3d 573, 575 (1st Cir. 2008).

[268] *Compare Quan*, 428 F.3d at 888–89, *with Khan*, 549 F.3d at 577.

one-and-a-half-day detention.[269] While detained, officers hit the applicant twice in the face, forced him to do pushups "until he could no longer stand it," and then kicked him in the stomach.[270] Conversely, in *Dandan v. Ashcroft*, the Seventh Circuit found that a three-day detention, accompanied by beatings that caused the applicant's face to swell, did not compel a finding of persecution, even though the applicant received no food during his detention.[271] Reaching a result comparable to *Dandan*, the Ninth Circuit in *Gu v. Gonzales* contradicted the persecution threshold it previously set in *Guo*.[272] It found persecution was not compelled where authorities detained the applicant for three days and hit him ten times on the back with a rod.[273] The applicant suffered pain from the blows, but aside from "temporary red marks," he did not sustain any injuries.[274]

Any attempt to synthesize the cases to identify a discernible pattern or threshold for persecutory conduct necessarily fails. Plotting the cases on a grid helps to illustrate:

FIGURE 1: PHYSICAL HARM AND DETENTION




[269] Guo v. Ashcroft, 361 F.3d 1194, 1197, 1202 (9th Cir. 2004). In addition to detaining Guo, authorities forced him to renounce his Christian beliefs. *Id.* at 1203. Renouncing one's faith or practicing in secret would create ongoing psychological harm. Nevertheless, the court in *Guo* did not ground at least one of its holdings on any such ongoing harm. Rather, the court found that the record "compels a finding that Mr. Guo was persecuted *during his first detention*." *Id.* (emphasis added).

[270] *Id.* at 1197.

[271] Dandan v. Ashcroft, 339 F.3d 567, 574 (7th Cir. 2003).

[272] Gu v. Gonzales, 454 F.3d 1014, 1018–20 (9th Cir. 2006).

[273] *Id.* at 1017–18. As in *Guo*, the harm endured by the applicant in *Gu* occurred against the backdrop of a request to sign an affidavit. *Id.* at 1018; *Guo*, 361 F.3d at 1197.

[274] *Gu*, 454 F.3d at 1018. The court's attempt in *Gu* to distinguish it from *Guo* was incorrect because, although the court in *Guo* did note several instances of abuse, it found—as noted above—that the record compelled a finding of persecution based on Guo's first detention. *Id.* at 1020; *Guo*, 361 F.3d at 1197–98, 1203.

The data points represent the duration and severity of harm experienced by the applicants in each of the above-discussed cases. Figure 1 demonstrates widely inconsistent persecution outcomes, even though the harm alleged by the applicants only concerned a single incident. Thus, after decades reviewing asylum claims, courts cannot even consistently assess the most basic and straightforward type of harm—a single instance of abuse and detention.

The duration data points for each physical harm and detention are taken directly from the cases. The plotted severity of the harms the applicants endured, however, is necessarily subject to interpretation. For example, reasonable minds could disagree about whether beatings that lead to facial swelling are moderately severe or highly severe (or somewhere in between). Despite the judgment call this study made when assessing harm severity, the data points are instructive for two reasons. First, adjudicators must always make judgment calls when assessing persecution claims. Just because harm's severity can be gauged in different ways does not change the fact that adjudicators' severity assessments can be the difference between a grant of asylum and deportation.

Second, and more importantly, the severity calculations are proportional when compared to each other. Indeed, the detention unaccompanied by overt physical abuse in *Bejko* is less severe than the sandbag hits experienced by the applicant in *Mihalev*. Moving up the severity axis, the harm perpetrated against the applicant in *Mihalev* is less severe than the harms suffered by the applicants in *Gu*, *Guo*, and *Dandan*, who all experienced hits, kicks, and other blows that caused comparable injury. Finally, the harms endured in this trio of cases are proportionately less severe than the electric shocks administered to the applicants in *Khan* and *Quan*, which are represented by the highest points on the severity axis.[275]

Residual harm should also be factored into the analysis to determine whether it impacts the inconsistency among the decisions. Figure 1, however, only depicts the harm experienced during the duration of the incident itself. It does not take into account physical symptoms that the applicants endured after the perpetrators released them. Such symptoms extend the duration of suffering caused by the harmful event. These cases do not indicate that any of the applicants required medical attention or experienced significant residual harm.[276]

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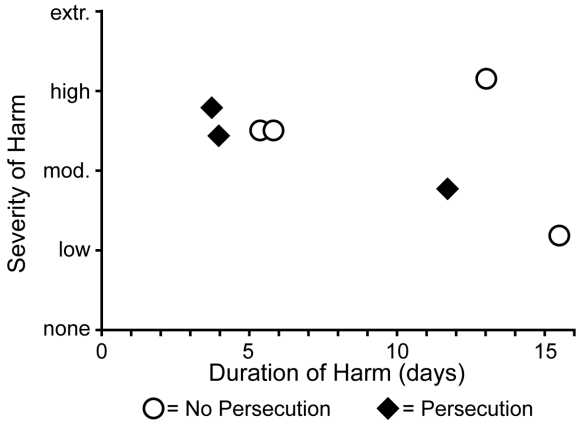
[275] The severity of harm endured by the applicant in *Quan* is based on how the majority characterized the suffering, but the dissent did raise several interesting points about the true extent of harm suffered by the applicant. Quan v. Gonzales, 428 F.3d 883, 892 (9th Cir. 2005) (O'Scannlain, J., dissenting).

[276] Khan v. Mukasey, 549 F.3d 573, 575 (1st Cir. 2008) (explaining that the applicant did not pursue medical treatment); Bejko v. Gonzales, 468 F.3d 482, 485 (7th Cir. 2006) (noting that the applicant did not need medical treatment and was able to make the three-to-four kilometer trip home on foot); *Gu*, 454 F.3d at 1018 (noting that the applicant sustained temporary red marks and did not need medical attention); *Quan*, 428 F.3d at 888–89 (noting that the applicant suffered from headaches, weakness, and distress but did not report any resulting "medical attention or sustained injury"); Mihalev v. Ashcroft, 388 F.3d 722, 729 (9th Cir. 2004) (indicating that the applicant suffered no significant injury); *Guo*, 361 F.3d at

Thus, for purposes of illustration in Figure 2, the severity and duration of the residual physical harm experienced by the applicants during their recoveries can be quantified by assuming that as the severity of the initial injury increases, the duration and physical pain of the recovery time increases as well. Accordingly, the residual pain and time that it would take to recover from beatings and electric shock would be greater than the recovery time required after getting hit with a bag of sand. Making such assumptions here is important because, in the absence of doing so, the true extent of physical pain suffered would be underrepresented.[277] Nevertheless, the fact that such assumptions must be made at all is indicative of a significant gap in the types of germane details seldom provided during asylum hearings.

For each data point in Figure 2, the severity of harm has diminished to reflect the fact that the average level of harm experienced over the course of the event and recovery period is not as high as the level of harm experienced during the event itself.[278] The overall amount of suffering, however, is higher because the duration is longer. Including the residual harm experienced during recovery time does not impact the severity of a particular harmful incident vis-à-vis the harms in the other cases. Consequently, the persecution outcome inconsistencies remain.

FIGURE 2: PHYSICAL HARM, DETENTION, AND RECOVERY




1203 (mentioning that the applicant was persecuted "during" the detention without reference to subsequent ailments); *Dandan*, 339 F.3d at 574 (stating that the known repercussions of the applicant's beatings were that "his face became swollen").

