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Human Frailty, Unbreakable Victims and Asylum

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ABSTRACT

This article analyzes the asylum decisions of immigration agencies and federal appellate courts and demonstrates that the case law driven standard for persecution is out of step with the original meaning of the term, international law standards, and contemporary understanding of how human beings experience physical and mental harm. Medical and psychological evidence establishes that even trauma at the lower end of the spectrum of severity can inflict lasting and debilitating effects on people's health. Yet over the last three decades, virtually no court decisions have decreased the showing of harm needed to establish persecution. To the contrary, courts have generally ratcheted up what is required. Today, most judicial decisions rest on the unwarranted assumption of an unbreakable asylum applicant who must show systematic and escalating physical mistreatment over a sustained period or a single instance of extraordinary harm that results in a scar, disability, or other lasting physical injury. Although mental harm can qualify as persecution, courts rarely find persecution based solely on mental mistreatment. And courts routinely fail to consider the longstanding mental effects of physical trauma. Court decisions on persecution are consistent with troubling studies suggesting people have difficulty empathizing with, and understanding, the situations of others when there is a lack of immediacy, and that decision makers and authority figures are prone to making racialized attributions of pain on the baseless assumption that people of color can withstand more pain than white people. Decision makers should seek to minimize the tendency to downplay the pain of others in asylum adjudications and adopt a human rights approach, which tags the concept of persecution to the

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violation of a human right and better tracks the prevailing understanding of how humans experience both physical and mental mistreatment, which grows more encompassing over time.

TABLE OF CONTENTS

INTRODUCTION

Hani Kazemzadeh was arrested, interrogated, and beaten for five hours by Iranian authorities because he was considered an anti-government political agitator.[1] After being detained for four days, the authorities released him but kept him under surveillance.[2] Mr. Kazemzadeh argued that his mistreatment constituted past persecution and thus qualified him for asylum.[3] The immigration judge and Board of Immigration Appeals ("Board") disagreed, finding that the abuse was not severe.[4] The U.S. Court of Appeals for the Eleventh Circuit refused to reverse the agency's finding, concluding that the record did not compel the conclusion that the physical abuse Mr. Kazemzadeh suffered rose to the level of persecution.[5] The Eleventh Circuit's restrictive approach to what constitutes persecution, as opposed to lesser forms of harm, is not an outlier. The First Circuit has stated that an applicant for asylum "bears a heavy burden and faces a daunting task in establishing subjection to past persecution."[6] The Eighth Circuit has characterized its case law as holding that "minor beatings and brief detention, even detentions lasting two or three days" do not amount to persecution.[7]

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1. Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1346–47 (11th Cir. 2009).
2. *Id.* at 1347.
3. *Id.* at 1345–46.
4. *Id.* at 1350.
5. *Id.* at 1352–55.
6. Martinez-Perez v. Sessions, 897 F.3d 33, 39 (1st Cir. 2018) (internal quotation marks omitted).
7. Njong v. Whitaker, 911 F.3d 919, 923 (8th Cir. 2018) (citing Eusebio v. Ashcroft, 361 F.3d 1088, 1091 (8th Cir. 2004) (holding that there was no past persecution where applicant was repeatedly detained and suffered detention resulting in injuries treated only with pain medication until the applicant sought medical attention a month later)). The court cited to cases involving beatings during detentions to support its conclusion. *Id.* (citing Nanic v. Lynch, 793 F.3d 945, 948 (8th Cir. 2015) (holding that beating by the police on two occasions did not compel finding of persecution)); La v. Holder, 701 F.3d 566, 571 (8th Cir. 2012) (holding that beating and a three-day detention did not amount to persecution); Samedov v. Gonzales, 422 F.3d 704, 707 (8th Cir. 2005) (holding that four-day detention together with police beating leading to broken thumb and injuries to left arm did not constitute persecution)); *see also* Briones v. U.S. Atty. Gen., 752 Fed. Appx. 898, 900 (11th Cir. 2018) (citing Kazemzadeh v. U.S. Atty. Gen., 577 F.3d 1341, 1353 (11th Cir. 2009)) ("Minor physical abuse and brief detentions do not amount to persecution"); Lopez v. Sessions, 886 F.3d 721, 724 (8th Cir. 2018) (citing Barillas-Mendez v. Lynch, 790 F.3d 787, 789 (8th Cir. 2025)) ("assault[s]"

In the decades since the passage of the Refugee Act in 1980, immigration agencies and federal courts have ratcheted up the requirement for what counts as persecution, taking the concept far afield from the original legislative understanding, and the international human rights law underpinnings, of the term.[8] As a result, people have been beaten, detained and degraded, and forced into stress positions for hours, only to have asylum adjudicators decide that their mistreatment did not constitute persecution. Increasingly, Board and judicial decisions rest on the unwarranted assumption of an unbreakable asylum applicant who must show systematic and escalating physical mistreatment over a sustained period or a single instance of extraordinary harm that results in a scar, disability, or other lasting physical injury.[9] Although mental harm can qualify as persecution, courts have rarely found persecution based solely on mental mistreatment in a published decision. Furthermore, courts routinely fail to consider the longstanding mental effects of physical mistreatment.[10]

This trajectory of restrictive decision-making breaks from the original, generous concept of persecution as encompassing most, if not all, physical harm as well as some mental and economic harm and runs contrary to today's understanding of how human beings experience trauma, including its lasting effects.[11] The contemporary medical and psychological understanding of trauma recognizes the connection between physical and mental wellbeing. Harm at the

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with "a cell phone cord and a belt" and hitting that "left temporary marks" on the applicant's skin were not persecution because they were "minor beatings").

8. For discussions of the unevenness of persecution findings and asylum determinations in general see Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 143 (2014) and JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

9. *See infra* Part II.

10. *See infra* note 65.

11. Hope Ferdowsian, Katherine McKenzie, and Amy Zeidan, *Asylum Medicine: Standard and Best Practices*, 21 HEALTH AND HUMAN RIGHTS JOURNAL, Vol. 21, No. 1, at 221 (June 2019) (explaining that most people who have experienced a traumatic event "suffer posttraumatic psychiatric symptoms and are at higher risk of developing mental illness"); *see also* Mina Fazel, Jeremy Wheeler, John Danesh, *Prevalence of Serious Mental Disorder in 7000 Refugees Resettled in Western Countries: A Systematic Review*, THE LANCET (2005) (explaining that refugees are at least tenfold more likely to suffer from post-traumatic stress disorder than age-matched general American population); *see also* discussion *infra* Part II.

lower end of the spectrum of severity can lead not only to long term mental health issues but physical ones as well.[12] The long-term effects of trauma have become so well known that a 2014 book authored by a psychiatrist on the topic is now a New York Times bestseller.[13] Despite our increased knowledge of human frailty, virtually no court or administrative adjudicator has decreased the showing of harm needed to establish persecution in a published opinion.

Agency and court decisions on what counts as persecution are consistent with troubling studies that suggest people have difficulty empathizing with, and understanding, the situations of others when there is a lack of immediacy, as well as findings that decision makers and authority figures are prone to making racialized attributions of pain on the baseless assumption that Black people and other people of color can withstand more pain than White people.[14] When deciding asylum claims, immigration judges and agency adjudicators listen to testimony about people's past pain and suffering and make judgments regarding the severity of harm. The Board and federal appellate courts review the decisions of immigration judges, conducting a paper review of the evidence, including prior testimony. They often defer to the fact finder's assessment of whether harm that rises to the level of persecution exists. The quality of the judgments of both the factfinders and the appellate judges depends on the ability to understand the true impact of harm on the human body and mind. Studies show that a psychological barrier exists to understanding the pain of others when the observer is removed in space or time from the experience.[15] And the ability to empathize with the pain of others, and to assess its level, is influenced by whether the pain victim is perceived by the observer as a member of the same group. Black people and other people of color routinely receive less pain medicine management than whites. Racial and gender stereotypes regarding

12. A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES (2014) (discussing the connection between traumatic experiences and behavioral health problems); *see also infra* Part IV.

13. BESSEL A. VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2014).

14. *See infra* Section II.A.

15. *See infra* notes 122–24 and accompanying text.

the ability to withstand pain and adversity distort assessments of harm.

Courts should reverse their current restrictive approach to what counts as persecution. Immigration judges, the Board, and federal courts should take steps to minimize the tendency to downplay the pain of others in asylum adjudications and adopt a new approach that ties the concept of persecution to the violation of a human right. What constitutes a human rights violation reflects contemporary understanding of human dignity and therefore better incorporates the prevailing view of how humans experience both physical and mental mistreatment. As our medical understanding of the nature and lasting effects of trauma broadens, so should our legal understanding of what qualifies as persecution.

Recalibrating the level of harm analysis will allow more asylum applicants, including all of those discussed below, to establish past persecution. But having experienced persecution in no way guarantees a grant of asylum, as applicants still must meet the other statutory requirements.[16] Under the refugee definition, not all traumas qualify a person for asylum, as the mental or physical harm cannot be the result of generalized violence but must have been "on account of" one of the five grounds for asylum.[17] Under this "nexus" requirement, the persecutor must have been motivated by the victim's race, religion, national origin, political opinion, or membership in a particular social group. This article does not analyze the "nexus" requirement but focuses solely on the level of harm analysis, arguing that the broad medical understanding of what counts as trauma encompasses many harms often excluded by courts as insufficiently severe to constitute persecution, such as threats, unlawful detention, witnessed abuse of others, and lesser beatings.

This article proceeds as follows. Part I describes U.S. law of asylum and its human rights law underpinning, demonstrating that the original conception of what counts as persecution was generous and flexible, encompassing a wide range of physical and mental harms. The Board and federal courts have generally taken a one-way

16. *See* 8 U.S.C. § 1158(b).

17. 8 U.S.C. § 1101(a)(42) (defining refugee stating grounds as political opinion, race, national origin, religion, and particular social group). The other requirements for asylum must also be met, including a timely application and a well-founded fear of persecution based on current country conditions. *See* 8 U.S.C. § 1158(a).

ratchet approach to defining persecution, first describing it as an "extreme concept" and then progressively restricting the types of harm that qualify.[18] Part II argues that today's agency and court decisions rest on the tacit assumption of an unbreakable victim, the idea that asylum applicants—unlike the rest of us mere humans—can withstand, or should be asked to withstand, beatings, threats, and other violence that we would find intolerable in our own lives. Studies document the danger of underassessing the level of a person's harm and pain when there is a lack of immediacy and demonstrate how pain assessments are racialized, leading to the systematic under-recognition of the pain felt by people of color. Part III describes our essential frailty as humans—the contemporary medical understanding of the human body and mind and how it reacts to harm and other trauma. Part IV argues for persecution to be understood as an evolving, inclusive norm tagged to our contemporary understanding of trauma as well as human rights law. Reviewing federal courts should conduct more searching review of agency persecution findings, treating them as questions of law subject to de novo review.

I. Asylum's Harm Analysis: From Generous Understanding to Extreme Concept

Despite being "at the heart" of asylum and refugee law, the concept of persecution has no definition in either U.S. asylum law or major international treaties relating to refugees.[19] Linguistically, the

18. Fatin v. I.N.S., 12 F.3d 1233, 1243 (3d Cir. 1993) (limiting the judicial concept of "persecution" so as not to "include every sort of treatment our society regards as offensive").

19. JAMES HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 182 (2014) (2nd ed.) (citing the United Nations High Commissioner for Refugees (UNHCR) Handbook). The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states, "There is no universally accepted definition of 'persecution[.]' . . . . From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom . . . is always persecution. Other serious violations of human rights . . . would also constitute persecution." U.N. REFUGEE AGENCY, UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. DOC. HCR/IP/4/ENG/REV.4 (FEB. 2019). Much of the discussion during the drafting of the Convention focused on the "geographical and temporal limitations" of the Convention, not the "kinds of persecution that would qualify an individual for refugee status." T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 11 (1991). "No

earliest usage of "persecution" conveyed "danger," "calamity," "harassment," or "oppression."[20] The modern, everyday meaning of the verb persecute is "to harass or punish in a manner designed to injure, grieve, or afflict."[21] Black's Law Dictionary defines persecution as "[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs."[22]

Under U.S. asylum law, a person must qualify as a "refugee" to be granted protection from return to their home country. A refugee is someone outside their country who cannot return "because of persecution or a well-founded fear of persecution" based on one of the five enumerated grounds, namely race, religion, national origin, political opinion, or membership in a particular social group.[23] Those who have suffered past persecution are presumed to have a well-founded fear of future persecution.[24] As a result of this presumption, applicants who can establish that harm they have suffered in the past rises to the level of persecution are more likely to prevail in their claims than those who cannot.

U.S. asylum law is based on international law. The international law principle of nonrefoulement, or nonreturn, prohibits a nation from returning people to places where their life or freedom would be threatened.[25] The principle of nonrefoulement gained recognition as a universal norm of human rights after the atrocities of World War II and the creation of the United Nations.[26] Under Article

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forms of persecution were intentionally excluded," but "minor inconveniences inflicted upon individuals" did not amount to persecution. *Id.* at 11–12.

20. *Persecutor*, OXFORD ENGLISH DICTIONARY (2005).

21. *Persecute*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/persecute [https://perma.cc/A4K8-TBL9]. As explained below, persecution is an international law term. It therefore must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331.

22. *Persecution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

23. 8 U.S.C. § 1101(a)(42).

24. 8 C.F.R. § 208.13(b)(1) (codifying that an applicant who establishes past persecution in their country of nationality or former habitual residence based on one of the five enumerated grounds "shall also be presumed to have a well-founded fear of persecution on the basis of the original claim").

25. GUY S. GOODWIN-GILL, JANE MCADAM, AND EMMA DUNLOP, THE REFUGEE IN INTERNATIONAL LAW 241–306 (2021).

26. *Id.*

14 of the Universal Declaration of Human Rights, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[27] The 1951 Convention Relating to the Status of Refugees assures that no signatory state "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[28] The Convention's phrase "life or freedom would be threatened" has the same meaning as "persecution."[29] In 1980, Congress passed the Refugee Act, as an amendment to the existing Immigration and Nationality Act (INA), to regularize the process of seeking asylum and to align domestic law with international treaty obligations. With some limited exceptions, the United States must withhold the deportation of a person whose life or freedom would be threatened on account of one of the five grounds for protection.[30] To a more select group of applicants, U.S. law permits the grant of asylum, a permanent status that can convert to lawful permanent residency after one year.[31]

The term persecution was carried forward into the Convention Relating to the Status of Refugees from the 1946 Constitution of the International Refugee Organization and "had its origins in even earlier refugee protection instruments that were written to exclude those persons seeking protection as a matter of mere 'personal convenience,'" signaling that the term was to include

27. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

28. United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1951). Article 1 of the Convention defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is outside their country of nationality or habitual residence and is unwilling to avail themselves of that country's protection or return to that country."

29. UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement, UN High Commissioner for Refugees (UNHCR)*, REFWORLD (1997), https://www.refworld.org/docid/438c6d972.html [https://perma.cc/7NY4-XGKZ].

30. 8 U.S.C. § 1231(b)(3)(A).