[277] It would also skew the relative severity of the physical harm when compared to the severity of psychological harms discussed *infra* Part III.B.2–3.

[278] The proportional extent to which the average harm has been lowered is also subject to interpretation, but, as with the assessments of harm in Figure 1, the overall level of harm has been lowered in proportion to the initial severity of the event and its duration.

*2. Psychological Harm: Single Fear-Inducing Event*

As noted above, one of the categories of cases universally found to establish persecution is "sufficient harm preceding a substantiated flight precipitator."[279] In the absence of sufficient preceding harm, however, the appellate courts have reached divergent conclusions when assessing whether the fear induced by a flight precipitator necessarily rises to the level of persecution. Forced conscription cases are particularly apt to illustrate the inconsistencies between analogous fact patterns. In *Miljkovic v. Ashcroft*, the applicant fled the country shortly after he received a military draft notice.[280] According to the applicant's uncontradicted statement, the government only sent draft notices to individuals opposed to the government.[281] The Seventh Circuit concluded that the applicant's circumstances established that he was persecuted even though he "was not exposed to the hazards of military duty."[282] The court noted, "[b]eing driven out of one's country is another crossing of the line that separates mere discrimination from persecution."[283]

The Ninth Circuit in *Sangha v. INS* held that a comparable flight precipitator necessarily established persecution.[284] Armed men came to the applicant's home, beat up his father, and gave him three weeks to join their cause and fight for them.[285] The applicant traveled to a different part of the country, but the armed men sent an additional threat.[286] Consequently, the applicant fled the county.[287] The court concisely held this conduct was "sufficient to show persecution."[288] The Second Circuit reached the same conclusion in *Islami v. Gonzales*.[289] Assessing the applicant's claim that he similarly fled the country after receiving a draft notice,[290] the court held that the applicant's "fear of retribution for refusing to participate in a military known to perpetrate crimes against humanity . . . rose to the level of past persecution."[291]

In contrast to these holdings, the Ninth Circuit in *Zehatye v. Gonzales* held that the record did not compel a finding of past persecution even though the ap-

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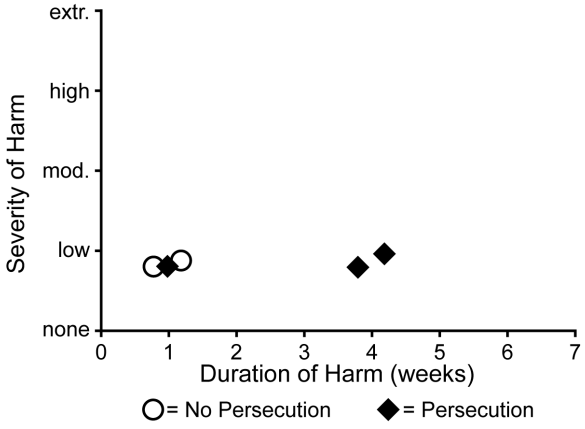
[279] *See supra* Part III.A.4.
[280] Miljkovic v. Ashcroft, 376 F.3d 754, 755 (7th Cir. 2004).
[281] *Id.*
[282] *Id.* at 756.
[283] *Id.*
[284] Sangha v. INS, 103 F.3d 1482, 1486–87 (9th Cir. 1997).
[285] *Id.* at 1486.
[286] *Id.*
[287] *Id.*
[288] *Id.* at 1487.
[289] Islami v. Gonzales, 412 F.3d 391, 397 (2d Cir. 2005).
[290] *Id.* at 393. While the case mentions additional forms of harassment experienced by the applicant before fleeing, the court did not factor them into its persecution holding. *Id.* at 397.
[291] *Id.* at 397. The cases cited by the court in support of this proposition concerned a well-founded fear of persecution rather than being persecuted itself. *Id.* (citing, among others, Mekhoukh v. Ashcroft, 358 F.3d 118, 126 (1st Cir. 2004)).

plicant fled the country after the government tried to forcibly conscript her.[292] Specifically, local authorities sent the applicant a letter that indicated she had "one week to prepare to enter the army."[293] In *Tobon-Marin v. Mukasey*, the court upheld the Board's determination that the applicant did not establish he was persecuted when he fled about one week after a rebel group tried to conscript him to fight for its cause.[294] The court found that the record did not compel a finding of persecution, even though the applicant learned that the rebels murdered a third party who refused to join their ranks.[295] In other cases, litigants did not even bother to assert that an attempted recruitment itself established past persecution, recognizing that its minimal severity level relegates the inquiry to what may happen if the applicant is deported back to the home country; that is, whether the applicant has a well-founded fear of persecution.[296] Figure 3 illustrates the courts' largely inconsistent assessments of whether applicants established they were persecuted because they feared conscription.

FIGURE 3: SINGLE-INCIDENT PSYCHOLOGICAL HARM




The case facts depict comparable levels of psychological harm with the possible exceptions of *Sangha* and *Tobon-Marin*, where the levels of harm were slightly elevated because one applicant watched authorities beat his father[297] and the other learned that rebels murdered at least one person who re-

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[292] Zehatye v. Gonzales, 453 F.3d 1182, 1186–87 (9th Cir. 2006). The divergence between this case and cases equating a fear of conscription to being persecuted is even more stark because the applicant in *Zehatye* also experienced economic harm. *Id.* at 1186.

[293] *Id.* at 1184.

[294] Tobon-Marin v. Mukasey, 512 F.3d 28, 30–32 (1st Cir. 2008).

[295] *Id.* at 30.

[296] *See, e.g.*, *Mekhoukh*, 358 F.3d at 123 (noting that the applicant did not even allege that he was persecuted in the past for evading military service); *see also* 8 C.F.R. § 1208.13(b)(2) (2014) (discussing the well-founded fear standard).

[297] Sangha v. INS, 103 F.3d 1482, 1486 (9th Cir. 1997).

fused to fight for the rebels' cause.[298] In several of these cases, the courts did not even specify the precise time lapse between the threat and the date when the applicant fled.[299] Their failure to do so minimizes the fact that the overall level of harm endured increases when an applicant experiences it over a greater duration of time. Regardless of the exact duration of psychological harm experienced before fleeing, the outcome discrepancies highlight another deficiency in many courts' decisionmaking processes for persecution assessments. These cases do not concern the actual suffering the applicants could endure if they had been conscripted to fight for a government or guerrilla group.[300] Rather, the harm was limited to the fear induced for a short period of time before the applicants decided to flee. Thus, it appears that some decisions conflate past suffering with prospective harm.[301] Nevertheless, regardless of whether courts conflate past and future harm, fail to appreciate the actual extent of suffering, or base their assessments on a tertiary reason, the outcomes themselves are equally inconsistent.

*3. Psychological Harm: Continuous Fear-Inducing Events*

In many cases, applicants allege a pattern of psychological harm perpetrated against them over a significant period of time. In these cases, the applicants do not experience any physical harm, either because the perpetrators have not acted on their threats or the applicants successfully evaded the assailants' efforts to physically harm them. As with psychological harm stemming from a single threat, appellate court holdings diverge in their assessment of whether continuous psychological harm is severe enough to rise to the level of past persecution.

In *Marcos v. Gonzales*, the Ninth Circuit held that years of threats against the applicant failed to compel the conclusion that he was persecuted.[302] The applicant, a radio operator for the military, received death threats over the radio for several years from a guerrilla group.[303] The medium then changed to telephone calls and in-person threats.[304] Although the military provided him with security in his office, the guerrilla group would approach him at the times when

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[298] *Tobon-Marin*, 512 F.3d at 30.