31. 8 U.S.C. § 1158 (asylum statute); 8 U.S.C. § 1159 (statute authorizing adjustment of status to lawful permanent residency); *see also* 8 C.F.R. § 209.2 (regulation governing adjustment of status to lawful permanent residency).

all but the most minor of hostile acts.[32] The international law understanding of persecution is tagged to our evolving understanding of human dignity[33] and intended to encompass the wide range of violence and threats during World War II that triggered mass migration and to protect people fleeing for "social or economic reasons," as well as political ones.[34] Though focused on "serious harm," persecution did not require violence of "life or death proportions."[35] As international law commentators have noted, a tension exists between the need for a generous and "flexible" concept that adapts to changing contexts and the necessity of a standardized understanding of the term.[36]

In the United States, courts have repeatedly observed that "[n]o precise definition of 'persecution' exists."[37] Protection from harm initially extended only to those who could show a probability of "physical persecution."[38] But some courts embraced a broad

32. DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES § 4:2 (2022); *see also* Aleinikoff, *supra* note 13, at 12 (discussing that the level of harm analysis for "persecution" was meant to exclude "minor inconveniences").

33. HATHAWAY & FOSTER, *supra* note 13, at 183 (citing Paul Weiss, *The Concept of the Refugee in International Law*, 87 J. DU DROIT INTERNATIONAL 928, 970 (1960)).

34. *Id.* (internal citations and quotation marks omitted).

35. *Id.*

36. *See id.* at 182 (citing A. GRAHL MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 193 (Vo. I, 1996)) (internal quotation omitted).

37. Panoto v. Holder, 770 F.3d 43, 46 (1st Cir. 2014); *see also* Grace v. Barr, 965 F.3d 883, 897 (D.C. Cir. 2020) ("The INA nowhere defines the term 'persecution'"); Juan Antonio v. Barr, 959 F.3d 778, 793 (6th Cir. 2020) (same); Adu v. U.S. Atty. Gen., 785 Fed. Appx. 776, 783 (11th Cir. 2019) (unpublished) (same); Mei Fun Wong v. Holder, 633 F.3d 64, 71–72 (2d Cir. 2011) ("[Persecution] is not statutorily defined and courts have not settled on a single, uniform definition." (internal quotation marks omitted)); Karim v. Holder, 596 F.3d 893, 896 (8th Cir. 2010) (stating that "[p]ersecution is a 'fluid concept'") (citations omitted)). Some states and regional bodies have tried to define persecution; Hugo Storey, *What Constitutes Persecution? Towards a Working Definition*, 26 INT'L J. REFUGEE L. 272, 274 (2014) (discussing Australia's attempt to define persecution); Won Kidane, *An Injury to the Citizen, A Pleasure to the State: A Peculiar Challenge to the Enforcement of International Refugee Law*, 6 CHI.-KENT J. INT'L & COMP. L. 116, 125, 135–41 (2006) (discussing attempts by the European Commission, the Organization of American States, and the Organization of African Unity to define persecution).

38. Internal Security Act of 1950, Pub. Law No. 831, 81st Cong., 2d Sess., C. 1024, amended the Immigration Act of 1917 to provide, "No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." *See*

understanding of physical persecution that included economic harm that "deprived a person of all means of earning a livelihood."[39] Additionally, Congress removed the qualifier "physical" from the statutory text of the INA in 1965.[40] During the Congressional debate on these amendments, the restriction limiting persecution to the physical drew criticism.[41] The requirement was labeled "outmoded" and "too narrow."[42] There was a concern that it would be "almost impossible for the alien under an order of deportation to assemble the quantum of evidence necessary to discharge his burden of proof."[43] Commenting on the legislative history of the term persecution, the Ninth Circuit stated in 1969: "[I]t seems beyond argument that by deleting the word 'physical,' Congress intended to effect a significant, broadening change . . . which would lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm. This intent seems especially relevant in cases of alleged economic persecution."[44] The court embraced the "ordinary" dictionary meaning of persecution as "the infliction of suffering or harm"[45] and signaled its understanding of the outer limits of what counted as persecution under the amended definition by counterposing persecution with "minor disadvantage or trivial

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Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir. 1961) (denying protection on the ground that the feared harm was not "physical").

39. *See, e.g.*, Soric v. Flagg, 303 F.2d 289, 290 (7th Cir. 1962) ("The government agrees that economic sanctions so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution.").

40. Immigration and Nationality Act, Pub. L. No. 89-236, §11(f), 79 Stat. 918.

41. *See* Kovac v. Immig. and Naturalization Serv., 407 F.2d 102, 105 (9th Cir. 1969) (citing *Hearings on S. 500 Before the Subcomm. on Immigration & Naturalization of the Senate Judiciary Comm.*, 89th Cong. 535, 887 (1965); *Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Judiciary Comm.*, 89th Cong., 217 (1965); *Hearings on H.R. 7700 Before Subcomm. No. 1 of the House Judiciary Comm.*, 88th Cong 860–61 (1964)); *see also Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcommittees of the Committees of the Judiciary*, 82d Cong. 438, 449, 539–40, 628, 681 (1952).

42. 111 Cong. Rec. 21804 (August 25, 1965).

43. *Id.*

44. Kovac, 407 F.2d at 106 (9th Cir. 1969).

45. *Id.* at 107 (citing *Persecution*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1965)).

inconvenience."[46] "[S]ubstantial economic disadvantage," the court found, could qualify as persecution.[47]

In 1980, after decades of piecemeal legislation addressing refugee issues, Congress passed the Refugee Act, the first comprehensive refugee legislation.[48] The Act removed ideology from the refugee protection scheme, installed a universal standard available to people from all countries, and otherwise aligned domestic law with international human rights obligations toward refugees.[49] The word "persecution" remained in the statute, unmodified and without definition.[50] Legislative history reveals an expansive understanding of asylum as protection for people facing both physical and economic harm.[51] Witnesses from the Departments of State and Justice testified to the mixed motivations of most refugees and the ways in which persecuting states imposed economic sanctions for political reasons.[52] Bona fide refugees, the officials pointed out, might

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46. *Id.*

47. *Id.*

48. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1157–59).

49. *Id.* Prior to the Refugee Act, "the history of refugee admissions into the United States [was a] story of a series of temporary responses to emergency crises." Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 9 SAN DIEGO L. REV. 9 (1981). The goal of the Act was to "create a nondiscriminatory definition of refugee and to make United States law conform to the UN Convention." *Id.* at 60 (citing S. REP. NO. at 19 (1980)).

50. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 103 (codified at 8 U.S.C. § 1521 (1980)).

51. H.R. 3056, 95th Cong., 1st Sess. § 207(a) 123 CONG. REC. 3431 (1977); *Hearings on H.R. 3056 Before the Subcomm. on Immigr., Citizenship and Int'l L. of the H. Comm. on the Judiciary*, 95th Cong. 61 (1977); *Hearings on H.R. 9133, H.R. 9134, and H.R. 9110 Before the Subcomm. on Immigration, Refugee and Int'l L. of the H. Comm. of the Judiciary*, 95th Cong. (1977); *Admission of Refugees, Part II: Indochinese Refugees and U.S. Refugee Policy*, 95th Cong. 89, 120, 121, 164, 169, 170, 183, 201, 243, 248 (1977–78); *The Refugee Act of 1979: Hearings on S. 643 Before the Sen. Comm. on the Judiciary*, 96th Cong. 36 (1979); *Hearings on H.R. 2816 Before the Subcomm. on Immigr., Refugee and Int'l L. of the H. Comm. of the Judiciary*, 96th Cong. (1979); H. Rep. No. 608, 96th Cong. (1979); *S. Rep. No. 590*, 96th Cong. 1 (1980).

52. *See, e.g., Hearings on H.R. 2816 Before the Subcomm. on Immigr., Refugee and Int'l L. of the H. Comm. of the Judiciary*, 96th Cong. 49 (1979) (statement of Dick Clark, United States Coordinator for Refugee Affairs) ("Much of [the] human flood in recent months can be attributed to the policies of the Hanoi government . . . . [T]he Vietnamese have systematically uprooted ethnic Chinese and other minorities and assisted their departure by boat or land, after

articulate economic reasons for coming to the U.S. and these statements should not be used against people seeking protection.[53] Any exclusion of economic harm from the ambit of protection was characterized as "spurious."[54] The legislative branch's commitment to protecting people who suffered economic harm and who expressed economic motivations for coming to the U.S. indicated a generous reading of the kinds of harm "persecution" was intended to include.[55]

Today, the term persecution remains undefined by Congress. In the half century that persecution has been in the INA, the administrative adjudicators in the U.S. Department of Justice—one of the agencies tasked with interpreting and applying the statute—have not defined the level of qualifying harm.[56] In the

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extracting large exit fees."); *Admission of Refugees into the United States Part II: Hearings Before the Subcomm. On Immigration, Citizenship, & International Law of the H. Comm. on the Judiciary*, 95th Cong. 89 (1977–78) (statement of Hon. Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs, Department of State) (stating it would be "extremely difficult to separate out political and economic refugees from a flow of refugees fleeing a country").

53. *Admission of Refugees into the United States Part II: Hearings Before the Subcomm. On Immigration, Citizenship, & International Law of the H. Comm. on the Judiciary*, 95th Cong. 120-22 (1977–78) (statement of Hon. Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs, Department of State).

54. *Id.* at 170 (statement of Leo Cherne, Chairman of International Rescue Committee).

55. *See* Barry Sautman, *The Meaning of "Well-Founded Fear of Persecution" In United States Asylum Law and in International Law*, 9 FORDHAM INT'L. L. J. 483, 539 (1986) (noting that the scope of persecution was intended to be generous).

56. Sahi v. Gonzales, 416 F.3d 587, 588 (7th Cir. 2005) ("Neither the parties' research nor our own has brought to light a case in which the BIA has defined 'persecution'" and "[t]he Board has failed to discharge that responsibility."); Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 340 (2d Cir. 2006) (noting that the term "persecution" is "not defined by the Immigration and Nationality Act"). The BIA has stated that persecution is "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). But the BIA has declined to define persecution, stating that Congress purposely left it undefined. Matter of Negusi, 27 I. & N. Dec. 347 (BIA 2018). U.S. Courts of Appeals have offered definitions of persecution but do not specify the level of harm needed to qualify. *See, e.g.*, Yasinskyy v. Holder, 724 F.3d 983 (7th Cir. 2013) ("significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force . . . or nonphysical

absence of a statutory or regulatory definition, the Board and federal courts have been left to their own devices.[57] Consensus exists that not every physical or mental harm is serious enough to constitute persecution, but adjudicators struggle to draw a line between harm that qualifies as persecution and harm that does not. This case-by-case approach has resulted in a patchwork of decisions.[58]

Unlike the jurisprudence relating to other aspects of the refugee definition, the published case law on persecution has largely developed in the U.S. Courts of Appeals rather than in administrative decisions by the Board or the U.S. Attorney General. The Board has issued only about twenty published decisions delineating the contours of persecution.[59] In 1996, the Board held that an asylum applicant

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harm of equal gravity"); Guardado v. Holder, 553 Fed. Appx. 459, 460 (5th Cir. 2014) (unpublished) ("the infliction of suffering or harm," including non-physical harm such as "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life") (quoting *Eduard v. Ashcroft*, 379 F.3d 182, 187 (5th Cir. 2004) and *Abdel-Masieh v. INS*, 73 F.3d 579, 584 (5th Cir. 1996)); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) ("threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom").

57. *See, e.g.*, Gurung v. Atty. Gen. U.S., 811 Fed. Appx. 777, 781 (3d Cir. 2020) (unpublished) ("Persecution is defined as 'threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.'") (citing Camara v. Att'y Gen., 580 F.3d 196, 202 (3d Cir. 2009) (citation omitted)).

58. *See* Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) (characterizing the definition of persecution as encompassing an "I know it when I see it" test). *See generally* DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 168–59 (2022) (discussing that U.S. courts have "inconsistent, result-oriented analysis . . . continues to confuse the development of a meaningful framework for analyzing persecution"). *See also infra* Part II. A U.S. Court of Appeals judge has commented on the persecution findings, stating "while it is distasteful to have to quantify suffering for the purposes of determining asylum eligibility, that is our task." Dandan v. Ashcroft, 339 F.3d 567 (7th Cir. 2003) (upholding agency finding that being detained, beaten, and deprived of food for three days did not constitute persecution).

59. *See* Matter of T-Z-, 24 I. & N. Dec. 163 (BIA 2007); Matter of A-B-, 28 I. & N. Dec. 199, 213 n.2 (2021); Matter of M-F-W- & L-G-, 24 I. & N. Dec. 633 (BIA 2008); Matter of O-Z- & I-Z-, 22 I. & N. Dec. 23 (BIA 1998); In Re A-T-, 24 I. & N. Dec. 296 (BIA 2007); Matter of M-D-C-V-, 28 I. & N. Dec. 18 (BIA 2020); Matter of O-F-A-S-, 27 I. & N. Dec. 709 (BIA 2019); In Re H-, 21 I. & N. Dec. 337, 341 (BIA 1996); In Re R-A-, 22 I. & N. Dec. 906 (BIA 2001); In Re A-M-, 23 I. & N. Dec. 737 (BIA 2005); In Re C-Y-Z-, 21 I. & N. Dec. 915 (BIA 1997); Matter of L-S-, 25 I. & N. Dec. 705 (BIA 2012); Matter of A-E-M-, 21 I. & N. Dec. 1157 (BIA 1998); In Re J-H-S-, 24 I. & N. Dec. 196 (BIA 2007); Matter of Chen, 20 I. & N. Dec. 16, 21

had suffered persecution when he was detained for five days and had been "badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present."[60] Two years later, the Board held that an asylum applicant "who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation on account of his Jewish nationality established" past persecution.[61] In a recent published case on past persecution, the Board found that a phone call threat followed by a written threat left at the applicant's house did not constitute past persecution.[62]

Although the Board decides what counts as persecution on a regular basis, it does so in its vast number of unpublished decisions, which have no precedential effect. As a result, much of the development of the law lies in U.S. Court of Appeals decisions reviewing these numerous unpublished agency decisions. In the last twenty years, appellate courts have decided over 200 cases interpreting the level of harm needed to qualify for persecution, ruling on whether harm ranging from beatings to death threats to economic loss constitute persecution.

Establishing past persecution under U.S. domestic law has never been easy for asylum seekers. But the general trend of courts has been toward a narrow approach. This trend began in the 1990s, ten years after the Refugee Act was passed. A major development in the evolution of the scope of persecution occurred in 1993, when the

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(BIA 1989); Matter of N-M-A-, 22 I. & N. Dec. 312, 326 (BIA 1998); Matter of L-K-, 23 I. & N. Dec. 677, 683 (BIA 2004); Matter of H-M- et al., 20 I. & N. Dec. 683 (BIA 1993); Matter of S-L-L-, 24 I. & N. Dec. 1 (BIA 2006).

60. In Re H-, 21 I. & N. Dec. 337, 341 (BIA 1996).

61. Matter of O-Z- & I-Z-, 22 I. & N. Dec. 23, 23 (BIA 1998); *see also* Matter of L-K-, 23 I. & N. Dec. 677, 683 (BIA 2004) (holding multiple home invasions resulting in injury met persecution standard articulated in *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998)). The Board also held that a threat painted on a house does not rise to the level of persecution. Matter of A-E-M-, 21 I. & N. Dec. 1157, 1159 (BIA 1998).

62. Matter of M-D-C-V-, 28 I. & N. Dec. 18, 31 (BIA 2020) (citing Duran-Rodriguez v. Barr, 918 F.3d 1025, 1028–29 (9th Cir. 2019)). Appellate courts have upheld findings that threats can qualify as persecution. *See, e.g.*, Bedoya v. Barr, 981 F.3d 240, 246 (4th Cir. 2020) (holding written threats alone qualified as persecution, even when the persecutors did not physically approach the applicants). *But see* Setiadi v. Gonzales, 437 F.3d 710, 713 (8th Cir. 2006) (explaining that "[p]ast persecution does not normally include unfulfilled threats of physical injury").

Third Circuit first described persecution as an "extreme concept."[63] In *Fatin v. U.S.*, the court found that a woman being forced to wear a veil was not sufficiently severe to qualify as persecution. In reaching its conclusion, the court stated that "persecution is an *extreme* concept that does not include every sort of treatment our society regards as offensive."[64] Other circuit courts rushed to embrace the characterization of persecution as "extreme" harm. At first, courts used the phrase in the same way the Third Circuit did in *Fatin*—to make the straightforward point that persecution does not encompass all "actions and attitudes that do not measure up to our own ideals of justice and fairness."[65] But soon the phrase "extreme concept" took on a life of its own, gaining a potency unhinged from the facts of *Fatin*. Courts began using the descriptor to exclude physical violence.

Over the last two decades, courts have continued to use the phrase "extreme concept" to characterize persecution.[66] Between 2000 and 2005, federal appellate courts used the phrase a total of 179 times in reported and unreported cases searchable on the legal database Westlaw. Between 2011 and 2015 and between 2016 and 2020, this number was about 200. As illustrated below, courts have ratcheted up the harm requirement during that time. They moved from citing physical violence as the archetype of persecution to finding that only high levels of physical violence met the "extreme concept" test. Courts began to counterpose persecution against mere harassment and discrimination.[67] Just as "extreme" began to take on

63. Fatin v. I.N.S., 12 F.3d 1233, 1243 (3d Cir. 1993); *see also* Fisher v. I.N.S., 61 F.3d 1366, 1375 (9th Cir. 1994), *on reh'g en banc*, 79 F.3d 955 (9th Cir. 1996).

64. Fatin v. I.N.S., 12 F.3d at 1243 (emphasis added).

65. Fisher v. I.N.S., 37 F.2d 1371, 1382 n. 8 (9th Cir.1994); *see also* Singh v. I.N.S., 134 F.3d 962, 967 (9th Cir.1998) ("Although persecution does not require bodily harm or a threat to life or liberty, persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.") (quotation and citation omitted); Mikhailevitch v. I.N.S., 146 F.3d 384, 390 (6th Cir. 1998) (explaining that persecution "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty").

66. The asylum regulation now states that "persecution is an extreme concept." 8 C.F.R. § 208.1(e).

67. Beskovic v. Gonzales, 467 F.3d 223, 225–26 & n.3 (2d Cir. 2006) ("Persecution may include 'non-life-threatening violence and physical abuse,' but the harm must rise above 'mere harassment.'"); Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 341 (2d Cir. 2006); Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir.1998) (explaining that persecution "requires more than a few isolated

a meaning that excluded some forms of physical harm, harassment started to include not just verbal abuse but physical abuse as well. The Board and federal courts began to focus on whether the harm was part of a pattern, as opposed to a single incident. Harm that was not part of a pattern needed to be especially egregious, such as harm that inflicted a lasting injury or required significant medical intervention.

A. Physical Harm As Archetype

Courts have retreated from the early view that all physical harm, and some nonphysical harm, qualifies as persecution. The first post-Refugee Act cases interpreting the definition of persecution assumed that physical mistreatment of all sorts represented the quintessential type of persecutorial harm. Physical violence ordinarily met the requirement of severity that characterizes persecution, as opposed to mere discrimination.[68] In 2003, the Ninth Circuit stated that certain types of threats were mere harassment but that "physical violence ordinarily meets the requirement of severity that characterizes persecution as opposed to mere discrimination."[69]

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incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); Bradvica v. I.N.S., 128 F.3d 1009, 1012 (7th Cir.1997) ("[M]ere harassment does not amount to persecution"); Gonzalez v. Reno, 212 F.3d 1338, 1355–56 (11th Cir. 2000); Nagoulko v. I.N.S., 333 F.3d 1012, 1016–17 (9th Cir. 2003) (finding that applicant who was teased, bothered, discriminated against, and harassed but not a victim of physical violence did not experience persecution); Rife v. Ashcroft, 374 F.3d 606, 612 (8th Cir. 2004) ("[H]arassment . . . does not constitute persecution."). Discrimination can rise to the level of persecution under international human rights law. According to the UNHCR, "[w]hile discrimination may not, in the normal course, amount to persecution, particularly egregious forms of discrimination certainly will . . . . [A] persistent pattern of discrimination will usually, on cumulative grounds, amount to persecution." UNHCR, UNHCR & International Protection: A Protection Induction Programme, Chapter 2: Persons of Concern to UNHCR 21 (June 30, 2006), *available at* http://www.unhcr.org/publ/PUBL/44b5005c2.pdf.

68. *See, e.g.*, Duarte de Guinac v. I.N.S., 179 F.3d 1156, 1161 (9th Cir. 1999) ("[W]e have consistently found persecution where, as here, the petitioner was physically harmed."); Korablina v. I.N.S., 158 F.3d 1038, 1044 (9th Cir. 1998) ("Persecution may be found by cumulative, specific instances of violence and harassment toward an individual and her family members.") (internal citation omitted).

69. Hoxha v. Ashcroft, 319 F.3d 1179, 1182 n. 5 (9th Cir. 2003) (citing Duarte de Guinac, 179 F.3d at 1161).

Consistent with this approach, the court recognized that some threats and mental harm could qualify as persecution.[70] In 1984, the court admonished the Board for "turn[ing] logic on its head" when it rejected a death threat as persecution simply because such threats were common in El Salvador.[71]

As explained below, courts, including the Ninth Circuit, began to retreat from recognizing all physical harm as persecution. Although no court has disavowed the position that mental harm, including threats, can qualify as persecution, courts have almost always found that such harm—when not combined with physical harm—falls short.[72] Few, if any, courts have considered whether

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70. Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997) (holding death threats to forcibly recruit followers for a revolutionary army are sufficient to establish persecution); Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1284–86 (9th Cir. 1984) (holding threats could be enough to establish that the petitioner would face persecution); Turcios v. I.N.S., 821 F.2d 1396, 1402 (9th Cir. 1987) ("Persecution does not require an arrest; Petitioner's freedom was threatened when he was watched continuously and felt compelled to restrict his activities."); Mofrad v. I.N.S., 30 F.3d 139, *3 (9th Cir. 1994) ("The term 'persecution' encompasses many forms and degrees of physical, social or psychological harm."); Fisher v. I.N.S., 79 F.3d 955, 962 (9th Cir. 1996) ("The Board's interpretation of persecution also is consistent with our decisions defining persecution to encompass both physical and mental suffering.").

71. Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1284 (9th Cir. 1984).

72. *See, e.g*, Morales Lopez v. Garland, 852 Fed. Appx. 758, 775 (5th Cir. 2021) ("It is not clear, however, whether the IJ's omission of psychological harm is error.") (citing Karanja v. Keisler, 251 F. App'x 891, 892 (5th Cir. 2007) (noting "a lack of authority concluding that emotional distress is a type of harm that constitutes past persecution")); Centeno-Hernandez v. U.S. Atty. Gen., 311 Fed. Appx. 227, 229 (11th Cir. 2009) (unpublished) (finding no persecution despite psychological harm of sleep deprivation and frequent interrogation); Roxas v. Ashcroft, 81 Fed. Appx. 642, 644 (9th Cir. 2003) (unpublished) (holding death threats from political group are not persecution); Zheng v. United States Att'y Gen., 451 F.3d 1287, 1291 (11th Cir. 2006) (finding no persecution where applicant was detained for several days, harmed with psychological coercion and forced to stand in the sun for an extended period); Escobedo Marquez v. Barr, 965 F.3d 561, 565 (7th Cir. 2020) ("[T]hreats alone can compel a finding of persecution 'only in the most extreme circumstances, such as where they are of a most immediate or menacing nature or if the perpetrators attempt to follow through on the threat[s].'") (citing Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) and Bejko v. Gonzales, 468 F.3d 482, 486 (7th Cir. 2006)); Villegas Sanchez v. Garland, 990 F.3d 1173, 1177 (9th Cir. 2021) (quoting BIA decision finding that "threats, though 'understandably frightening,' did not rise to the level of past persecution because 'unfulfilled threats generally 'constitute harassment rather than persecution'"); Centeno-Hernandez v. U.S. Atty Gen., 311 Fed. Appx. 227, 229 (11th Cir. 2009) (finding no persecution where applicant was detained,

witnessing the harm of others could constitute qualifying harm, and those that have done so declined to rule it was persecution.[73] Similarly, courts have found that, in principle, severe economic deprivation can qualify as persecution but typically rule that it is not sufficiently severe.[74]

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interrogated frequently, and was permitted to sleep for only a few hours during detention); Lim v. INS, 224 F.3d 929, 936 (9th Cir. 2000) ("Threats themselves are sometimes hollow and, while uniformly unpleasant, often do not effect significant actual suffering or harm."); *see also* Nermeen S. Arastu, *Access to a Doctor, Access to Justice? An Empirical Study on the Impact of Forensic Medical Examinations in Preventing Deportations*, 35 HARV. HUM. RIGHTS J. 47, 52 (2022) ("[F]indings show that physical harms may have been viewed [by adjudicators] as more persuasive than psychological harm."). *But see* Jaramillo v. Gonzales, 222 Fed. Appx. 35, 38 (2d Cir. 2007) (holding that threats of death and rape constituted past persecution).

73. The Cano v. Barr, 956 F.3d 1034, 1039 (8th Cir. 2020) (finding no past persecution where applicant was "threatened at gunpoint while helplessly watching her son be beaten and abducted" because applicant was "never physically harmed" and "experienced only an unfulfilled threat of physical injury"); Shoaira v. Ashcroft, 377 F.3d 837, 844 (8th Cir. 2004) (finding psychological harm from applicant's "rough treatment" by Egyptian authorities and "from witnessing her father's arrest on three occasions" did not qualify). In this regard, asylum case law is out of step with other areas of immigration law that contemplate witnessing the mistreatment of others as potentially qualifying harm. Such victims may qualify for a nonimmigrant "U" visa under 8 U.S.C. § 1101(a)(U). *See* Dep't of Homeland Sec., New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 FR 53016 (A)(1)(a)(i) (Sept. 17, 2007) (holding that immigration adjudicators have discretion to treat "bystanders" as victims if they "suffer unusually direct injuries as victims.") (citing to Office for Victims of Crime, Attorney General Guidelines for Victim and Witness Assistance (May 2005)).

74. *See* Tao Chen v. U.S. Att'y. Gen., 704 Fed. Appx. 881, 883 (11th Cir. 2017) (holding that economic sanctions can be persecution if they reduce a person "to an impoverished existence" but denying asylum); Eduard v. Ashcroft, 379 F.3d 182, 187 (5th Cir. 2004) ("The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.") (citing Abdel–Masieh v. INS, 73 F.3d 579, 583–84 (5th Cir.1996) (citation omitted)); Machic v. Ashcroft, 94 Fed. Appx. 596, 597–98 (9th Cir. 2004) (holding that the government's limiting of applicant's "access to health care, education, and employment" are not persecution); Burog-Perez v. I.N.S., 95 Fed. Appx. 886, 888 (9th Cir. 2004) (holding that a dentist who lost patients because of her sexual orientation are not persecuted); Askari v. Ashcroft, 110 Fed. Appx. 254, 257 (9th Cir. 2004) (being blocked from medical specialization in certain area of medicine does not qualify as persecution); *see also* Hussain v. Rosen, 18-70780, 2021 WL 79915 (9th Cir. Jan. 11, 2021) ("We have defined economic persecution as 'substantial economic disadvantage' that interferes with

B. Harassment and Discrimination v. Persecution

Parallel to the use of the phrase "extreme concept" to exclude some forms of harm from the definition of persecution, courts started to draw a distinction between harm that qualifies as persecution and harm that is mere "harassment" or "discrimination."[75] Although international standards and early commentators understood some discrimination as qualifying as persecution, U.S. agencies and courts have never embraced this approach.[76] The terms harassment and discrimination generally connote nonphysical acts, such as verbal abuse or blocked access to jobs and other opportunity, but U.S. courts have sometimes placed physical violence in these categories as a means of excluding it from the definition of persecution. In 2010, the Tenth Circuit found that being abducted from one's home in the middle of the night and forced to walk to a field and made to lie on the ground and later being "kidnapped on the street, blindfolded," interrogated, and threatened with death was "more akin to harassment than persecution."[77] The Eleventh Circuit failed to reverse a decision denying asylum to Ashok Patel, an Indian asylum seeker who was beaten.[78] The court characterized the beating as "harassment" and held that it "falls short of persecution" because it "resulted only in swelling, bruising, and tenderness on his torso."[79] In 2009, the same court found that a woman had suffered only harassment when a man "led [her] into an alley, placed a gun at her head," "hit, kicked, and fondled" her and said she was 'marked' and

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the applicant's livelihood . . . .") (citing He v. Holder, 749 F.3d 792, 796 (9th Cir. 2014) (internal citation omitted)).

75. *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (internal quotation marks and alterations omitted) ("Persecution is an extreme concept, which ordinarily does not include discrimination on the basis of race or religion, as morally reprehensible as it may be.").

76. *See* Deborah Anker and Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 67 (1981) ("Persecution may take the form of specific hostile acts or it may consist of an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."); Office of the United Nations High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979) (referring to persecution as "serious discriminatory or other offensive acts").

77. Nalwamba v. Holder, 375 Fed. Appx. 859, 864 (10th Cir. 2010).

78. Patel v. U.S. Atty Gen., 747 F. App'x 819, 821 (11th Cir. 2018) (unpublished).

79. *Id.*

that her family should 'know better.'"[80] Other courts have also used the rhetoric of "harassment" to dismiss forms of physical mistreatment as unqualifying.[81] Dubbing beatings, abductions, and sexual abuse "harassment" instead of physical harm distorts the plain meaning of the term and needlessly places obstacles in the way to asylum protection by depriving applicants of the presumption of future harm that accompanies a finding of past persecution.

C. Isolated v. Pattern of Physical Harm

Further ratcheting up what is required to show persecution, courts have required that the harm be part of a pattern or that a single instance of harm be exceptionally severe and cause serious injury or lasting harm.[82] In early cases, some courts recognized that a single instance of physical harm, such as a beating, qualified as persecution.[83] But many later decisions began to require more than a

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80. Rakiq v. U.S. Atty. Gen., 344 Fed. Appx. 501 (11th Cir. 2009).