[299] As such, some of the duration numbers are estimations. Nevertheless, these approximations do not impact the inconsistencies depicted.

[300] *See, e.g.*, Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) (evaluating harm the applicant experienced after being conscripted).

[301] Courts have not consistently discussed the significance of the time the applicant remained in the country. *Compare* Lopez de Hincapie v. Gonzales, 494 F.3d 213, 217 (1st Cir. 2007) ("[T]hreats of murder would fit neatly under [persecution's] carapace."), *with* De Oliveira v. Mukasey, 520 F.3d 78, 79–80 (1st Cir. 2008) (faulting the applicant for remaining in the country for four months after assailants threatened him).

[302] Marcos v. Gonzales, 410 F.3d 1112, 1119 (9th Cir. 2005).

[303] *Id.* at 1115–16.

[304] *Id.* at 1116.

no security was present.[305] As a result, the applicant stopped traveling outside his town for work.[306] Although the frequency of the threats diminished over time, they continued until the applicant departed his home country.[307]

In *Lim v. INS*, the applicant appeared on a "death list" and subsequently received multiple death threats because he testified against a revolutionary group opposed to the government.[308] He used police protection and restricted his travel for two years while the threats continued.[309] "[T]o escape the threats," the applicant quit the police force.[310] The applicant hired a personal bodyguard to protect him because he continued to receive threats.[311] Throughout the following years, three of the applicant's former colleagues who also testified were murdered, and the applicant observed that assailants had started to follow him.[312] Consequently, the applicant fled the country.[313] Based on these facts, the Ninth Circuit concluded that the applicant failed to establish that he was persecuted.[314]

The same court reached a different conclusion in *Ruano v. Ashcroft*, where it found that a series of threats did compel the conclusion that the applicant was persecuted.[315] Over a six-year period, a guerrilla group sent the applicant thirty to thirty-five death threats.[316] During the last four years, armed men would trail the applicant and occasionally try to accost him.[317] They would also look for him at his house, but he always managed to escape.[318] The applicant avoided the assailants by changing his modes of transportation.[319] While the applicant was never personally injured, he heard that the guerrillas had murdered other members of the political organization to which he belonged.[320] The court found the applicant's circumstances more severe than those experienced by the applicant in *Lim* because the applicant in *Ruano* was "closely confronted" by men who were visibly armed and these men also confronted the applicant's family to try to learn his whereabouts.[321]

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305 *Id.*
306 *Id.*
307 *Id.*
308 Lim v. INS, 224 F.3d 929, 932 (9th Cir. 2000).
309 *Id.* at 932–33.
310 *Id.* at 933.
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.* at 936.
315 Ruano v. Ashcroft, 301 F.3d 1155, 1157–60 (9th Cir. 2002).
316 *Id.* at 1157.
317 *Id.* at 1158.
318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.* at 1160.

The court reached the same conclusion in *Salazar-Paucar v. INS*, where a guerrilla organization repeatedly threatened the applicant with death because he was elected to the equivalent of a town councilman.[322] For months, the guerrilla group conveyed the death threats though a middleman and by painting them in the town square.[323] They also killed the town's mayor, who had served as the applicant's boss.[324] About a year into his term, while the applicant was on a trip, guerrillas came to town with a list of targets that the applicant presumed he was on. These guerrillas located eight people on the list and executed them.[325] Because the guerrillas could not find the applicant, they beat his parents.[326] The applicant subsequently fled to a city with his family, where he lived without incident for over a year.[327] Then, he discovered a death threat painted on the wall of his house and soon learned that two of the others who were elected to the town councilman equivalent had been killed.[328] As a result, the applicant fled the country.[329] The court found the record compelled the conclusion that he was persecuted due to the death threats, the murder of other politicians, and the physical harm to his family.[330]

The juxtaposition of the cases that did and did not find past persecution compelled highlights important points about the way to measure both the distinction in the severity of harm caused by threats and how the level of psychological harm compares to other forms of harm. As to the extent of psychological harm, in all of the cases, the applicants experienced recurring death threats over a period of years. The courts accepted the legitimacy of the threats in each of the cases as well.[331] Additionally, all of the applicants demonstrated their fear by altering their behavior in response to the threats, including changing movement patterns, restricting movement, obtaining security protection, or relocating entirely. Others were killed in each of the cases as well.

These comparable incidents and the courts' reasoning establish a baseline level of suffering necessarily experienced by all the applicants.[332] In both *Marcos* and *Lim*, the Ninth Circuit held that even though the circumstances did not

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[322] Salazar-Paucar v. INS, 281 F.3d 1069, 1071 (9th Cir. 2002).
[323] *Id.*
[324] *Id.*
[325] *Id.* at 1071–72.
[326] *Id.* at 1071.
[327] *Id.* at 1072.
[328] *Id.*
[329] *Id.*
[330] *Id.* at 1075.
[331] Marcos v. Gonzales, 410 F.3d 1112, 1119 (9th Cir. 2005) (labeling the threats "credible"); Ruano v. Ashcroft, 301 F.3d 1155, 1160 (9th Cir. 2002) (presuming legitimacy by virtue of the ultimate holding); *Salazar-Paucar*, 281 F.3d at 1075 (discussing the evidence supporting legitimacy); Lim v. INS, 224 F.3d 929, 934–35 (9th Cir. 2000) (finding that the applicant's fear was "well-founded" based on previous threats).
[332] The baseline level of harm is germane because it impacts the proportional increase in suffering that the applicants purportedly experienced in the cases where the courts did find persecution compelled.

compel a finding of past persecution, they *did* compel the conclusion that the applicant had a well-founded fear of being persecuted.[333] In holding that the applicants justifiably feared harm or death if returned to their home countries, the courts acknowledged that the events described by the applicants caused fear when they were living in their home countries and that the assailants had the will and ability to carry out the threats. After all, it would be impossible to find that the applicants reasonably feared prospective harm on the basis of circumstances that caused no fear while they were happening.[334]

Accordingly, the Ninth Circuit panels believed that the applicants were living in their home countries for years under the fear of knowing that serious harm or death was, at the very least, a possibility. A true understanding of the psychological anguish caused by such constant fear requires a momentary digression into the shoes of an asylum applicant: picture your daily existence for a number of consecutive years under the cloud of a seemingly legitimate belief that outsiders want to kill you and have the means to carry out their wishes. This scenario is what each of the fact patterns dictates by virtue of the determination in each that the circumstances necessarily establish past persecution or a well-founded fear of persecution.[335]

Because the court panels diverged in whether a finding of persecution was compelled in each of the cases, these similar circumstances and levels of suffering, in and of themselves, are not sufficient to compel such a finding in this case sample. Thus, the distinctions between the cases must be examined to try to discern if there exists a consistent harm threshold among the divergent case outcomes. In *Ruano*, the assailants at times got closer to the applicant than in *Lim*, the applicant could see that the assailants brandished weapons, and the assailants had contact with the applicant's family.[336] Nevertheless, the applicant in *Lim* was being followed as well, and the applicant's belief that these men desired to kill him makes the actual observation of a gun nominal. The contact with the *Ruano* applicant's family, however, could certainly be particularly troubling. Similarly, regarding *Salazar-Paucar*, the fact that the assailants injured the applicant's parents can increase the psychological harm the applicant experienced in a way not seen in either *Lim* or *Marcos*.[337] Consequently, the

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[333] *Marcos*, 410 F.3d at 1119; *Lim*, 224 F.3d at 934–36.

[334] The absence of a harm crescendo could be a potentially mitigating factor, but there is no indication that the courts factored such a consideration into their decisions. Indeed, in *Marcos* the threat frequency *diminished* toward the end of the applicant's time in his home country and the court still believed he established a well-founded fear of persecution. *Marcos*, 410 F.3d at 1116, 1120.

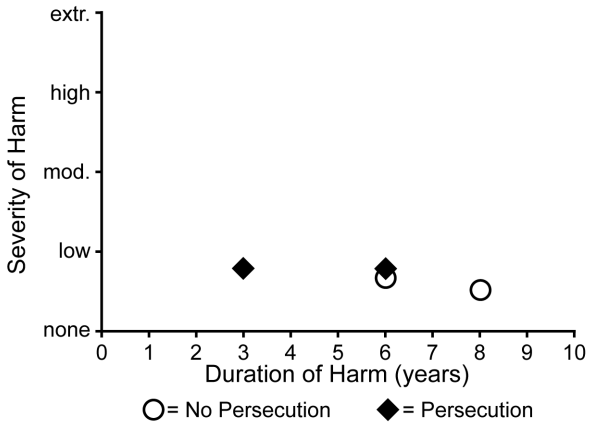
[335] For an in-depth analysis of the possible meanings of "fear" in the well-founded fear inquiry, see James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?*, 26 MICH. J. INT'L L. 505 (2005).

[336] *Ruano*, 301 F.3d at 1160.

[337] Salazar-Paucar v. INS, 281 F.3d 1069, 1074–75 (9th Cir. 2002); *see also* Ladha v. INS, 215 F.3d 889, 902 (9th Cir. 2000) (factoring harm to family members into its persecution

panels that found the applicant was persecuted were able to point to some evidence of increased harm. Do these differences establish a threshold for determining that such conduct compels the conclusion that an applicant was persecuted? Figure 4 is instructive:[338]

FIGURE 4: AVERAGE PSYCHOLOGICAL HARM OVER CONTINUOUS PERIOD




The harm measurements for each case represent an estimated[339] average severity level over the duration of the harm endured by each applicant.[340] The severity level is based on averaging the higher suffering caused by actual threats and harm to third parties with the lower baseline psychological turmoil applicants experienced between the more tangible incidents. Even assuming *arguendo* a higher harm severity in the cases where the courts found persecution compelled, the cases do not appear to yield consistent persecution outcomes when assessing the overall amount of harm experienced by the applicants because of differences in duration. Indeed, the applicant in *Salazar-Paucar* might have experienced harm greater than the applicant in *Marcos* dur-

finding); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 265 (2013 ed.) (reviewing when harm to family members is relevant to being persecuted).

[338] The severity of harm that results from the threats is based on averaging the experiences of the applicants throughout the duration of their time in their home countries. It takes into account the peaks and lulls of the harm endured. Thus, for example, while the psychological harm would spike after a threat escalation or learning that a similarly-situated person has been murdered, the harm experienced would diminish during periods of relative tranquility. Consequently, a more refined graph depiction would make each case's harm measurement resemble the output of a cardiograph, but an in-depth discussion of persecution's temporal dimensions is beyond the scope of this article.

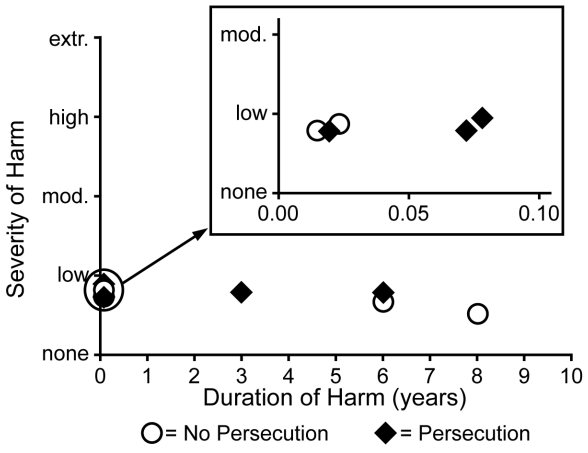
[339] The estimation is based on the level of detail provided in each case about the harms endured.

[340] *See supra* Part II.B. (discussing the study's methodology for measuring harm).

ing the time when assailants victimized him, but the *Marcos* applicant endured psychological anguish that lasted for five years longer.[341]

The heightened complexity of these continuous psychological harms make an assessment of their consistency less concrete than the single instances of harm previously analyzed. Nevertheless, while the courts' holdings regarding continuous psychological harm do appear inconsistent, comparing them to the courts' single-incident persecution assessments leaves no room to question the palpable divergence in outcome. Indeed, in *Marcos* and *Lim*, the psychological harm lasted for years, but the courts determined that the respective records did not compel a finding of persecution.[342] Conversely, even though the psychological trauma in *Islami*, *Miljkovic*, and *Sangha* took place over the span of approximately several weeks, each decision found the record compelled the conclusion that the applicant was persecuted.[343] Figure 5 depicts the inconsistencies for psychological harm, generously assuming the applicants in the single-incident, persecution-compelled cases suffered a level of harm comparable to the applicants in the continuous psychological harm cases.

FIGURE 5: COMBINED PSYCHOLOGICAL HARM CASES



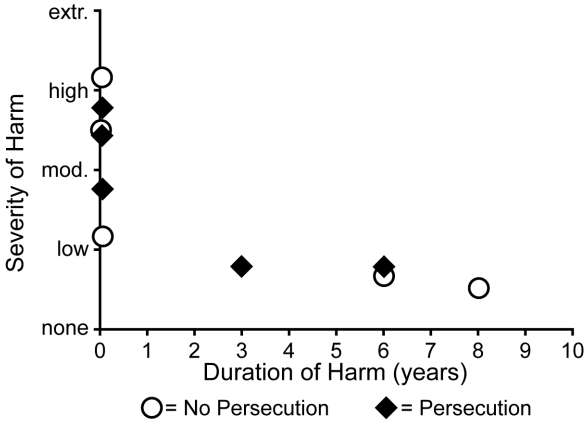

[341] Marcos v. Gonzales, 410 F.3d 1112, 1115–16 (9th Cir. 2005) (eight years); *Salazar-Paucar*, 281 F.3d at 1071–72 (three years).

[342] *Marcos*, 410 F.3d at 1119; Lim v. INS, 224 F.3d 929, 936 (9th Cir. 2000).

[343] Islami v. Gonzales, 412 F.3d 391, 397–98 (2d Cir. 2005) (rendering ambiguous the exact time between learning of conscription and fleeing); Miljkovic v. Ashcroft, 376 F.3d 754, 756 (7th Cir. 2004) (making clear that the applicant fled shortly after he received the draft notice); Sangha v. INS, 103 F.3d 1482, 1486–87 (9th Cir. 1997) (indicating that the applicant fled several weeks after he received the draft notice).