81. *See, e.g.*, Patel, 747 Fed. Appx. at 821 (characterizing as "harassment" that "falls far short" of persecution a beating that "resulted only in swelling, bruising, and tenderness on his torso" combined with "occasional threats to [the applicant's] mother); Okpara v. U.S. Atty Gen., 860 F. App'x 667, 669–70 (11th Cir. 2021) (beating did "not amount to persecution because it was an isolated incident of harassment by a single individual"); Hussain v. Holder, 576 F.3d 54, 57 (1st Cir. 2009) ("[T]he law of this circuit is clear that not every instance of physical harm rises to the level of persecution, for [t]o qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering.") (internal quotations omitted); Fedosseeva v. Gonzales, 492 F.3d 840 (7th Cir. 2007) (holding that kicks by three men "rose only to the level of harassment, not persecution"); Janelidze v. U.S. Atty. Gen., 197 Fed. Appx. 859, 862 (11th Cir. 2006) (holding that beatings and threat at gunpoint were "troubling" but constituted "harassment, not persecution"); Chin v. Holder, 471 Fed. Appx. 72 (2d Cir. 2012) (holding that "frequent[] grop[ing]" and single threat of rape was "harassment, not persecution").

82. The Eleventh Circuit found persecution in a case because the applicant was "handcuffed to a bar and left outside overnight exposed to the elements, a fact [the court] said 'highlights the unusual nature of the authorities' efforts to suppress [the applicant's] religious practice.'" Qinrong Chen v. U.S. Atty. Gen., 573 Fed. Appx. 878, 880 (11th Cir. 2014) (citing Shi v. U.S. Att'y Gen., 707 F.3d 1231 (11th Cir. 2013)); *see also* De Santamaria v. U.S. Atty Gen., 525 F.3d 999 (11th Cir. 2008) (finding persecution where applicant was threatened with death, dragged by hair out of car, beaten, kidnapped, and had groundskeeper tortured and killed).

83. Vaduva v. I.N.S., 131 F.3d 689, 690 (7th Cir. 1997) (finding past persecution where petitioner was beaten once—punched, face bruised, and finger broken); Asani v. I.N.S., 154 F.3d 719, 721 (7th Cir. 1998), as amended (Oct. 28,

single instance of physical violence. The concept of non-qualifying physical harm being "isolated," as opposed to part of a pattern, emerged.[84] Courts began to take the view that physical harm does not necessarily constitute persecution and that more than a single incident of physical harm is typically required.[85]

One source of confusion about whether a pattern is necessary for harm to qualify as persecution is that the asylum analysis makes patterns relevant in related, but distinct, inquiries. Nothing in the level of harm analysis requires that a pattern of harm exists. One incident alone can suffice. However, if a pattern does exist, adjudicators must evaluate the multiple instances of past harm in the aggregate to determine whether, together, they constitute persecution.[86] One incident of harm might not rise to the level of persecution, but more than one—a pattern—might.[87] But this rule about considering multiple harms in the aggregate in no way makes a pattern a prerequisite for past persecution. Courts that suggest otherwise are incorrect.

Patterns are also relevant in cases where there is no past persecution, but the applicant could qualify based on a well-founded fear of future persecution.[88] In these cases, adjudicators must assess

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1998) (rejecting BIA's determination that a single beating in which a petitioner lost two teeth did not constitute persecution).

84. *See* Dandan v. Ashcroft, 339 F.3d 567, 573–74 (7th Cir. 2003) (holding that there is no persecution where the applicant was detained, beaten until his face was swollen, and deprived of food for three days where it only happened once); Mullai v. Ashcroft, 385 F.3d 635, 637–38 (6th Cir. 2004) (finding no persecution where applicant was detained once for over a week and beaten by police); Zhu v. Gonzales, 465 F.3d 316, 320 (7th Cir. 2006) (finding that evidence of an isolated beating by family planning officials, on account of the petitioner's resistance to China's family planning policies, did not compel a finding of past persecution); Wiratama v. Mukasey, 538 F.3d 1, 7 (1st Cir. 2008) ("[I]solated beatings, even when rather severe, do not establish the systematic mistreatment needed to show persecution."); Decky v. Holder, 587 F.3d 104, 111 (1st Cir. 2009) (finding no persecution where the beating was an isolated event and there was no evidence of systematic mistreatment).

85. Courts have found some single instances of harm qualify as persecution if they are extremely severe. *See, e.g.*, Fon v. Garland, 34 F.4th 810, 814 (9th Cir. 2022) (holding that "single episode of bloody physical violence" that involved stab to the stomach leaving "visible scar" constituted past persecution).

86. *See* Herrera-Reyes v. U.S. Atty. Gen., 952 F.3d 101, 109 (3d Cir. 2020).

87. *See* Manzur v. U.S. Dept. of Homeland Sec., 494 F.3d 281, 290 (2d Cir. 2007).

88. 8 C.F.R. § 1208.13(b)(2)(iii)(A).

the probability of persecution in the future. Patterns, such as a string of events indicating a threat or a practice of persecuting similarly situated individuals, are relevant to this inquiry into the probability of future harm.[89] But neither the rule on considering harm in the aggregate nor the need for a probability analysis in cases not involving past persecution *require* that past harm be part of a pattern to constitute persecution. A single instance of past harm can qualify, if it rises to the level of persecution.[90]

Another source of confusion stems from a misreading of the Ninth Circuit case *Hoxha v. Ashcroft*.[91] *Hoxha* involved the case of an ethnic Albanian man from the Kosovo region of Serbia. Mr. Hoxha had experienced a lifetime of harassments and threats due to his ethnicity, including threats that he would be killed if he did not leave the country. But Mr. Hoxha had only been physically mistreated once. After hearing Mr. Hoxha and a friend speak Albanian, a group of Serbs attacked and beat them. Mr. Hoxha sought medical care for "extensive facial bruises and two broken ribs."[92] The Court found that Mr. Hoxha's experiences had been "disturbing and regrettable," but found that they did not "compel a finding of past persecution."[93] The death threats were "harassment rather than persecution."[94] The beating did not qualify as persecution because it "was not connected with any particular threat and there [was] no evidence indicating that the incident was officially sponsored."[95] The Court rejected the single instance of physical harm *not* because it was insufficiently severe but because it was not linked to one of the five grounds for asylum—the distinct nexus requirement for asylum. Indeed, as discussed above, the court affirmed that "physical violence ordinarily meets the requirement of severity that characterizes persecution as opposed to mere discrimination."[96] However, the Ninth Circuit, in subsequent decisions and up until the present day, erroneously cites to *Hoxha* as holding that a single instance of physical harm does not

89. *Id.*; Gailius v. I.N.S., 147 F.3d 34, 47 (1st Cir. 1998).
90. Thayalan v. U.S. Atty. Gen., 997 F.3d 132, 139 (3d Cir. 2021).
91. Hoxha v. Ashcroft, 319 F.3d 1179 (9th Cir. 2003).
92. *Id.* at 1181.
93. *Id.* at 1182.
94. *Id.*
95. *Id.*
96. *See supra* n. 67.

necessarily qualify as persecution, unless it was particularly severe.[97] Because the reason for the denial in *Hoxha* was the harm's lack of relationship to one of the five grounds, not the harm's insufficient severity, the Ninth Circuit should not have relied on the case as saying a single physical harm can fall short of persecution.

Courts from other circuits have also shrunk the universe of what counts as persecution by adopting the view that a single instance of physical mistreatment does not necessarily constitute persecution.[98] In 2005, the Third Circuit explained the state of its jurisprudence on persecution by employing the concept of a "simple beating." The court stated, "While this Court has not yet drawn a precise line concerning where a simple beating ends and persecution begins, our cases suggest that isolated incidents that do not result in serious injury do not rise to the level of persecution."[99] More recently,

97. Gukutu v. Mukasey, 269 Fed. Appx. 679 (9th Cir. 2008) ("[T]he single incident of physical harm that Gukutu endured did not rise to the level of past persecution.") (citing *Hoxha*, 319 F.3d at 1182); Pakulov v. Gonzales, 221 Fed. Appx. 654 (9th Cir. 2007) ("[A] single assault and veiled threats [] do not rise to the level of persecution.") (citing *Hoxha*, 319 F.3d at 1182); Kuwe Kheng Lie v. Ashcroft, 114 Fed. Appx. 924 (9th Cir. 2004) (holding that "on-going religious harassment and a single act of physical violence [] do not compel a finding" of persecution) (citing *Hoxha*, 319 F.3d at 1185); Wang v. Ashcroft, 108 Fed. Appx. 519, 521 (9th Cir. 2004) (holding that the applicant's "single arrest and detention, and the physical abuse she endured, does not rise to the level of persecution") (citing *Hoxha*, 319 F.3d at 1182). Recent decisions continue to cite to *Hoxha* for this proposition. *See, e.g.*, Soliman v. Garland, 2021 WL 2105016 (9th Cir. 2021) (finding no persecution where "[t]he sole physical confrontation did not result in any actual suffering or harm") (citing *Hoxha*, 319 F.3d at 1182); Huang v. Garland, 851 Fed. Appx. 38 (9th Cir. 2021) (holding that a single beating by teaching did not constitute persecution) (citing *Hoxha*, 319 F.3d at 1182).

98. *See, e.g.*, Zagorcani v. Gonzales, 145 Fed. Appx. 184 (7th Cir. 2005) (applicant who was beaten once, lost his job, and summoned to a police station did not establish past persecution); Dushi v. Gonzales, 152 Fed. Appx. 460 (6th Cir. 2005) (finding that a single incident during which applicant was arrested and beaten did not compel finding of past persecution); Siswanto v. Gonzales, 177 Fed. Appx. 523, 524–25 (8th Cir. 2006) (holding that a single incident of being attacked and punched was "harassment" and "did not rise to the level of persecution necessary to establish past persecution"); Wu v. U.S. Atty. Gen., 192 Fed. Appx. 829 (11th Cir. 2006) (concluding that a single arrest followed by guards pulling applicant's hair, knocking her head on a table causing a nosebleed, and kicking her did not constitute past persecution).

99. Voci v. Gonzales, 409 F.3d 607, 615 (3d Cir. 2005). In *Voci*, the court found persecution because there was a pattern of beatings over years and some of the beatings "result[ed] in bleeding, scars, and 'health problems.'" *Id.* Other courts have stated that "isolated violence" does not necessarily constitute persecution.

the Third Circuit has indicated that physical mistreatment, even if it occurs during detention, may not be persecution "especially in the absence of concrete and menacing threats of violence or death" or an "escalating pattern of mistreatment."[100] As explained by the court, when there is physical harm "plus something more, such as credible death threats," the court has "not hesitated to conclude" that there was persecution.[101] The "something more" might be an "escalating pattern of mistreatment."[102]

Recent decisions demonstrate the entrenched view that "a one-off physical beating" is not necessarily persecution and even repeated beatings may not qualify.[103] At least one member of the

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Ngure v. Ashcroft, 367 F.3d 975, 990 (8th Cir. 2004); *see also* Jelezyan v. Ashcroft, 110 Fed. Appx. 756, 758 (9th Cir. 2004) (finding that shots fired at applicant's car were "offensive and threatening" but were "isolated" and not persecution); Woldermarian v. Ashcroft, 112 Fed. Appx. 189, 193 (3d Cir. 2004) (holding that a beating by Eritrean authorities was "solitary incident causing no serious injuries" and therefore not severe enough to constitute persecution); Tjong v. Ashcroft, 113 Fed. Appx. 790, 792 (9th Cir. 2004) (finding no persecution despite unwanted physical touching and muggings and stabbing of father and burning of family shop); Kibinda v. U.S. Atty. Gen., 477 F.3d 113, 117 (3rd Cir. 2007) (finding no persecution where military detained person for five days and struck his "jawbone" with a "heavy object" that caused "a laceration that required seven stitches" and a scar because the injury was not "severe" and required "only a few stitches").

100. Thayalan v. Atty. Gen. of U.S., 997 F.3d 132, 140 (3d Cir. 2021).

101. *Id.*; *see also* Aden v. Wilkinson, 989 F.3d 1073, 1082–83 (9th Cir. 2021) ("[A] one-off physical beating did not compel a finding of persecution, even if . . . a reasonable factfinder could conclude such a beating rose to the level of persecution. . . . Nonetheless, when the incidents have involved physical harm *plus something more* . . . we have not hesitated to conclude that the petitioner suffered persecution.") (emphasis in original).

102. Thayalan, 997 F.3d at 140 (citing Herrera-Reyes v. Att'y Gen., 952 F.3d 101, 112 (3d Cir. 2020)) (internal quotations omitted); *see also* Gjetani v. Barr, 968 F.3d 393, 397 (5th Cir. 2020) (explaining that persecution usually "has the quality of a sustained, systematic effort to target an individual") (emphasis omitted).

103. Reule v. U.S. Atty. Gen., 810 Fed. Appx. 834, 838–39 (11th Cir. 2020) (finding that a beating with a stick for one hour was not sufficiently severe to constitute persecution); Aden v. Wilkinson, 989 F.3d 1073, 1082–83 (9th Cir. 2021) (recognizing "physical harm" has been "treated as persecution" but finding single beating insufficient); Yong Gao v. Barr, 950 F.3d 147, 152 (1st Cir. 2020) (explaining that the applicant's "sole detention was neither systematic nor frequent, and 'a single detention, even one accompanied by beatings and threats . . . does not necessarily rise to the level of persecution.'") (quoting Jinan Chen v. Lynch, 814 F.3d 40, 45 (1st Cir. 2016)); Kibinda, 477 F.3d 113, 117 (3d Cir. 2007) (holding that there was no persecution where military detained person for five days and struck his "jawbone" with a "heavy object" that caused "an injury

Board has also adopted this view. In an unpublished decision by a single board member, the Board stated that "isolated incidents of beatings that do not result in serious injury do not rise to the level of persecution."[104] The Board, however, has not made this statement in a published, and thereby binding, opinion.

Even when there is a pattern of harm, courts have sometimes not found persecution.[105] In *Kapcia v. INS*, for example, two men from Poland claimed past persecution.[106] One of the men had been "arrested four times, detained three times, and beaten once."[107] In addition, "his house [had been] searched, and he was treated adversely at work."[108] The second applicant was twice

> detained for a two-day period during which time he was interrogated and beaten. . . . [H]is parents' home was searched, he was assigned poor work tasks and denied bonuses, his locker was broken into many times, and he was conscripted into the Polish army

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requiring seven stitches" and a scar because the injury was not "severe" and required "only a few stitches").

104. *See* Thayalan v. Atty. Gen. of U.S., 997 F.3d at 140 (quoting the BIA's unpublished decision) (internal quotations omitted).

105. Sidabutar v. Gonzales, 503 F.3d 1116, 1124 (10th Cir. 2007) (finding that the mistreatment was not necessarily persecution where applicant "was beaten repeatedly" and "was repeatedly confronted by people who demanded money from him," including an occasion "when he did not have money to give, [so] he was struck and his motorcycle was burnt" (internal quotation marks omitted)); Kapcia v. INS, 944 F.2d 702, 704–05, 708 (10th Cir. 1991) (noting that no past persecution finding was required where applicant suffered three police detentions and beatings, a search of his parents' home, assignment to poor work tasks, the denial of bonuses, having locker broken into multiple times, conscription into the army leading to constant harassment, and being fired from a job); Morgado v. U.S. Atty Gen., 213 Fed. Appx. 953, 954–55 (11th Cir. 2007) (holding that an ambush while driving that resulted in applicant being forced to kneel and being hit in the head with a gun, punched, and kicked, resulting unconsciousness and injuries to head, stitches to eyebrow, and bruises, coupled with hundreds of threatening phone calls did not constitute persecution); Alyas v. Gonzales, 419 F.3d 756, 761 (8th Cir. 2005) (concluding that the detention and beating by police two times was "regrettable" but "brief period of detention . . . or isolated violence do not necessarily constitute persecution") (citing Krasnopivtsev v. Ashcroft, 382 F.3d 832, 839 (8th Cir. 2004)); Ngure v. Aschcroft, 367 F.3d 975, 990 (8th Cir. 2004)); Tawm v. Ashcroft, 363 F.3d 740, 743 (8th Cir. 2004)).

106. Kapcia v. INS, 944 F.2d 702, 704–05, 708 (10th Cir. 1991).

107. *Id.* at 704.

108. *Id.*

> where he was constantly harassed. Finally, he was fired from his job.[109]

Despite the pattern of mistreatment, the court concluded that the harm was not sufficiently severe.[110]

Nothing in the level of harm analysis requires that past persecution be part of a pattern. A single instance of harm can qualify. Insisting on patterns is one way in which courts and adjudicators have narrowed their past persecution findings in the last three decades.

D. Serious Injury and Medical Attention

Courts have also been hesitant to find persecution in cases where the victim did not sustain a lasting or severe injury or seek medical attention.[111] The Eighth Circuit found no persecution in a

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109. *Id.*

110. *Id.* at 708; *see also* Sidabutar v. Gonzales, 503 F.3d 1116, 1124 (10th Cir. 2007) (holding that a pattern of beatings not sufficiently severe to qualify as past persecution).

111. De Lopez v. Sessions, 886 F.3d 721, 724 (8th Cir. 2018) (concluding that despite evidence of an assault with a belt and a cell phone cord and multiple beatings over 14 years, persecution was not found because "marks on [the applicant's] skin" were "temporary" and the applicant "never sought medical care and did not claim any lasting injuries"); Shijie Huang v. U.S. Atty Gen., 330 Fed. Appx. 871, 875 (11th Cir. 2009) (finding no persecution where applicant was detained for five days and beaten and no evidence that applicant "required medical treatment following the beating" or "that he suffered any lasting effects or other mistreatment"); Chen v. Ashcroft, 381 F.3d 221, 223, 234–35 (3d Cir. 2004) (characterizing an attack in which officials hit the asylum applicant with sticks and threatened the applicant with an arrest as a mere "scuffle" that did not result in injuries requiring medical care); Njong v. Whitaker, 911 F.3d 919, 921 (8th Cir. 2018) (finding that multiple detentions and beating with sticks and kicks with military boots resulting in injury to ankle, elbow, and knees did not necessarily rise to the level of persecution when applicant only used pain medication and did not seek medical attention until he had fled to safety almost a month later) (citing Nanic v. Lynch, 793 F.3d 945, 948 (8th Cir. 2015) (upholding agency's finding that being stopped and beaten by the police on two occasions did not rise to the level of persecution); Zhao v. Wilkinson, 844 Fed. Appx. 389, 391–92 (2d Cir. 2021) (holding that a police beating with baton was not persecution where "pain was not bad" and applicant "did not seek medical treatment afterwards"); Tao Chen v. U.S. Atty Gen., 704 Fed. Appx. 881, 884–85 (11th Cir. 2017) (concluding that a police interrogation during which the applicant was punched in the face, leading to bleeding in his nose and mouth, and the applicant was hit with a baton in his arm, feet, legs, and back was not severe enough to constitute persecution in part because applicant did not say that he required medical treatment).

case where the applicant had been injured in detention after being "beat[en] with sticks, stepped on, and 'smashed' with the officials' boots."[112] The court's reasoning was based in part on the fact that the applicant had treated his own injuries.[113] In a domestic violence case, the same court found no persecution because the asylum seeker had not sought medical care after having been "whipped with a belt and dragg[ed] into the street."[114] The narrow focus on severe physical injury and medical attention operates to exclude other types of harm, including abuses such as the touching of genitals, from the definition of persecution by some courts.[115] The focus on medical attention also ignores why injured people might not seek medical care for reasons relating to accessibility and quality, as well as social or cultural norms.[116]

Contemporary judicial understanding of persecution has broken with the original, expansive understanding of persecution as excluding only mere inconveniences and including most, if not all,

112. Njong v. Whitaker, 911 F.3d 919, 921 (8th Cir. 2018).

113. *Id.* at 921.

114. De Lopez v. Sessions, 886 F.3d 721, 724 (8th Cir. 2018).

115. Alghubari v. U.S. Atty Gen., 554 Fed. Appx. 880, 882–83 (11th Cir. 2004) (finding no persecution where applicant was detained three times, the longest being for three days, and "was pushed from the back of the neck and his genitals were touched"); Halim v. Holder, 590 F.3d 971, 975–76 (9th Cir. 2009) (holding that mob beating, denial of medical care, arrest and detention did not constitute persecution).

116. Not all court decisions have endorsed a myopic focus on serious physical injury. In 2004, the Ninth Circuit commented that such an emphasis seems misplaced, as "it would be a strange rule if the absence or presence of a broken arm were the dispositive fact." Mihalev v. Ashcroft, 388 F.3d 722, 729–30 (9th Cir. 2004) (finding past persecution when applicant was detained for ten days, beaten daily, and forced to do hard labor); *see also* Dandan v. Ashcroft, 339 F.3d 567, 574 (7th Cir. 2003) (noting "[w]e do not hold that lost teeth or broken bones are the *sine qua non* of persecution" but finding no persecution due to lack of severity). In a case involving an applicant who was shot at while in his car multiple times, the Eleventh Circuit reversed a finding of the agency, stating "the observation that [the applicant] fortuitously escaped from the shooters unharmed does not undermine the basic conclusion that being shot at while driving is sufficiently 'extreme' to constitute persecution . . . [t]he motorcyclists' poor marksmanship does not undermine this conclusion." Sanchez Jimenez v. U.S. Atty. Gen., 492 F.3d 1223, 1233–34 (11th Cir. 2007). Yet the trend, including in the Ninth Circuit, is to require serious physical injury that is lasting or that required medical attention. *See* Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995) (holding that the "attack" of petitioner was not "so overwhelming as to necessarily constitute persecution" in part because the petitioner "did not require medical treatment"). *Prasad* is cited in over 800 Ninth Circuit cases. *Id.*

physical harm. Through rhetorical sleights of hand and grafted-on requirements of patterns, lasting injury, and medical attention, court have ratcheted-up what is required to prove persecution and minimized the seriousness of the physical and mental harms suffered by asylum seekers.

II. The Unbreakable Victim

The judicial ratcheting of the harm requirement is premised on a dehumanizing and misguided notion of victims of persecution as unbreakable. Asylum applicants are treated as people who can withstand, or should be asked to withstand, a level of pain and suffering far beyond the threshold of what is considered acceptable under modern medical standards. In this view, asylum applicants are unbreakable or hard-shell victims, mythical people who can tolerate beatings, threats, stress, and coercion more than the average person. This implicit trope of an unbreakable victim handicaps and distorts the ability of adjudicators and reviewing courts to accurately assess human suffering when applying the concept of persecution.

Federal courts interpreting the scope of persecution often rattle off harms against people like they are flavors of ice cream and then minimize the impact on the victim, often concluding that the harm was less severe than in other cases in which no persecution had been found. For example, in 2020, the Ninth Circuit considered the case of Yongsheng Cui, a political activist from China who was detained and beaten by the Chinese police for five days as punishment for engaging in a protest.[117] The court described what happened: "Police officers handcuffed him to a chair, beat him with books in his face and with a baton on his back, threatened to freeze him to death, and pulled his hand to force him to sign a confession."[118] Officials also encouraged other prisoners to punch Mr. Cui repeatedly in the stomach and kick him in the legs and buttocks. Despite the extreme level of harm, the court upheld the agency's finding that Mr. Cui had not be persecuted. The court sustained the denial on the grounds that the applicant had "suffered mistreatment more like mistreatment that [the court] previously [had] found does not constitute persecution, and less like mistreatment that [the court

117. Yongsheng Cui v. Barr, 839 Fed. Appx. 50, 52 (9th Cir. 2020).
118. *Id.*

had] found did constitute persecution."[119] The court did not engage with the nature of the trauma, and its likely physical and mental effects, on Mr. Cui.

As people who have succeeded in entering the U.S. to seek protection, asylum seekers who have experienced past harm are, by definition, survivors. Especially if they have no lasting, physical injuries, they appear to immigration judges and other asylum adjudicators as having successfully endured violence, making them more pain tolerant. This understanding of asylum seekers as "hard-shell" victims with super-human resilience underlies court decisions that dismiss physical and mental mistreatment by focusing on the absence of debilitating physical injury. As discussed above, the Eleventh Circuit failed to reverse a decision denying asylum to Ashok Patel, an Indian asylum seeker who was "beaten."[120] The court characterized the beating as "harassment" and held that it "falls short of persecution" because it "resulted only in swelling, bruising, and tenderness on his torso." Three years later, the same court upheld the denial of asylum to Luis Cabrera Martinez, a journalist from Cuba who was arrested and detained for three days, beaten unconscious by plain clothes officers, threatened with death and torture, and fired from three jobs.[121] The court found that the mistreatment, even when considered in the aggregate, failed to constitute persecution, noting that the applicant was only "briefly" unconscious and "did not suffer any significant or severe physical injuries."[122]

The tacit assumption that asylum seekers are unbreakable facilitates no-persecution findings, even in cases involving classic forms of torture. For example, in 2008, the First Circuit considered the case of Bahri Karam Khan, who had applied for asylum because

119. *Id.* (citing Gu v. Gonzales, 454 F.3d 1014, 1020–21 (9th Cir. 2006), *Prasad v. INS*, 47 F.3d at 339–40, and Jian Guo v. Ashcroft, 361 F.3d 1194, 1197–98 (9th Cir. 2004)).

120. Patel v. U.S. Atty Gen., 747 F. App'x 819, 821 (11th Cir. 2018) (unpublished).

121. Martinez v. U.S. Atty. Gen., 992 F.3d 1283, 1287 (11th Cir. 2021).

122. *Id.* at 1292; *see also* Djonda v. U.S. Atty Gen., 514 F.3d 1168, 1171 (11th Cir. 2008) (finding no persecution when police stripped applicant naked, beat him with a belt, kicked him, and held him for three days because was "minor beating"); Kazemzadeh v. U.S. Atty. Gen., 577 F.3d 1341, 1353 (11th Cir. 2009) (finding no persecution because applicant "did not prove that he suffered any physical harm" when he was arrested, interrogated, and beaten for five hours, detained for four days, and subsequently monitored by Iranian authorities).

he feared persecution in his home country of Pakistan.[123] He had joined an opposition political party and arranged party meetings and attended demonstrations. The police arrested him at a demonstration and ordered him to stop working with the opposition party. He was "charged with speaking against the government" and sent to prison. While he was jailed for ten days, prison guards beat him with wooden sticks and shocked him with electrical wires. The court found Mr. Khan had not suffered past persecution, noting that he had not sought medical care for his injuries and that the mistreatment only happened once before Mr. Khan was able to flee.[124] It gave no explanation for why Mr. Khan had not experienced severe suffering while being subjected to electric shocks. Similarly, in 2020, the Ninth Circuit ruled that a Chinese applicant, Fuyong Cui, failed to establish past persecution even though the police had detained him, kicked and "punched [him] causing a tooth to fall out," "shocked" him with a "electric baton," and "struck" him "several times with a baton."[125] Again, the court provided no explanation for why it believed Mr. Cui would not experience this mistreatment as severe.

Even in cases involving children, reviewing courts have assumed that the asylum seeker can, or should, withstand pain beyond that which the adjudicators themselves, or the adjudicators' children, should be expected to tolerate. In the 2007 Third Circuit case of Thamotharam Thayalan, a sixteen-year-old boy from Sri Lanka was kidnapped, blindfolded, and beaten by military personnel.[126] Soldiers slammed his head against a wall and punched him in the stomach.[127] In upholding the Board's finding of no persecution, the court cited to the fact that the boy suffered no "severe or protracted injury."[128] In so doing, the court recognized that "outrageous conduct" could qualify as persecution, "even if limited to a single event," but found that the harm inflicted on the teenager was not sufficiently severe.[129] The court did not explain why the teenage victim did not suffer severely when he was kidnapped and blindfolded

123. Khan v. Mukasey, 549 F.3d 573 (1st Cir. 2008).

124. *Id.* at 577–78.

125. Fuyong Cui v. Barr, 806 Fed. App'x 588, 590 (9th Cir. 2020) (comparing the facts of petitioner's case to the "harassment" suffered by the petition in *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995)).

126. Thayalan v. U.S. Atty. Gen., 997 F.3d at 135–36.

127. *Id.*

128. *Id.* at 140.

129. *Id.*

and punched in the stomach while his head was slammed against a wall.

Although some appellate courts have articulated a concern that the Board has an overly narrow understanding of persecution,[130] reversals of agency non-persecution findings are rare. Today's judicial understanding of persecution has become unmoored from the everyday understanding of persecution as hostile acts to the point that only an extraordinarily high showing of physical harm overcomes the quixotic notion of asylum applicants as unbreakable.

A. The Role of the Empathy Gap and Invidious Stereotypes

The myth of the unbreakable victim can be understood at least in part as the result of the lack of immediacy between judges and asylum applicants, an "intergroup empathy gap," and invidious stereotypes about pain tolerance.[131] Asylum adjudicators are removed in space and time from the experiences of asylum seekers, who recount events that occurred in another country, sometimes in the distant past, making it difficult for adjudicators to appreciate the true level of harm. This underestimation of pain may be due in part to what is called the "hot-cold empathy gap," the difference between assessing pain when the assessor is experiencing the painful event ("hot") or just hearing about it after the fact ("cold"). This gap is a cognitive bias that leads people to underestimate the influence of

130. *See, e.g.*, Blanco v. Atty. Gen. U.S., 967 F.3d 304, 311 (3d Cir. 2020) (reversing the agency's denial in case involving abduction, beatings over course of 12 hours, and death threats, noting "[t]his Court does not 'condition[] a finding of past persecution on whether the victim required medical attention . . . or even on whether the victim was physically harmed at all") (quoting Doe v. Att'y Gen., 956 F.3d 135, 145 (3d Cir. 2020)); Bedoya v. Barr, 981 F.3d 240, 246 (4th Cir. 2020) (finding past persecution where applicant was not physically harmed but experienced at least five "threats of death and injury to him and his family," including explicit messages saying members of the applicant's family were being tracked").