Comparing the continuous psychological harm cases to the cases that concerned single instances of physical abuse and detention also yields questionable outcome divergences:

FIGURE 6: COMBINED CONTINUOUS PSYCHOLOGICAL HARM AND SINGLE INSTANCE OF HARM AND DETENTION CASES




Physical harm may be construed as a central aspect of what it means to be persecuted,[344] but it is dubious to conclude that several hits and kicks during a detention lasting little more than one day is more severe than living under a substantiated threat of death for many years.[345]

*4. Other Harm Inconsistencies*

The inconsistencies among appellate court persecution assessments are not limited to those falling within one of the preceding three categories. While the panoply of divergent outcomes is too numerous to mention in full, a few final comparisons will serve to round out the prior sections. In *Alibeaj v. Gonzales*, for example, the court found the following circumstances insufficient to compel a finding of persecution: a longstanding pattern of physical harm and murder against the applicant's family members, along with more recent "death threats, beating, and misappropriation of property" directed at the applicant and her husband.[346] Conversely, in *Del Carmen Molina v. INS*, the court found that the

[344] Kambolli v. Gonzales, 449 F.3d 454, 457 (2d Cir. 2006) (indicating that a "lack of physical harm" to the applicant was a main reason for not finding persecution compelled); Chand v. INS, 222 F.3d 1066, 1073 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution.").

[345] *Compare* Guo v. Ashcroft, 361 F.3d 1194, 1197 (9th Cir. 2004) (short detention with physical harm), *with Lim*, 224 F.3d at 932–33 (longer period of psychological suffering).

[346] Alibeaj v. Gonzales, 469 F.3d 188, 191–92 (1st Cir. 2006); *see also* Nzeve v. Holder, 582 F.3d 678, 683–84 (7th Cir. 2009) (holding that threats and a beating did not compel a finding of persecution); De Oliveira v. Mukasey, 520 F.3d 78, 79–80 (1st Cir. 2008) (finding

record compelled the conclusion that the applicant was persecuted based on previous killings and harms to family members and two unfulfilled threats against her.[347]

In *Ladha v. INS*, the court determined that a combination of physical harm and harm to others compelled a finding of past persecution.[348] A similar combination of harm directed at the applicant and family members did not compel a finding of past persecution in *Cabas v. Holder*.[349] In both *Ladha* and *Cabas*, the assailants physically beat the applicants.[350] The applicant in *Cabas*, however, sustained the more severe injury. The applicants in both cases also suffered additional threats and learned second-hand that assailants threatened and injured members of their immediate family.[351] Consequently, the applicants did not suffer appreciably different levels of harm, but the court only found that the facts necessarily established persecution in one of the cases.

*Guo v. Ashcroft* and *Bocova v. Gonzales* provide another example of courts' inconsistent holdings. In *Guo*, the court found persecution compelled where assailants administered several hits and kicks over one and a half days.[352] Conversely, in *Bocova*, the court found the circumstances did not compel a finding of persecution where the applicant was "interrogated, beaten, and threatened with death" during a two-day detention, and then, about two years later, was again detained, threatened, and beaten by authorities until he lost consciousness.[353] Finally, while the minimal injuries caused to the applicant in *Mihalev v. Ashcroft* during a ten-day detention compelled a finding that he was persecuted,[354] persecution was not compelled in *Nelson v. INS*, where assailants physically abused the applicant during three incidents of solitary confinement and the applicant further experienced surveillance, harassment, and stops and searches.[355] Accordingly, as demonstrated by the case comparisons in this section and the previous sections, the appellate courts diverge considerably in the types of harm they find necessarily establish persecution.

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insufficient to establish persecution multiple death threats directed at the applicant and his family).

[347] Del Carmen Molina v. INS, 170 F.3d 1247, 1249 (9th Cir. 1999).

[348] Ladha v. INS, 215 F.3d 889, 902 (9th Cir. 2000).

[349] Cabas v. Holder, 695 F.3d 169, 174 (1st Cir. 2012).

[350] *Id.*; *Ladha*, 215 F.3d at 902.

[351] *Cabas*, 695 F.3d at 172; *Ladha*, 215 F.3d at 902.

[352] Guo v. Ashcroft, 361 F.3d 1194, 1203 (9th Cir. 2004).

[353] Bocova v. Gonzales, 412 F.3d 257, 261 (1st Cir. 2005) (noting that authorities immediately had to take the applicant to get medical treatment after the second incident).

[354] Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004).

[355] Nelson v. INS, 232 F.3d 258, 264 (1st Cir. 2000); *cf.* Touch v. Holder, 568 F.3d 32, 37–40 (1st Cir. 2009) (relaying a series of incidents, including the forced drinking of wastewater, that did not compel a finding that the applicant had been persecuted).

## IV. DIVERGENCE AND CAUSATION

Two interrelated questions emerge from the inconsistent persecution outcomes: what are the causes of these troubling discrepancies and how can they be minimized? Part IV addresses these questions. It examines whether certain judges or circuits are more likely to find persecution compelled. After reviewing whether there exists intra- and inter-circuit patterns to the disparities, Part IV will discuss why a significant cause of the outcome inconsistencies concerns how adjudicators assess harm and what it means to be persecuted. Additionally, Part IV will offer several preliminary proposals to remedy the inconsistent persecution decisions.

### *A. Deviations Between Judges*

The likelihood of applicants successfully establishing they either experienced persecution or fear being persecuted should not depend on the composition of the judicial panel they happen to draw. This study sought to determine whether the particular appellate judges assigned to review an applicant's asylum claim could impact the applicant's likelihood of success. To assess whether the judicial panel could have contributed to the outcome divergences, this study tabulated the judges in Ninth Circuit cases that decided specifically whether an applicant established that the facts compelled a finding of persecution.[356]

The low vote count renders some of the results statistically insignificant. Indeed, for many of the judges with remand rates slightly above or below fifty percent, a difference in one or two cases would significantly impact the percentage of cases where they found persecution compelled. Nevertheless, for many of the judges on the high and low end of remand rates, the data is instructive and, at the very least, should serve as a springboard for future research.

There are several reasons to not discount the remand rate disparities depicted in the data. For one, many of the judges at the extreme ends of the spectrum reviewed more than five cases—most reviewed between eight and nineteen. Several of the percentage distinctions are quite staggering. In particular, Judges O, P, Q, R, and S found persecution compelled at least eighty-five percent of the time while Judge A only found persecution compelled in one of the nine cases reviewed.

Additionally, to compile the initial assessment of the cases in the findings section of this article, this study required a thorough review and assessment of the cases that form the data points for Table 1. The facts in these cases and the tenor of the opinions make clear that an applicant would benefit considerably if one of several judges were assigned to the panel reviewing the applicant's case—that is, a review of the individual cases demonstrates that Table 1 accurately reflects the outlier status of several judges.

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[356] The Ninth Circuit was chosen because it reviewed the highest number of cases. For the full list of Ninth Circuit judges and their votes, see Supplement Table S3, http://scholars.law.unlv.edu/nlj/vol15/iss1/6/.

TABLE 1: NINTH CIRCUIT JUDGES RENDERING AT LEAST FIVE PERSECUTION DECISIONS

| Judge | Party[357] | Total Votes[358] | Votes Finding Persecution Compelled |
|---|---|---|---|
| A | Democrat | 9 | 1 (11%) |
| B | Republican | 5 | 1 (20%) |
| C | Democrat | 9 | 3 (33%) |
| D | Republican | 5 | 2 (40%) |
| E | Democrat | 5 | 2 (40%) |
| F | Democrat | 6 | 3 (50%) |
| G | Republican | 7 | 4 (57%) |
| H | Democrat | 7 | 4 (57%) |
| I | Democrat | 5 | 3 (60%) |
| J | Democrat | 5 | 3 (60%) |
| K | Republican | 6 | 4 (67%) |
| L | Republican | 10 | 7 (70%) |
| M | Democrat | 5 | 4 (80%) |
| N | Democrat | 5 | 4 (80%) |
| O | Democrat | 13 | 11 (85%) |
| P | Democrat | 19 | 17 (89%) |
| Q | Democrat | 10 | 9 (90%) |
| R | Democrat | 8 | 8 (100%) |
| S | Democrat | 5 | 5 (100%) |

Aside from the percentage of persecution cases where a judge voted to remand, Table 1 shows that certain judges sat on a panel that specifically rendered judgment on the persecution-compelled question considerably more often than his or her colleagues. The number of votes cast by Judge P is particularly notable. The implications of the distinction in volume requires further study, but this article hypothesizes that certain judges are more likely to publish their persecution decisions. As such, even if these judges do not review considerably more persecution determinations than their colleagues, their opinions disproportionately influence what it means to be persecuted within their circuit.[359]

The seven judges most likely to find that the facts compelled a finding of persecution were all appointed by presidents who were Democrats. Nevertheless, on the whole, the limited data does not appear to depict any systematic distinction in case outcomes based on the appointing president's political affiliation. At most, the data supports the possibility that presidents who are Democrats are more likely to appoint outlier judges.