131. Cigdem V. Sirin et al., *Group Empathy Theory: The Effect of Group Empathy on US Intergroup Attitudes and Behavior in the Context of Immigration Threats*, 78 THE J. OF POLITICS 893–908 (2016); Marta Miklikowska, *Empathy Trumps Prejudice: The Longitudinal Relation Between Empathy and Anti-immigrant Attitudes in Adolescence*, 54(4) DEVELOPMENTAL PSYCHOLOGY 703–717 (2018).

visceral drives on their attitudes, preferences, and behaviors.[132] The problem stems from the fact that human understanding of pain or harm is state dependent, meaning that it depends on the listener's own physical and mental state—specifically whether they are in the hot state of experiencing pain or not.[133]

The hot-cold empathy gap appears even when people assess their own pain experience, as documented in a study that assessed people's willingness to endure pain for monetary gain.[134] The participants were divided into three groups. The first was subjected to pain right before they decided how much to ask for in compensation for the pain. The second group experienced the pain a week before the decision, and a final group never experienced the pain. The immediacy of the pain directly correlated with the amount of compensation requested. The group that had experienced the pain just before deciding how much to ask for (the "hottest" group) had the highest monetary requests. The study demonstrated the barriers to appreciating historical pain, including people's own historical pain. This empathy gap is thought to be a contributing factor to the undertreatment of pain by physicians. Physicians are in a "cold" state with no pain of their own while treating "hot" state patients in pain.

The dismissal or under-acknowledgement of the pain of those considered "other" may also explain, at least in part, overly restrictive asylum adjudications. In most asylum cases, privileged and powerful adjudicators render judgments about the pain and suffering of people who, by virtue of their color, ethnicity, or class, are viewed as members of an outgroup.[135] The "intergroup empathy gap" is defined as individuals of one racial groups failing to appreciate the pain of outgroup members.[136] Social neuroscience—the study of brain function and social behavior—shows that humans socially categorize

132. Rachel L. Ruttan and Loran F. Nordgren, *Perceptions of Desire: A Hot-Cold Empathy Gap Perspective, in* THE PSYCHOLOGY OF DESIRE 225, 225–243, (Wilhelm Hofmann & Loran F. Nordgren eds., 2015).

133. *Id.* at 233.

134. George Loewenstein, *Hot-Cold Empathy Gaps and Medical Decision Making,* 24 HEALTH PSYCHOLOGY S49 (2005).

135. Ava Morgenstern, *Judicial Diversity in North American and European Asylum Court Systems: A Literature Review* in HUMANITY IN ACTION PRESS (2015).

136. John F. Dovidio et al., *Empathy and Intergroup Relations,* AM. PSYCH. ASS'N 393 (2010).

others in "just a few hundred milliseconds."[137] Brain activity level in the cerebral cortex reveals that "the race of a face implicitly interferes with the neural empathic reactions toward others' pain."[138] Studies have demonstrated that White people's pain matrix in the brain is not triggered when they witness the harming of Black people.[139] Compounding the problem is people's difficulty recognizing the pain of, and empathizing with, people considered members of a different group.[140] Studies have documented that human responses to others' pain vary depending on whether the observer is a different race than the person in pain.[141] The psychological tendency to empathize with members of one's own group, places many asylum seekers at a disadvantage.

Unconscious, or conscious, views about how different groups experience pain may also figure into judges' findings of no-persecution. These views include stereotypes that Black people and

137. David M. Amodio and Mina Cikara, *The Social Neuroscience of Prejudice*, 72 ANNU. REV. PSYCHOL. 439, 440 (2021).

138. Federica Meconi et al., *On the Neglected Role of Stereotypes in Empathy Toward Other-Race Pain*, 10(1) SOCIAL NEUROSCIENCE 1 (2015) (citing sources); *see also* Ruben T. Azevedo, et al., *Their Pain Is Not Our Pain: Brain and Autonomic Correlates of Empathetic Resonance With the Pain of Same and Different Race Individuals*, 34 HUMAN BRAIN MAPPING 3168 (2013); Paola Sessa et al., *Taking One's Time In Feeling Other-Race Pain: An Event-Related Potential Investigation On the Time-Course of Cross-Racial Empathy*, 9 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 454 (2013).

139. Sophie Trawalter and Kelly M. Hoffman, *Got Pain? Racial Bias in Perceptions of Pain*, 9(3) SOC. AND PERSONALITY PSYCH. COMPASS 153 (2015) (citing studies); *see also* Paola Sessa et al., *Taking One's Time In Feeling Other-Race Pain: An Event-Related Potential Investigation On the Time-Course of Cross-Racial Empathy*, 9 SCAN 454–63 (2014) ("Neural reactions to the pain of own-race individuals . . . were magnified relative to neural reactions to the pain of other-race individuals."); Ruben T. Azevedo et al., *Their Pain Is Not Our Pain: Brain and Autonomic Correlates of Empathic Resonance With the Pain of Same and Different Race Individuals*, 34 HUMAN BRAIN MAPPING 3168-31812 (2013) (providing "neural and autonomic evidence of in-group bias in empathetic reactivity and demonstrate that both perceived familiarity/similarity and racial attitudes modulate motivational and affective responses to out-group members' pain").

140. John Francis Dovidio et al., *Empathy and Intergroup Relations*, AM. PSYCH. ASS'N 393 (2010).

141. Xiaojing Xu et al., *Do You Feel My Pain? Racial Group Membership Modulates Empathetic Neural Responses*, 29 J. NEUROSCIENCE 8525–29 (2009); Alessio Avenanti et al., *Racial Bias Reduces Empathetic Sensorimotor Resonance With Other-Race Pain*, 20 CURRENT BIOLOGY 1018–22 (2010); Ronald Wyatt, *Pain and Ethnicity*, AMA J. ETHICS (May 2013).

other people of color experience less pain than White people. These assumptions and stereotypes are not unique to the legal system and expand to include the medical community. The inaccurate idea that Blacks feel less pain than Whites can be traced to the time of slavery, when nineteenth century white physicians spread the mistaken belief that Black people were not sensitive to pain and could tolerate surgery and childbirth much better than Whites.[142] These distorted beliefs about Black people's pain tolerance "excused inhumane treatment of Black men and women in medical research by neurologists and surgeons and justified inhumane treatment of Black slaves by White slave owners."[143]

Today, people may have different reasons for thinking Black people experience pain differently than White people than did physicians in the nineteenth century, but studies show that the core belief that White people's bodies are different from Black people's persists.[144] In one study, a causal relation was found between the erroneous belief that Blacks have "superhuman" bodies and pain tolerance. The study showed that White Americans "attribute superhuman capacities to Black versus White people"—a tendency made apparent in how Black athletes are portrayed and regard them as better able to suppress hunger and thirst leading to injured Black athletes being expected to keep playing more than Whites.[145] Another study showed that the underlying belief that Black people in the United States have, on average, lower economic and social status and therefore endure greater hardship leads to the conclusion that Black people feel less pain than White people do.[146] The study concluded that "perceptions of a target person's hardship predict perceptions of that target person's pain and mediate the effect of target race on perceptions of pain."[147] The link between perceived hardship and pain tolerance was apparent from results showing that "racial bias in perceptions of others' pain can be eliminated and even reversed if and when people are given information that a White person has endured

142. Trawalter & Hoffman, *supra* note 139 at 147 (discussing medical authorities Samuel Cartwright, Charles White, and Jon Simms, the "father of gynecology").

143. *Id.* (internal citations omitted).

144. *Id.* at 148 (collecting studies).

145. *Id.*

146. *Id.* at 149.

147. *Id.*

more hardship than a Black person."[148] As discussed below, experiencing past trauma does not give people a hard shell but rather makes them more susceptible to developing PTSD, debunking the unbreakable victim myth.[149] In short, White people's stereotypes about the hardship faced by Blacks and the strength of their bodies leads to underassessment of, and bias against, Black people's pain.

Gendered stereotypes may also play a role. In some periods of time, in some societies, women, particularly White women, were deemed more sensitive to pain and difficult circumstances, than men.[150] The trope of women as the "weaker sex," for example, existed in the Victorian Era in Europe.[151] But the view that women, particularly women of color, are better at enduring pain has also been present throughout history and today.[152] Black women were historically thought to experience the pain of childbirth much less than White women.[153] Today, men of color, particularly low-income male immigrants, are viewed as "disposable" workers, "invisible" "beasts of burden" who can legitimately be asked to withstand pain and injury in subhuman working conditions.[154] As Leticia Saucedo has explained, immigrant workers, particularly men, suffer from an "endurance narrative."[155] In this misplaced view, "[i]mmigrants who endured the dangers of crossing" the border are expected "to endure the difficult conditions they encounter[] in the workplace."[156] The fact that almost all of the asylum applicants in the denied cases discussed

148. *Id.* at 150 (emphasis in original).

149. *See supra* notes 183–87 and accompanying text.

150. Whitney Wood & Joanna Bourke, *Conceptualising Gender and Pain in Modern History*, 32(1) GENDER & HISTORY 8–12 (Mar. 2020).

151. JOAN PERKIN, VICTORIAN WOMEN 8 (1993) (internal quotations omitted).

152. Trawalter & Hoffman, *supra* note 139 at 146–157 (2015).

153. JOHN H. DYE, PAINLESS CHILDBIRTH OR HEALTHY MOTHERS, AND HEALTHY CHILDREN: A BOOK FOR ALL WOMEN 52 (7th ed. 1888).

154. Rachel Nadas & Jayesh Rathod, *Damaged Bodies, Damaged Lives: Immigrant Worker Injuries As Dignity Takings*, 92 CHICAGO-KENT L. REV. 1155, 1161 (2017) (citing Lori A. Nessel, *Disposable Workers: Applying a Human Rights Framework to Analyze Duties Owed to Seriously Ill or Injured Migrants*, 19 IND. J. GLOBAL LEGAL STUD. 61, 93 (2012); Nancy Nivison Menzel & Antonio P. Gutierrez, *Latino Worker Perceptions of Construction Risks*, 53 AM. J. INDUS. MED. 179, 183 (2010)) (internal quotations omitted).

155. Leticia M. Saucedo, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes*, 21 CORNELL J. LAW & PUB. POL'Y 641, 650 (2012).

156. *Id.*

above are men suggests that men as a group are more likely to be expected to endure violence than women.

These assumptions and stereotypes also exist in the medical community. In studies of assumptions of how people of different races tolerate pain, medical providers tend to assume that Black people are more tolerant of pain—and therefore need less pain relief—than White people, even though there is evidence that the opposite may be true.[157] One study found that, after surgery, white patients received more than three and a half times the amount of morphine than Black patients.[158] The study found that the "amount of narcotic prescribed was greater for Whites than for Hispanics, and greater for Blacks than for Hispanics and Asians."[159] In another study, Latinx people with isolated long bone fractures were twice as likely as similarly situated non-Latinx White people to be treated without pain medication in the hospital emergency room.[160] In a 2016 survey, half of medical students and residents held one or more false beliefs about Black people's bodies, including that they have thicker skin than Whites and that their nerve endings are less sensitive.[161] The 2014

157. *See* Trawalter & Hoffman, *supra* note 139 at 146, 148 (2015) (collecting studies); *see also* Sophie Trawalter et al., *Racial Bias in Perceptions of Others' Pain*, 7 PLOS ONE (2012) (collecting sources and documenting study showing that white medical professionals assume that Black people feel less pain than White people); Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment*, 29 J. LAW MED. ETHICS 52–68 (2001); Brian B. Drwecki et al., *Reducing Racial Disparities in Pain Treatment: The Role of Empathy and Perspective-Taking*, 152 PAIN 1001–1006 (2011); Knox. H. Todd et al., *Ethnicity and Analgesic Practice*, 35 ANN. EMERGENCY MED. 11–16 (2000).

158. Bernardo Ng et al., *The Effect of Ethnicity on Prescriptions For Patient-Controlled Analgesia for Post-operative Pain*, 66 PAIN 9–12 (1996); *see also* Bernardo Ng et al., *Ethnic Differences In Analgesic Consumption for Postoperative Pain*, 58(2) PSYCHOSOMATIC MED.125–29 (1996).

159. Ng, *supra* note 158, at 11.

160. Knox H. Todd et al., *Ethnicity As a Risk Factor for Inadequate Emergency Department Analgesia*, 269 JAMA 1537–9 (1993); *see also* Know H. Todd, Christi Deaton, Anne P. D'Adamo, and Leon Goe, *Ethnicity and Analgesic Practice*, 35 ANNALS OF EMERGENCY MEDICINE 1 (2000) (Blacks in emergency rooms with long-bone fractures less likely than Whites to receive pain medication); Charles S. Cleeland et al., *Pain and Its Treatment in Outpatients with Metastatic Cancer* 330 NEW ENG. JOURNAL J. MED. 592 (1994) ("Patients seen at centers that treated predominantly minorities were three times more likely than those treated elsewhere to have inadequate pain management.").

161. Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences*

edition of a nursing textbook listed how "Hispanics," "Jews," "Native Americans," "Blacks," and "Indians" respond differently to pain.[162]

Although these stereotypes have been proved incorrect for decades, they continue to influence people's perception of the pain tolerance of others as an implicit bias, a habitual response which can be hard to change.[163] Medical education has shifted to address these biases with emphasis on cultural competence and culturally informed care. As is discussed below in Section IV.A., the legal community must take similar steps to increase its empathy and neutralize the racialized and gendered assumptions that underlie the view of asylum seekers as unbreakable.

III. Human Frailty

The judicial ratcheting up of the pain and suffering required for persecution runs contrary to our current medical understanding of the human body and mind, which reveals a fuller and more nuanced understanding of human mental and physical health. As courts have constructed unbreakable victims in their asylum jurisprudence, doctors and researchers have documented our essential frailty, pointing to the deep and lingering effects of many levels of physical and mental mistreatment. Asylum law is out of step with what we now know about the effect of trauma and the mind/body connection. The view that asylum seekers are less affected by trauma because they have developed "hard shells" from their experiences is false. Past trauma sensitizes people, leading to more severe trauma response symptoms.

For hundreds of years, the medical community had recognized reactions to trauma but typically categorized them as transient in nature and as lacking a basis in biology.[164] People who suffered

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Between Blacks and Whites, 113(16) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 4296–301 (2016).

162. PEARSON EDUCATION, NURSING: A CONCEPT-BASED APPROACH TO LEARNING (2d ed. 2014). The content was removed from the textbook in 2017. PEARSON EDUCATION, NURSING: A CONCEPT-BASED APPROACH TO LEARNING (Revised 2d ed. 2017).

163. John F. Dovidio et al., *The Roles of Implicit and Explicit Processes in Contemporary Prejudice*, PSYCH. PRESS 165 62; 62–63 (2009); Nao Hagiwara et al., *A Call for Grounding Implicit Bias Training in Clinical and Translational Frameworks*, 395 LANCET 1457 (2020).