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[357] The political party of the president who appointed each judge.

[358] The votes counted are (1) those where a judge either authored or agreed with the majority opinion regarding persecution; and (2) those where the judge dissented specifically because he or she believed that the facts either compelled a finding of persecution or did not do so. Dissenting votes based on other considerations are not included.

[359] *See* Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 71–75 (2004) (summarizing several criticisms of unpublished decisions).

### *B. Deviations Between Circuits*

In addition to the composition of specific judicial panels, this study assessed whether the particular circuit that reviews an applicant's persecution claim could impact the applicant's likelihood of success. In a previous study, Professors Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag measured appellate courts' remand rates for asylum claims decided between 2004 and 2005.[360] Their results demonstrated notable disparities, with circuit remand rates ranging from 1.9 percent to 36.1 percent.[361] These disparities, however, were based on remand rates for any substantive issue; the professors did not dissect the specific reasons why a court decided to remand an asylum case.[362]

To determine whether the same inter-circuit discrepancies would exist for persecution assessments specifically, this article's study compared the decisions of the First and Ninth Circuits. Specifically, it tabulated all of the First and Ninth Circuit opinions where a panel explicitly decided whether the harm proffered by the applicant necessarily established persecution.[363] These two circuits were chosen because they have the highest volume of published cases that decided the persecution-compelled question.[364]

TABLE 2: PUBLISHED FIRST AND NINTH CIRCUIT PERSECUTION DECISIONS

| Circuit | Decisions Issued | Cases Finding Persecution Compelled | Cases Finding Persecution Not Compelled |
|---|---|---|---|
| First | 66 | 3 (5%) | 63 (95%) |
| Ninth | 78 | 51 (65%) | 27 (35%) |

The Ninth Circuit held that the facts compelled a finding of persecution substantially more often than the First Circuit. This significant disparity supports the conclusion that the geographic region where asylum applicants' persecution claims are adjudicated may affect the outcome of the case.[365]

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[360] Ramji-Nogales et al., *supra* note 26, at 362.

[361] *Id.*

[362] *Id.* at 403. Additionally, their study also assessed unpublished decisions. *Id.* at 404.

[363] The inter-circuit comparison did not include asylum decisions where a panel remanded the case because of one of the procedural flaws that this study discarded for a reason discussed in the methodology section.

[364] Even though most of its decisions are unpublished, the Ninth Circuit reviews significantly more asylum cases than the First Circuit. *See* Guendelsberger, *2012 Asylum Statistics*, *supra* note 16; Guendelsberger, *2011 Asylum Statistics*, *supra* note 16. To see a list of First and Ninth Circuit cases addressing the persecution-compelled question, see Supplement Table S4 (Ninth) and Schedule S5 (First), http://scholars.law.unlv.edu/nlj/vol15/iss1/6/.

[365] This study also tabulated the countries where the applicants claimed they were persecuted. The results suggest that these distinctions do not likely contribute in a significant way to the outcome discrepancies between the First and Ninth Circuits. In most instances, the circuits assessed a comparable amount of cases from various regions. The Ninth Circuit, however, did review significantly more claims for asylum from applicants who fled countries in

The results are troubling because persecution outcomes should not so significantly depend on an applicant's location. The outcome disparity between the two circuits would likely narrow if unpublished decisions were factored into the results. For the persecution-compelled question, however, the terse analysis provided in many unpublished opinions could make it difficult to determine the specific reason why a panel decided to remand an asylum claim.[366] Assume *arguendo* that the reasons for remand in unpublished decisions are not ambiguous and including such unpublished opinions would narrow the outcome divergence. Even if this were the case, the very fact that circuits would diverge so drastically in their use of unpublished opinions is itself problematic because it would likely skew a circuit's persecution jurisprudence.

Professors Ramji-Nogales, Schoenholtz, and Schrag attributed the inter-circuit discrepancies they found in their study to "differing attitudes that the judges in these circuits have, in the aggregate, with respect to asylum seekers' claims, or at least the differing degrees of their skepticism about the adequacy of Board and immigration judge decision making."[367] Attitudinal differences are certainly a contributing factor. Nevertheless, at least for the persecution-compelled question, the cases reviewed in this article's study yielded several more tangible causes for the inter-circuit discrepancies, as well as the discrepancies between individual cases. These causes relate to how courts assess and measure harm.

To be sure, a court's attitude and harm assessment are not mutually exclusive. Indeed, a court's attitude toward asylum seekers can impact the way that a court views and judges the harm alleged by an asylum applicant. Thus, without discounting the significance of attitudinal divergences, the next section will review the tangible harm assessment and measurement issues that have contributed to the divergent persecution outcomes documented in the findings section above.

### *C. Measuring Harm*

The cases examined in this study show that much of the disparity among appellate court persecution decisions can be attributed to the way courts interpret the meaning of persecution, and how they characterize and measure harm. This section will review these causes of outcome discrepancies and provide several preliminary observations for what can be done to mitigate them.[368]

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Central America. Additionally, the Ninth Circuit reviewed nine asylum claims from citizens of Fiji while the First Circuit did not consider any.

[366] *See, e.g.*, Baroi v. INS, 22 F. App'x 775 (9th Cir. 2001).

[367] Ramji-Nogales et al., *supra* note 26, at 364.

[368] The suggestions are general and preliminary because the data yield several additional areas of study that would aid more specific solutions.

*1. The Systematic Harm Question*

Among the appellate courts, there is a fundamental disagreement about the importance of harm being perpetrated systematically in order to be persecutory. The First Circuit's reasoning in *Khan*—where electric shock did not compel a finding that assailants persecuted the applicant[369]—exemplifies its focus on systematic conduct rather than an "isolated" event or even multiple fairly severe events that are not perceived as interrelated.[370] Under this rubric, a lack of systematic conduct can preclude a finding of persecution when the harm would otherwise appear to be sufficiently severe. For this reason, within the categories of cases that the reviewed courts universally regard as sufficiently severe, nearly all of them concern repeated abuse over a substantial period of time.[371] In several instances, other circuits have followed the First Circuit's belief that systematic mistreatment is a condition precedent to establishing persecution.[372] By contrast, as demonstrated by the outcomes in several of the cases described above, the Second, Seventh, and Ninth Circuits do not regularly follow comparably narrow parameters,[373] nor do most of the other appellate courts.[374] The incredible outcome divergence between the First and Ninth Circuits seen in Table 2 is indicative of this fundamental disagreement.

The fact that decades of adjudications involving over a million asylum claims have failed to yield a consistent approach on the systematic harm question is nothing short of astounding.[375] It is well within the Attorney General's authority to lay claim to such an important question—one that is so fundamental to determining what it truly means to be persecuted.[376] A more thorough discussion of whether adjudicators should require that applicants experience

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[369] Khan v. Mukasey, 549 F.3d 573, 576–77 (1st Cir. 2008).

[370] Wiratama v. Mukasey, 538 F.3d 1, 7 (1st Cir. 2008) ("[I]solated beatings, even when rather severe, do not establish systematic mistreatment needed to show persecution."). The First Circuit has, on occasion, seemingly softened its language on systematic mistreatment as a prerequisite. Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005) (couching it as a factor).

[371] *See supra* Part III.A.

[372] *See, e.g.*, Baharon v. Holder, 588 F.3d 228, 232 (4th Cir. 2009) (citing *Bocova*, 412 F.3d at 263) (distinguishing "systematic" and "isolated incidents"); Kalaj v. Gonzales, 137 F. App'x 851, 854 (6th Cir. 2005) (crediting the immigration judge's determination that the incidents were not systematic).

[373] Sahi v. Gonzales, 416 F.3d 587, 588–89 (7th Cir. 2005) (chastising decisions by immigration judges that purport to require systematic conduct); Guo v. Ashcroft, 361 F.3d 1194, 1203 (9th Cir. 2004) (finding that a short detention and minor beating "compels a finding that Mr. Guo was persecuted *during* his first detention" (emphasis added)).

[374] *See, e.g.*, Corado v. Ashcroft, 384 F.3d 945, 947–48 (8th Cir. 2004) (discussing persecution based on a single incident).

[375] At most, courts have inferred a systematic requirement from Board decisions that have alluded to its relative importance. *See, e.g.*, *Bocova*, 412 F.3d at 263 (citing for support *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (B.I.A. 1998)).

[376] *See* Negusie v. Holder, 555 U.S. 511, 524 (2009) (noting the scope of the Board's authority to interpret the "statutory meaning of 'persecution' ").

systematic harm is beyond the scope of this article. The systematic question is one among many points that collectively comprise the temporal dimension of persecution assessments. The temporal dimension concerns the significance of the moment in time when a particular event takes place, how it factors into the applicant's overall experience in the home country prior to fleeing, and how the surrounding context of the harm impacts its initial and residual severity. Given the complexities of this issue, a more in-depth inquiry will have to be the subject of a future endeavor. As a general observation from cases where adjudicators impose a systematic harm requirement, it appears these decisions constrict too narrowly the number of applicants who should be eligible for asylum relief. Applicants can experience multiple severe harms on account of protected grounds that warrant protection even without assailants perpetrating the harms systematically.

*2. Normative Thresholds*

Even in those circuits that do not require systematic abuse, the results of this study show that courts do not consistently determine when harm is severe enough to cross the persecutory threshold. The discussion of this study's findings axiomatically points to inconsistent assessments and interpretations of the requisite harm severity threshold as a root cause of the inconsistencies. Courts and scholars regularly caution against the creation of prescribed harm thresholds because the meaning of persecution is constantly evolving and the nuances within specific claims purportedly make generalizations impractical.[377]

The often fact-intensive nature of persecution inquiries, however, should not act as a shield to prevent the creation of general severity principles, by means of regulation or adjudication.[378] Immigration agencies could provide guiding principles to which appellate courts would be required to defer.[379] This study's assessment of the persecution case law points to two instances where such guiding principles would be warranted and practical. The first concerns circumstances where the outcome discrepancies are irrefutably apparent. For example, this study reviewed inconsistent psychological harm assessments and measurements that were divergent enough to warrant general guidance. There is no reason why several weeks of psychological suffering should necessarily qualify as persecution while several years of comparable or greater psychologi-

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[377] *See* Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 63 (1993) (noting the "endless variety of situations the term [persecution] might cover").

[378] For cases that highlight the distinction between general guiding principles and pure questions of fact, see Ceraj v. Mukasey, 511 F.3d 583, 591 (6th Cir. 2007) (refusing to defer to Board credibility decisions when the inconsistencies cited do not enhance the applicants' asylum claims); Singh v. Ashcroft, 362 F.3d 1164, 1171 (9th Cir. 2004) (same).

[379] *See* Sahi v. Gonzales, 416 F.3d 587, 588 (7th Cir. 2005) (recognizing that "as the Attorney General's delegate," the Board has "primary responsibility for defining key terms in the immigration statute that the statutes themselves do not define, such as 'persecution' ").

cal harm does not.[380] Second, guidance is warranted for comparable harms that applicants regularly proffer in support of their claims. For instance, is it sufficient to sustain blows to the head that render one unconscious? Is a two-week detention with minimal harm enough? Decisions based on these types of questions appear frequently enough to warrant greater consistency.[381]

This article is not suggesting reform that would base persecutory harm assessments on generic tables and grids as seen in Social Security disability claims.[382] Moreover, for asylum applicants with ulterior motives, overly preestablished harm severity thresholds could provide a clearer path to game the system—a problem which exists in the limited areas of asylum law where the INA specifically prescribes a set path to establishing persecution.[383] Nevertheless, the desire to avoid any sort of specificity has inhibited consistent assessments of similar harms and symptoms that appear in numerous cases.

*3. Requisite Level of Detail*

In addition to differing assessments of persecution's harm threshold in general, the cases reviewed for this study show that courts require applicants to provide varying amounts of detail about the harm they experienced. The divergence in required detail can affect the likelihood that a panel will decide to remand an asylum case. In some instances, appellate courts held that the record compelled a finding of persecution even though the applicant alleged he or she was simply beaten.[384] Several cases held that the record compelled the conclusion that the applicant was persecuted without any specification of the harm that led to that conclusion.[385] Conversely, other decisions determined that applicants' general harm descriptions were too vague to compel a finding of persecution or, at the very least, served as a negative factor to granting a petition for review.[386]

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[380] *Compare* Miljkovic v. Ashcroft, 376 F.3d 754, 755 (7th Cir. 2004) (persecution based on weeks of psychological harm), *with* Lim v. INS, 224 F.3d 929, 936 (9th Cir. 2000) (no persecution despite years of psychological harm).

[381] The answers to these questions, of course, are axiomatically linked to the systematic question and other contextual considerations.

[382] See Frank S. Bloch et al., Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications, 25 CARDOZO L. REV. 1, 16–22 (2003) (describing the disability determination process).

[383] *See* 8 U.S.C. § 1101(a)(42)(B) (stating that applicants forced to undergo an abortion or sterilization satisfy the definition of a "refugee"); Joseph Goldstein & Kirk Semple, *Law Firms Are Accused of Aiding False Asylum Claims for Chinese*, N.Y. TIMES, Dec. 19, 2012, at A28.

[384] *See, e.g.*, Ladha v. INS, 215 F.3d 889, 902 (9th Cir. 2000); Duarte de Guinac v. INS, 179 F.3d 1156, 1160, 1162 (9th Cir. 1999) (finding that repeated "beatings" over a ten-month period established that the applicant was persecuted).

[385] *See, e.g.*, Begzatowski v. INS, 278 F.3d 665, 670 (7th Cir. 2002).

[386] *See, e.g.*, Tarraf v. Gonzales, 495 F.3d 525, 535 (7th Cir. 2007) (finding that the applicant only provided "scant details"); Liao v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002).