164. Gordon J. Turnbull, *A Review of Post-Traumatic Stress Disorder. Part I: Historical Development and Classification*, 29 INJURY 87, 88 (1998) ("Acute

trauma were considered healed once the immediate threat had passed and any acute physical injury had healed.[165] Only in the last four decades has the medical community officially recognized trauma's long-lasting effects on wellbeing. Today, trauma—including sustained coercion and threats as well as witnessing or hearing of the pain of others in some circumstances—is known to have serious, long lasting mental and biological effects.[166] As medical researchers deepen our understanding of psychopathology, evidence continues to strengthen the view that traumatic exposure causes changes in neurobiological pathways and affects the ability of core biological systems to self-regulate.[167]As psychiatrist Bessel A. van der Kolk explains in his bestselling book *The Body Keeps the Score*, "[l]ong after a traumatic experience is over, it may be reactivated at the slightest hint of danger and mobilize disturbed brain circuits and secrete massive amounts of stress hormones."[168]

The early view was that once the acute phase of trauma was over, people suffered no significant lingering effects. As illustrated in Section II.D, this outdated view still appears in the persecution assessments of courts and immigration agencies. With a myopic focus on physical scarring, judges and adjudicators neglect lasting mental effects and harms, thus disregarding the full scope of harm. The evolution of the medical understanding of the long-term effects of trauma led to the inclusion of Post-Traumatic Stress Disorder (PTSD) as a mental health disorder in the Diagnostic and Statistical Manual of Mental Disorders III (DSM) in 1980.[169] Under the current DSM,

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reactions to stress were described as very transient disorders of any severity and nature which occur in individuals without any apparent mental disorder in response to exceptional physical or mental stress, such as natural catastrophe or battle, and which usually subside within hours or days.").

165. Jennifer DiMauro et al., *A Historical Review of Trauma-Related Diagnoses to Reconsider the Heterogeneity of PTSD*, 28 J. OF ANXIETY DISORDERS 774, 786 (2014).

166. Some effects of trauma appear in Post-Traumatic Stress Disorder (PTSD), discussed below.

167. BESSEL A. VAN DER KOLK, M.D., TEXTBOOK OF BIOLOGICAL PSYCHIATRY CHAPTER 11 (2004).

168. VAN DER KOLK, *supra* note 13, at 18.

169. Matthew J. Friedman, *PTSD History and Overview*, U.S. DEP'T OF VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp#:~:text=In%201980%2C%20the%20American%20Psychiatric,in%20psychiatric%20theory%20and%20practice (last visited Jan. 26, 2022) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980)).

PTSD is defined as a psychiatric condition caused by trauma or stress that is physical, psychological, or sexual.[170] A person must have experienced "[e]xposure to actual or threatened death, serious injury, or sexual violence," either directly or indirectly.[171] Indirect experience, such as "learning about an event," can qualify if it involves "experiences affecting close relatives or friends and experiences that are violent or accidental (e.g., death due to natural causes does not qualify)."[172] PTSD often manifests in the reexperience of the underlying traumatic event in different ways, often well after the underlying event or events took place. PTSD can cause negative alterations in cognition and mood, which may lead to chronic feelings of emotional detachment as well as a negative outlook on the world, other people, and life in general. These symptoms in turn can lead to isolation and difficulty with interpersonal relationships.[173] People who develop PTSD are at risk for developing other mental health and physical ailments.[174]

Historically, the medical understanding of what counted as trauma was limited. Trauma was conceptualized in narrow, extreme terms, stressing physical violence and excluding lesser forms of aggression like coercion and threats.[175] Over time, the definition of trauma has broadened, expanding from physical acts of violence to include sexual, psychological, or coercive behaviors that can leave

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170. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 275 (5th ed. 2013), [hereafter DSM-V]; *see also* Lisa Y. Maeng & Mohammed R. Milad, *Post-Traumatic Stress Disorder: The Relationship Between the Fear Response and Chronic Stress*, 1 CHRONIC STRESS 1–13 (2017).

171. DSM-V, *supra* note 158, at 285.

172. *Id.* at 271.

173. Alexander C. McFarlane & Clara Bookless, *The effect of PTSD on Interpersonal Relationships: Issues for Emergency Service Workers*, 16 SEXUAL AND RELATIONSHIP THERAPY 261, 263 (2001).

174. Jack Goldberg et al., *The Association of PTSD with Physical and Mental Health Functioning and Disability*, 23 QUALITY OF LIFE RSCH. 1579, 1587 (2014).

175. Moreover, society judged victims who suffered long term trauma at the hands of an abuser—such as survivors of domestic violence—questioning why they didn't leave or escape. Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377, 388 (1992) ("Social judgment of chronically traumatized people has tended to be harsh."); *see also id.* ("Observers who have never experienced prolonged terror, and who have no understanding of coercive methods of control, often presume that they would show greater psychological resistance than the victim in similar circumstances.").

lifelong scars not visible to the naked eye.[176] The current understanding is that PTSD can result not only from a single event but from sustained coercion or control.[177] "[E]stablishing control over another person" involves "the systematic, repetitive infliction of psychological trauma."[178] These "methods are designed to instill terror and helplessness, to destroy the victim's sense of self in relation to others, and to foster a pathological attachment to the perpetrator."[179] This trauma might include "control of the victim's body and bodily functions" as well as "deprivation of food, sleep, shelter, exercise, personal hygiene, or privacy."[180] Threats and control are central to this form of trauma; physical violence is not needed. Sustained, nonphysical trauma—such as being in an abusive relationship or being manipulated or threatened as a prisoner—can lead to life-long debilitating physical and mental conditions just like direct physical violence.[181] Many of the court decisions discussed above erroneously categorize death threats, and even some physical violence, as mere harassment instead of trauma qualifying as persecution. For example, a court found that a woman had suffered only harassment when a man "led [her] into an alley, placed a gun at

176. *See generally* Susan Lagdon, Cherie Armour, & Maurice Stringer, *Adult Experience of Mental Health Outcomes as a Result of Intimate Partner Violence Victimization: A Systematic Review*, 5 EUR. J. OF PSYCHOTRAUMATOLOGY (2014). Sara E. Gold points to the helpful explanation of trauma put forth by the federal Substance Abuse and Mental Health Services Administration (SAMHSA). According to the SAMHSA, "[i]ndividual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual wellbeing." Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLIN. L. REV. 201, 207 (2018). SAMSHA discusses the concept of trauma around three "E's": (1) event(s), (2) experience of the event(s), and (3) effect. *Id.*

177. Herman, *supra* note 161, at 388 ("The evidence reviewed in this paper offer strong support for expanding the concept of PTSD to include a spectrum of disorders, ranging from the . . . stress reaction to a single acute trauma . . . to the complex disorder of extreme stress . . . that follows upon prolonged exposure to repeated trauma.").

178. *Id.* at 383.

179. *Id.*

180. *Id.*

181. *Id.* at 377–78 (discussing the multitude of serious physical and mental conditions stemming from "prolonged, repeated trauma," as opposed to "circumscribed traumatic events" like "combat, disaster, and rape").

her head," "hit, kicked, and fondled" her and said she was 'marked' and that her family should 'know better.'"[182]

Courts should not downplay the impact of experiences of discrimination in the level of harm analysis. Research has shown that the experience of racism and the accumulation of race related stressors can result in PTSD symptoms.[183] Racial trauma is defined as a traumatic response to the cumulative impact of racism on a person who has been racialized. For asylum seekers, the relevant racialization is that which occurred in their country of origin. These traumatic events may include individual experiences of discrimination, community-level trauma, or systemic racism.[184] Sources of trauma include hate crimes, police violence, immigration issues, and workplace harassment. Furthermore, people who are members of multiple stigmatized groups might suffer compounded effects.[185] This intersectionality is key to understanding the trauma experienced by people facing discrimination based on multiple grounds, including race, gender identification, sexual orientation, and severe mental illness.

Courts should abandon the view of asylum seekers as unbreakable due to their surviving past harm because it runs contrary to medical science. The idea that a significant traumatic experience hardens an individual or makes them resilient is incorrect.[186] Accumulation of recurrent trauma is equally, if not more, harmful than one single event.[187] Exposure to repeated trauma primes victims for a pathological response and leads to more severe

182. *See* discussion *supra* note 77 and accompanying text.

183. Monnica T. Williams et al., *Assessing Racial Trauma Within a DSM-5 Framework: The UConn Racial/Ethnic Stress and Trauma Survey*, 3 PRAC. INNOVATIONS 242 (2018).

184. Monnica Williams et al., *Posttraumatic Stress Disorder and Racial Trauma*, 32 PTSD RSCH. Q. 1, 1 (2021).

185. Sannisha K. Dale & Steven A. Safren, *Gendered Racial Microaggressions Predict Posttraumatic Stress Disorder Symptoms and Cognitions Among Black Women Living with HIV*, 11 PSYCH. TRAUMA: THEORY, RSCH., PRAC. & POL'Y 685, 685 (2019).

186. Jason J. Radley, et al., *Stress Risk Factors and Stress-related Pathology: Neuroplasticity, Epigenetics, and Endophenotypes*, 14 STRESS 481 (2011); *Trauma Awareness*, *in* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), U.S. DEP'T OF HEALTH & HUM. SERVS., TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 46–47 (2014).

187. Ibrahim Kira, *Etiology and Treatment of Post-Cumulative Traumatic Stress Disorders in Different Cultures*, 16 TRAUMATOLOGY 128 (2010).

trauma symptoms—a process called sensitization.[188] Exposure to repeated traumatic events predisposes a person to the development of trauma-related symptoms and increases their risk of future trauma exposure and victimization. Trauma thus sensitizes, rather than immunizes, its victims to future trauma. Moreover, because PTSD involves "repeated recollection of traumatic memories," it is long-lasting and can worsen over time.[189] Re-exposure to trauma related triggers and ongoing trauma are known stressors that lead to the worsening of PTSD symptoms and a poor prognosis for recovery. The effects of accumulated trauma should have been an important consideration in *Sidabutar v. Gonzales*, for example, given the repeated beatings and retraumatization, which likely led to sensitization.[190]

The medical consensus today is that traumas that fall short of extreme physical abuse are not only injurious in the moment but can have devastating long term mental and physical effects, including the ability to carry out daily functions. When assessing whether a given harm rises to the level of persecution, asylum adjudicators must take account of the medical community's current understanding of the true impact of a wide range of mental and physical harms on the human body and mind. If this modern medical understanding had been applied in the cases discussed above, there is little doubt that fact finders would have reached a different outcome in their harm assessments.

IV. Persecution As An Evolving, Inclusive Norm

U.S. case law on what counts as persecution is out of step with both Congress' original, inclusive understanding of the term, as well as the modern medical understanding of the nature and lasting impact of trauma. The view of asylum seekers as unbreakable is not

188. Alexander C. McFarlane, *The Long-Term Costs of Traumatic Stress: Intertwined Physical and Psychological Consequences*, WORLD PSYCHIATRY 9:4 (2010).

189. Sidabutar, 503 F.3d at 1124; *see also* McFarlane, *supra* note 177, at 8 ("[T]here is an increasing body of literature demonstrating that a significant proportion of trauma victims do not have their maximal stressor response in the immediate aftermath of the event, but rather this progressively increases with time."); *see also id.* at 5 ("[T]raumatic events are followed by 'a critical period of increased brain plasticity, during which irreversible neuronal changes may occur in those who develop PTSD.'") (internal citation omitted).

190. *See supra* note 95 and accompanying text.

only medically incorrect but the result of invidious stereotypes and the intergroup empathy gap. Courts and administrative adjudicators should address this problem in three ways. First, they should take steps to dial back the restrictive understanding of persecution through improved hiring practices of adjudicators as well as trainings on trauma and bias geared to helping adjudicators surface and counteract unconscious mistaken beliefs. Second, they should adopt a trauma-informed understanding of persecution that takes account of the true impact that the wide-ranging forms of trauma have on human physical and mental health. As has been suggested by commentators in the field of human rights, persecution should be defined as the violation of a human right rather than as extreme harm. And third, following the lead of the U.S. Supreme Court in *Guerrero-Lasprilla v. Barr*, reviewing courts should stop deferring to the persecution findings of immigration agencies and should exercise de novo review.

A. Improved Hiring Practices and Anti-Bias Training

One way to reduce biased or distorted persecution findings is to improve the hiring practices of immigration judges and to include training on the nature of trauma and bias in pain assessments. Historically, the U.S. Department of Justice—the department containing the Executive Office for Immigration Review—has hired former immigration prosecutors as judges. A 2019 U.S. Department of Justice announcement said two thirds of new immigration judge appointments were former prosecutors.[191] Because true assessments of pain and suffering require an understanding of, and connection with, human vulnerability, judges conditioned to arguing against findings of persecution, repeatedly, over many years, may face barriers to fostering the empathy and understanding needed to accurately assess harm. Hiring practices that privilege judges with backgrounds that involved connection with, and understanding of, people of diverse backgrounds might improve the accuracy of persecution findings.[192]

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191. Executive Office for Immigration Review to Swear in 28 Immigration Judges, Bringing Judge Corps to Highest Level in History, U.S. Dep't of Just. (2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest (last visited Feb. 7, 2022).

192. *See supra* note 133 and accompanying discussion.

Judicial administrators should incorporate into judicial, and other adjudicator, trainings instruction on the nature of trauma and its lasting effects. Although the topics included in trainings have been expanded under the Biden Administration to include the topic of trauma, the training does not focus on trauma as it relates to the definition of persecution.[193] Judges should not only be schooled in the broad definition of trauma but they should also be given diversity training specifically aimed at disrupting the documented tendency to under-appreciate the pain and suffering of those considered others, as well as training on compassion fatigue.[194]

B. Persecution As A Human Rights Violation

Courts and asylum adjudicators should jettison the idea of persecution as an "extreme concept" and instead adopt a broad understanding of persecution as the non-trivial violation of a human right. As explained above, asylum law stems from the international law norm of nonrefoulement, making it logical to tag the definition of persecution to human rights. International human rights norms evolve as humanity deepens its understanding of the nature of human well-being and dignity and the effects of mental and physical trauma. By relying on an unspoken assumption that asylum seekers are unbreakable, the judiciary has not only diverged from the medical community's understanding of trauma, but it has contravened the international law roots of asylum, which recognize that human rights—and thus the notion of persecution—evolve, becoming more

193. Training topics under consideration by EOIR are: 1) Best practices for making assessments through virtual media / how to facilitate and interpret virtual medium testimony; 2) Training on domestic violence and how the dynamics of DV affect relate to asylum claims—in particular, the cycles of violence, why abusers harm their victims, and why victims often stay with an abuser; 3) Training on correct usage of pronouns and the handling of transgender asylum cases; 4) Microaggression training/Cross-cultural issues affecting credibility determinations; 5) Judicial stress / secondary trauma / burnout; 6) Training for IJs on understanding victims of trauma and best practices; 7) Criminal procedure; 8) Discrete asylum law topics particular to respondents appearing on dedicated dockets; 9) Issues particular to cases involving unaccompanied children; 10) How transnational gangs operate; and 11) Refugee processing. Email from Alexander Wang, Assoc. Dir. for Immigr., Domestic Pol'y Council to Rebecca Sharpless, (Nov. 19, 2021) (on file with the author).

194. The topic of judicial stress and burnout is among the proposed topics for immigration judge training.

inclusive, over time. Courts should reverse course and embrace an expanded view of human pain and suffering.

As the Seventh Circuit has noted, "Congress did not define persecution in the INA, nor did the United Nations in the international conventions and protocols that provided the backdrop for congressional asylum legislation and which have thus informed the judiciary's interpretation of [the immigration statute]."[195] But despite the lack of definition of the term, international law still serves as a "backdrop" for the meaning of persecution. Not only were the Refugee Act's amendments to the INA meant to reflect treaty obligations under the Refugee Convention, but the Supreme Court's statutory interpretation rule in *Murray v. The Charming Betsy* holds that, 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'"[196] The international law understanding of persecution is forward-looking and inclusive.[197] The drafters of the UN Refugee Convention sought

195. Balazoski v. I.N.S., 932 F.2d 638, 641–42 (7th Cir. 1991); *see also supra* notes 30–51 and accompanying text.

196. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804); *see also* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy* . . . that, 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'").

197. The UNHCR Handbook refers to the 1951 Convention as "a living and dynamic instrument." U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK AND GUIDELINES ON PROC. AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROT. RELATING TO THE STATUS OF REFUGEES 9 (2019); *see also* ANKER, *supra* note 51, § 4:2, (explaining how "[t]he drafters of the Convention deliberately chose not to define persecution so that the term could be interpreted in a flexible and evolving manner" and how "[t]he persecution standard was meant to be an evolving one, grounded in protection of interests essential to human dignity, and based on norms of international law"); Volker Turk & Frances Nicholson, *Refugee Protection in International Law* 3, 39, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller et al., eds. 2003) ("The lack of legal definition of persecution 'is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term.'") (quoting UNHCR, Interpreting Art. 1 of the 1951 Convention Relating to the Status of Refugees, ¶ 16, (2001)); ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 193 (1966) ("It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men."); Jane McAdam, *Australian Complementary Protection: A Step-by-Step Approach*, 33 SYDNEY L. REV. 687, 694 (2011) (referring

to ensure that asylum protection would evolve with time, encompassing future types of harms. A leading treatise on refugee protection describes the intent of the Refugee Convention drafters: "From the beginning, there was no monolithic or absolute conceptual standard of wrongfulness, the implication being that a variety of measures in disregard of human dignity might constitute persecution."[198]

U.S. courts should adopt an international human rights law understanding of persecution and place the preservation of human dignity at the center.[199] In his 1991 pathbreaking work, *The Law of Refugee Status*, James Hathaway mounts a critique of domestic U.S. jurisprudence on what counts as persecution, calling the U.S. approach "the zenith of a fundamentally subjective approach to the identification of persecutory harms."[200] Under this approach, "the question of whether harm is sufficiently 'intense,' 'offensive,'

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to the "evolving scope of the notion of 'persecution' and cognizant of the way in which developments in human rights law inform and expand its meaning").

198. JAMES C. HATHAWAY & MICHELLE FOSTER, *supra* note 13 at 183 (internal citations omitted); Goodwin-Gill & McAdam, *supra* note 19 at 131–32 ("Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the State faced with determining a claim to asylum or refugee status.").

199. Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement as an Open Concept*, 19 INT'L J. REFUGEE L. 639, 645–48 (2007) (discussing ways of understanding persecution); Nicholas R. Bednar & Margaret Penland, *Asylum's Interpretative Impasse: Interpreting "Persecution" and "Particular Social Group" Using International Human Rights Law*, 26 MINN. J. INT'L L. 145, 173–76 (2017) (referencing human rights treaties to identify rights violations that constitute persecution); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848–49 (1983) ("The 'dignity of the human person' and 'human dignity' are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples. Human dignity appears in the Preamble of the Charter of the United Nations . . . ."). The preamble to the Refugee Convention discusses human rights principles. United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Asylum Officer Trainings have noted the connection between asylum law and human rights law. U.S CITIZEN AND IMMIGR. SERV., IMMIGR. OFFICER ACAD., ASYLUM ELIGIBILITY PART I: DEFINITION OF REFUGEE DEFINITION OF PERSECUTION ELIGIBILITY BASED ON PAST PERSECUTION ASYLUM OFFICER BASIC TRAINING COURSE (May 2000).

200. JAMES C. HATHAWAY & MICHELLE FOSTER, *supra* note 13 at 187.

'oppressive,' or 'unjustified' is based on a given decision-maker's personal assessment of the severity of the harm feared"—a "I know it when I see it" test that "tends to a near-fixation with physical harm."[201] Hathaway rejects this approach, in favor of a more principled methodology anchored in international law, particularly human rights norms. Persecution is "serious harm," defined as a nontrivial violation of a human right.[202] Hathaway claims that the "human rights approach is clearly predominant in the common law world" and cites as support the European Union's Qualification Directive, which defines persecution as "an act that is 'sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made.'"[203] Under his view, persecution includes a violation of the human right to security of the person, which not only encompasses the right to be free of extreme physical mistreatment, such as torture, slavery, and inhuman and degrading treatment, but also the right to be free of lower levels of physical violence, such as unlawful detentions, threats, and all types of beatings.[204] Persecution also extends to violations of socio-economic human rights, as human rights law recognizes that "[p]hysical integrity may be compromised as much by the deprivation of an adequate standard of living as by more direct threats to life or physical well-being."[205] A person being denied "access to the 'necessities of life'" represents a human rights violation that constitutes persecution. The right to health might be violated where a person is denied "critical forms of health care or medical treatment."[206] Hathaway argues that tagging persecution to human rights violations is "an invaluable means of ensuring that the benchmark for the identification of relevant forms of serious harm does not stagnate, but rather evolves in line with authoritative international consensus."[207] Because de minimis violations of human rights may exist, Hathaway qualifies his understanding of persecution as a nontrivial violation of a human right.

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201. *Id.* at 187–88 (citing Stanjokova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011)).
202. *Id.* at 194.
203. *Id.* at 196 (citing OJ L 337/9 (Dec. 20, 2011) at Art. 9).
204. *Id.* at 208–228.
205. *Id.* at 228.
206. *Id.* at 236.
207. *Id.* at 194.

In asking whether a human rights violation has occurred, Hathaway's approach rejects the de facto rules that domestic U.S. courts have adopted, including the idea that a single beating does not qualify as sufficiently serious unless there are lasting physical injuries or disabilities or the rule that discrimination and harassment are distinct from persecution. Rather, the approach is to ask whether a human rights violation of any kind has occurred and, if so, whether it is more than a "de minimis" violation—a human rights violation "far at the margins of a rights violation."[208] Although some human rights can be limited in scope "where critical to a more general social purpose" or during an emergency, these limitations are not present with respect to the right to physical security, which Hathaway characterizes as underlying "quintessential refugee claim[s]."[209] Under this test, *all* of the cases involving physical violence discussed above qualify as persecution.[210] And many cases of nonphysical mistreatment would as well. Hathaway's suggestion of analyzing past harm by asking whether a human rights violation has occurred would grant asylum adjudicators and reviewing courts the needed latitude to alter the present, restrictive course regarding persecution. An expansive understanding of persecution not only respects the original, broad understanding of the term but better aligns with the contemporary medical understanding of what counts as trauma and the long-term effects of such harm on the mind and body.

C. Persecution As A Question of Law

Whether or not a given harm rises to the level of persecution should be a question of law, not fact, allowing appellate courts to conduct de novo review of the agency's persecution findings. Today, some courts consider the issue of whether harm rises to the level of persecution a factual question necessitating deference, rather than a

208. *Id.* at 206, 211. Hathaway does not give an example of de minimis harm but notes that it would be "exceptional" and that "[t]here can also be no issue of de minimis breach" of the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment. *Id.*

209. *Id.* at 205 and 208.

210. Hathaway characterizes "physical violence" as "impermissib[le]" under his framework, including "domestic violence." *Id.* at 226 (internal quotations omitted). He recognizes that "freedom from physical violence is a central component of the right to security of the person." *Id.* at 227.

legal question meriting de novo review.[211] These courts defer to the Board's persecution findings under substantial evidence review, overturning the agency's factual finding only if no reasonable factfinder could come to the agency's conclusion. Under substantial evidence review, a reviewing court must find that the record compels a finding of persecution such that no reasonable factfinder could disagree.[212] One consequence of substantial evidence review is that reviewing courts leave in place agency rulings on the parameter of persecution, even if the court disagrees with the agency's finding.[213] By failing to overrule ungenerous interpretations of what counts as persecution, appellate courts have contributed to the narrowing of protection over time.

An opportunity now exists for courts to reverse this trend and to realign their persecution standard with the original, broad understanding of the term. In *Guerrero-Lasprilla v. Barr*, the

211. *Compare* Fabian-Soriano v. Barr, 925 F.3d 552, 557 (1st Cir. 2019) ("[Petitioner] is challenging the *factual* determination by the agency that the threats he received did not rise to the level of persecution, which we lack jurisdiction to review.") (emphasis added), *and* Guzman Orellana v. AG United States, 956 F.3d 171, 177 (3d Cir. 2020) ("[W]hether Guzman has established that he suffered past persecution because of anti-gang political opinion imputed to him—presents a *factual* question.") (emphasis added), *with* Njong v. Whitaker, 911 F.3d 919, 923 (8th Cir. 2018) (whether harm rises to the level of persecution is a *legal* issue) (emphasis added), *and* Huo Qiang Chen v. Holder, 773 F.3d 396, 403 (2d Cir. 2014) ("[W]hether certain events, if they occurred, would constitute persecution as defined by the INA is a question of *law*.") (emphasis added). Some courts have issued contradictory decisions on the standard of review. *Compare* Herrera Morales v. Sessions, 860 F.3d 812, 816 (5th Cir. 2017) ("Whether a prior assault rises to the level of past-persecution is a question of law that we review de novo."), *with* Gjetani v. Barr, 968 F.3d 393 (5th Cir. 2020) (approaching the issue of past persecution as a question of fact); *compare* Medina v. United States AG, 800 F. App'x 851, 855 (11th Cir. 2020) ("[W]hether a fact pattern constitutes persecution is a question of law, subject to de novo review."), *with* Castro v. United States AG, 819 F. App'x 722, 725 (11th Cir. 2020) ("We review a finding as to whether an applicant suffered past persecution under the substantial evidence test.").

212. *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992) (stating that to reverse a factual finding by the BIA, the court must find not only that the evidence supports a contrary conclusion, but that it compels one); 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

213. *See* Flores Molina v. Garland, 37 F.4th 626, 641 (9th Cir. 2022) (Vandyke, J., dissenting) (recognizing the difference in outcome a de novo standard of review would have made, noting "[i]f I were the BIA-for-a-day . . . I may have been persecuted" to find persecution).

Supreme Court considered the question of whether legal, as opposed to factual, questions "include[] the application of a legal standard to undisputed or established facts."[214] The Court considered the question in the context of a jurisdictional clause in the Immigration and Nationality Act that ensures review of "questions of law," notwithstanding the jurisdictional bars elsewhere in the Act.[215] Mr. Guerrero-Lasprilla had sought judicial review of whether he had demonstrated "due diligence" in pursuing his rights such that the deadline for filing a motion to reopen could be equitably tolled. The facts pertinent to the due diligence inquiry were settled, having been adjudicated in administrative immigration court proceedings. Mr. Guerrero-Lasprilla asked the court to review as a legal question the agency's determination that the established facts did not constitute due diligence. This inquiry parallels the one in many asylum cases, where the facts relating to the level of past harm are settled, either because they are undisputed or have already been adjudicated. The relevant question is whether the harm meets the legal standard for persecution. Under *Guerrero-Lasprilla*, courts should now treat this question as legal and stop deferring to the Board's rulings on what level of severity counts as persecution.[216] Recognizing the importance of *Guerrero-Lasprilla*, some appellate courts have begun to reverse their prior holdings that certain inquiries are factual rather than legal.[217]

Through training on trauma and bias, a human rights framing for persecution, and treating persecution findings as questions of law, adjudicators and reviewing courts can improve

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214. Guerrero-Lasprilla v. Barr, 140 S.Ct. 1062, 1067 (2020).

215. *See* 8 U.S.C. § 1252(a)(2)(D). The Court referred to this provision as the "Limited Review Provision." *Guerrero-Lasprilla*, 140 S.Ct. at 1067.

216. A circuit split exists on whether a court of appeals reviews an agency determination of whether harm rises to the level of persecution de novo as a legal question or for substantial evidence as a factual one. *Compare* Malik v. Barr, 822 Fed. Appx. 763, 765 (10th Cir. 2020) (de novo), *and* Huo Qiang Chen v. Holder, 773 F.3d 396, 403 (2d Cir. 2014) (de novo), *with* He v. Garland, 24 F.4th 1220, 1224 (8th Cir. 2022) (citing INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)) (substantial evidence), *and* Bertrand v. Garland, 36 F.4th 627, 632 (5th Cir. 2022) (substantial evidence).

217. *See, e.g.*, Singh v. Rosen, 984 F.3d 1142, 1145 (6th Cir. 2021) (stating that hardship determinations made under 8 U.S.C. § 1229b(b)(1)(D) are the type of mixed questions of law and fact that the court now has jurisdiction to consider following *Guerrero-Lasprilla*); *see also* Arreola-Ochoa v. Garland, 34 F.4th 603 (7th Cir. 2022) (same); Gonzalez Galvan v. Garland, 6 F.4th 552, 559-60 (4th Cir. 2021) (same).

persecution findings and remain true to the humanitarian aim of refugee law, on which U.S. asylum law is founded.

CONCLUSION

Our shared commitment to asylum, to human rights, and to each other, requires that asylum adjudicators and reviewing court abandon the myth of asylum seekers as unbreakable and embrace a more robust understanding of human suffering informed by contemporary medical practice. This article demonstrates how immigration agencies and federal courts require levels of harm far in excess of the original legislative and international law understanding of what counts as persecution and contrary to contemporary understanding of how humans experience pain and trauma. Congress intended the notion of persecution to be generous, reflecting international human rights law. In the last three decades of interpreting the term persecution, agency adjudicators and federal courts have broken with this original conception and tacitly adopted the inaccurate view of asylum seekers as hard-shelled victims who are assumed to be able to endure high rates of suffering. Medical studies not only debunk the view that adversity makes a person more able to withstand pain and suffering but support the opposite view—namely that people who suffer repeated traumas become sensitized and experience a larger impact from harm. As the medical community expands its understanding of the long-term effects of lower-grade trauma, immigration adjudicators as a group, the Board of Immigration Appeals, and reviewing courts continue to restrict what qualifies as persecution.

The current state of judicial findings about persecution are consistent with troubling studies about the barriers to understanding the pain and suffering of others, particularly those applicants that adjudicators perceive as from a different group. Racial and general stereotypes about pain tolerance further limit objectivity and contribute to a view of asylum seekers who have suffered past harm as unbreakable. The administrators of our immigration agencies must take steps to counteract the effect of bias in assessing the pain and suffering of others and help adjudicators deepen their understanding of our essential frailty as humans.

Persecution is best understood as a nontrivial violation of a human right. Under the proper definition of persecution, the trauma endured by Hani Kazemzadeh should have qualified as past

persecution. His four-day detention, during which he endured a five-hour beating and interrogation, more than violated his human right to the security of his person. Indeed, far lesser mistreatment should have qualified him for protection. No one should have to live in a world in which what happened to Mr. Kazemzadeh is a mere "simple beating" or "harassment" that falls short of persecution. Mr. Kazemzadeh, like the rest of us, is not unbreakable. Now that the U.S. Supreme Court has clarified what counts as a legal, rather than factual, question, reviewing federal courts no longer need to defer to the persecution findings of agency adjudicators. Reviewing courts should reset the baseline of what counts as persecution to account for our essential frailty.