While greater detail would appear important to properly assessing the extent of harm endured (and hence rendering sound judgments),[387] at the very least adjudicators must approach the issue consistently. The immigration judges within EOIR are responsible for adjudicating tens of thousands of asylum cases every year.[388] Mixed messages from the appellate courts undermine immigration judges' understanding of the level of detail they must look for when they evaluate harm. The conflicting signals also inhibit attorneys' understanding of the type of information they must elicit from their clients and introduce into the record through testimony or written documentation. While the appellate courts must be mindful to consistently require comparable levels of detail from applicants, ultimately the responsibility for a consistent standard lies with the Attorney General.

*4. Harm Proxies*

The lack of sufficient detail within many asylum claims leads adjudicators to infer the extent of suffering from the information that is presented. This article refers to these sources of information as "harm proxies." The reviewed persecution decisions demonstrate that courts do not assess these proxies consistently, which can contribute to the divergent outcomes. In some cases, the courts tie the severity of harm to whether the applicant sought medical treatment, while other cases do not.[389] Then, when courts do assess the medical treatment, their perceptions of the significance of the treatment vary considerably. Courts have found that a need to obtain stitches demonstrates significant injury, but other cases have reached the opposite conclusion.[390] The proxies for measuring psychological harm are equally divergent. Although several courts opine that death threats are sufficiently severe, others determine that such threats are usually not enough.[391] Some decisions discount the relevance of threats that are not "imminent,"[392] whereas other decisions recognize the residual suffering that an

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[387] *See* Liu v. Ashcroft, 380 F.3d 307, 313 (7th Cir. 2004) ("[I]t is the details that reveal the severity of the particular situation.").

[388] EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 3.

[389] *Compare* Ouk v. Keisler, 505 F.3d 63, 67 (1st Cir. 2007) (minimizing an incident where the applicant was beaten unconscious because he did not seek medical treatment), *with* Quan v. Gonzales, 428 F.3d 883, 888–89 (9th Cir. 2005) (determining that the facts compelled a finding of persecution even though the applicant did not seek medical treatment).

[390] *Compare* Zhu v. Gonzales, 465 F.3d 316, 319 (7th Cir. 2006) ("[A] cut requiring seven stitches is doubtless a substantial injury . . . ."), *with* Mekhtiev v. Holder, 559 F.3d 725, 730 (7th Cir. 2009) ("His resultant injuries do not appear to have been severe: he testified that he required only stitches and bed rest.").

[391] *Compare* Shah v. INS, 220 F.3d 1062, 1072 (9th Cir. 2000) ("The determination that actions rise to the level of persecution is very fact-dependent, though threats of violence and death are enough." (quoting Cordon-Garcia v. INS, 204 F.3d 985, 991 (9th Cir. 2000))), *with* Gui v. INS, 280 F.3d 1217, 1229 (9th Cir. 2002) ("[T]hreats alone are typically insufficient . . . .").

[392] Borovsky v. Holder, 612 F.3d 917, 922 (7th Cir. 2010).

"ominous" threat can cause over a longer period of time.[393] On occasion, courts discount psychological harm when no physical harm accompanies it.[394]

Courts' reliance on several of these harm proxies is misguided. For example, the suffering caused by psychological harm does not cease to exist because physical harm does not accompany it. Adjudicators are not at liberty to discount psychological harm simply because mental suffering is harder to quantify than physical harm.[395] For other harm proxies, such as the significance of medical treatment generally, or stitches specifically, adjudicators must apply them more cautiously. Many factors, including an applicant's financial circumstances, may render unfeasible any attempt to obtain medical treatment. Moreover, certain serious medical ailments may not require formal treatment to heal, while applicants could choose to seek professional assistance for incidents that are less severe.[396]

### *D. Ambiguous Basis for Remand*

Throughout this study's case assessment process, it became apparent that several circuit panels supported their persecution determinations by citing or analogizing to prior cases that did not hold what the deciding court believed the prior case held.[397] To illustrate, the Seventh Circuit at times has interpreted its decision in *Asani v. INS*[398] to stand for an example of a flawed decisionmaking process,[399] while other cases imply that *Asani* established a particular set of facts that compelled the conclusion that the applicant was persecuted.[400] Holding that a set of facts compels a finding of persecution can significantly impact what it means to be persecuted within a circuit's jurisdiction. Appellate courts should ensure that their opinions leave no room for future courts, agencies, or

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[393] Pathmakanthan v. Holder, 612 F.3d 618, 623 (7th Cir. 2010) ("To live, day after day, knowing that government forces might secretly arrest and execute you is itself a form of mental anguish that can constitute persecution.").

[394] Hasanaj v. Ashcroft, 385 F.3d 780, 782 (7th Cir. 2004) (citing a definition of persecution that requires "punishment" or "personal[] harm[]").

[395] Several of the decisions that minimize psychological harm justify their conclusions by pointing to burden of proof concerns. *See, e.g.*, Lim v. INS, 224 F.3d 929, 936 (9th Cir. 2000).

[396] For example, an applicant who sustains a jolt to the head that causes concussive symptoms may forsake medical treatment, while an applicant who sustains a gash caused by moderate contact may seek out a medical professional.

[397] In *Fedunyak v. Gonzales*, for example, the Ninth Circuit assessed whether the assailants harmed the applicant because of a protected ground. Fedunyak v. Gonzales, 477 F.3d 1126, 1129 (9th Cir. 2007). Nevertheless, the Ninth Circuit subsequently cited *Fedunyak* to illustrate a set of facts that can be construed as *compelling* a finding of persecution. Ahmed v. Keisler, 504 F.3d 1183, 1194 (9th Cir. 2007).

[398] Asani v. INS, 154 F.3d 719, 723 (7th Cir. 1998).

[399] Gomes v. Gonzales, 473 F.3d 746, 754 (7th Cir. 2007); Vladimirova v. Ashcroft, 377 F.3d 690, 696 (7th Cir. 2004).

[400] Irasoc v. Mukasey, 522 F.3d 727, 730 (7th Cir. 2008); Soumahoro v. Gonzales, 415 F.3d 732, 738 (7th Cir. 2005); Dandan v. Ashcroft, 339 F.3d 567, 573 (7th Cir. 2003).

litigants to misconstrue the meaning of their persecution decisions. When finding error in EOIR's persecution assessments, courts should state unambiguously whether they are remanding the case for decisionmaking flaws or because they believe the record compels the conclusion that assailants persecuted the applicant. Otherwise, the body of factual circumstances that necessarily qualify as persecutory will remain unclear, and subsequent circuit panels' ability to construe the decision in multiple ways will continue to exacerbate the outcome discrepancies.

## CONCLUSION

Professors Goodwin-Gill and McAdam have noted that "[p]ersecution is a concept only too readily filled by the latest examples of one person's inhumanity to another, [so] little purpose is served by attempting to list all its known measures."[401] Influenced by this conventional wisdom, perhaps, the Board "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."[402] While the premise for taking an "I know it when I see it"[403] approach is well-grounded, the effect it has produced on applicants' claims is unfortunate. This article has demonstrated that, aside from limited areas of agreement, appellate court determinations regarding what it means to be persecuted diverge considerably. The appellate courts have now adjudicated thousands of asylum claims, and many more cases have passed through immigration agencies. With a clearer understanding of how and why the case outcomes are so inconsistent, decisionmakers have an opportunity to reassess their *modus operandi*, and infuse greater consistency and fairness into a system in desperate need of both.

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[401] Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 93–94 (3d ed. 2007).

[402] Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005).

[403] Stanojkova v. Holder, 645 F.3d 943, 949 (7th Cir. 2011).