

No Physical Harm, No Asylum: Denying a Safe Haven for Refugees

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I. Introduction

Give me your tired, your poor, Your huddled masses
yearning to breathe free, The wretched refuse of your
teeming shore. Send these, the homeless, tempest-tost to me,
I lite my lamp beside the golden door.¹

This noble sentiment has greeted immigrants approaching American shores for over a century but unfortunately, federal asylum laws are much less welcoming. As the United States Court of Appeals for the Fifth Circuit stated, “[T]he law regulating persecution claims, although humane in concept, is not generous.”² A requirement of physical harm is not included in the statute and was not the intent of the asylum legislation.³ Nonetheless, federal courts frequently affirm decisions by the Immigration and Naturalization Service (“INS”) to deny asylum to refugees whose persecution has not resulted in physical injury, forcing these individuals to return to the dangerous situation they sought to escape. Refugees who enter the country illegally or who overstay their visas are subject to deportation unless the Immigration and Naturalization Service grants them asylum. The INS has tended to grant asylum only if refugees present evidence of severe physical injuries.

The purpose of the asylum statute, 8 U.S.C. § 1101, was to “ ‘give statutory meaning to our national commitment to human rights and humanitarian concerns.’ ”⁴ The statute was intended to protect the “exercise of internationally recognized human rights.”⁵ “The [statute’s] narrow definition of refugee⁶ is no doubt driven by Congress’ concern that a more lenient and compassionate policy would qualify the entire

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1. Emma Lazarus, *The New Colossus: Inscription for the Statute of Liberty, New York Harbor* (1883).

2. *Coriolan v. I.N.S.*, 559 F.2d 993, 996 (5th Cir. 1977).

3. 8 U.S.C. § 1101(a)(42)(A) (1999).

4. *Selgeka v. Carroll*, No. 184 F.3d 337, 343 (4th Cir. 1999) (quoting 125 Cong. Rec. 23232 (1979)).

5. *Perkovic v. I.N.S.*, 33 F.3d 615, 623 (6th Cir. 1994).

6. 8 U.S.C. § 1101 (a)(42)(A) (1994); 8 C.F.R. § 208.13(b)(1) (1999).

population of many war-torn nations for asylum.”⁷ This, however, is no justification for the misinterpretation of federal law by the appellate courts. Courts of appeals repeatedly affirm the petitioner’s denial of asylum if the petitioner was fortunate enough to escape before being physically harmed by his tormentors.

This article analyzes and discusses asylum petitioners whose claims were denied at the administrative appeal level and subsequently appealed to the United States Courts of Appeals. By way of reviewing individual case outcomes, this article demonstrates the failure of the courts to link persecution to non-physical forms of harm such as economic deprivation, incarceration, harassment, and threats. This article will then contrast these outcomes to cases where asylum was granted based on evidence of physical harm.

Sections II, III, and IV are intended to frame the discussion by providing a brief overview of the rule of law, administrative procedure, and the standard of review applied to asylum cases. Section V will focus its discussion on cases where the petitioners were not physically harmed, yet nonetheless were persecuted in other ways. In all of these cases, the federal courts of appeal subsequently affirmed the denials of asylum. Section VI will discuss cases where the petitioners were physically harmed. In stark contrast to the discussion in Section V, these cases were remanded on appeal to the Board of Immigration Appeals because the physical harm was sufficient for a finding of persecution. Section VII will review cases where the petitioner again was not physically harmed, but the court determined there was a well-founded fear of future persecution due to a pattern of severe harm suffered by persons similarly situated. Finally in section VIII, the authors conclude that until courts enforce the human rights purpose of the asylum statute to include non-physical harm as persecution, there will be no safe haven for refugees in America.

It should be noted that the authors have chosen to include in this article a discussion of several unpublished cases. While these cases may lack precedential value in many jurisdictions,⁸ the authors felt their inclusion was nonetheless vital as they provide additional examples of the courts’ treatment of asylum claims. Additionally, because the Fourth and Tenth Circuit Courts refrain from publishing a majority of asylum opinions, a discussion of unpublished opinions is necessary for an overall discussion of the posture of these circuits towards asylum claims.⁹

7. *Urukov v. I.N.S.*, 55 F.3d 222, 228 (7th Cir. 1995) (quoting *Sivaankaran v. I.N.S.*, 972 F.2d 161, 165 (7th Cir. 1995)).

8. Some jurisdictions allow citation of unpublished cases as authority. *See, e.g.*, U.S. Ct. of App. 11th Cir. R. 36-2 (allowing citation of unpublished opinions as persuasive authority); *see generally* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541 (1997).

9. The Fourth Circuit, for example, need not publish an opinion unless among other things it “involves a legal issue of continuing public interest.” U.S. Ct. of App. 4th Cir. R. 36(a)(1)(i). Sadly,

II. Rule of Law

Pursuant to 8 U.S.C. §1158, a refugee may apply to the INS for asylum. The term “refugee” is defined as any person outside their native country “who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”¹⁰ The petitioner must establish that the persecution was inflicted based on one of these five statutory grounds.¹¹ Past persecution and fear of future persecution are alternatives for eligibility for asylum.¹² That is, a petitioner may be granted asylum for past persecution, fear of future persecution, or both. The determination of persecution is circular; the two alternatives are interrelated.¹³ The past persecution alternative alone will only be sufficient if the persecution is severe and atrocious, generally resulting in permanent physical injury.¹⁴ The petitioner must show that her past persecution was so severe that it would be inhumane to force her to return home.¹⁵ This type of asylum, therefore, is also sometimes referred to as “humanitarian asylum.”

Courts, which have granted asylum on this “inhumane” standard, have generally required evidence of prolonged periods of torture and evidence of severe physical injury.¹⁶ The Seventh Circuit, which has a particularly strict interpretation of this standard, describes the humanitarian asylum alternative as, “[D]esigned for the case of the German Jews, the victims of the Chinese ‘Cultural Revolution,’ survivors of the Cambodian genocide, and a few other such extreme cases.”¹⁷ Notwithstanding this unusually narrow application of the

this practice denies refugees the ability to use these cases as precedent and restricts their access to legal resources.

10. 8 U.S.C. § 1101(a)(42)(A) (1999).

11. 8 C.F.R. § 208.13(a) (1999).

12. 8 U.S.C. § 1101(a)(42)(A) (1999); 8 C.F.R. § 208.13(b)(1)(i) (1999). In 1996 the Refugee Act was amended to provide that persons forced to abort a pregnancy, undergo involuntary sterilization, or persecuted for resisting coercive population control measures, are considered to be persecuted because of their political opinion and to possess a well-founded fear of future persecution. However, the amended statute only allows admittance of one thousand asylees a year.

13. 8 C.F.R. § 208.13(b)(1)-(b)(2)(ii) (1999).

14. *See Baka v. I.N.S.*, 963 F.2d 1376, 1379 (10th Cir. 1992). The Tenth Circuit denied asylum to two Hungarians who feared they would be unable to obtain employment in their native country because they had stayed in the United States for over ninety days and were members of the Catholic Church. Citing earlier cases, where petitioners were denied asylum even though they had been jailed, beaten, tortured, and denied employment, the Tenth Circuit held potential job loss did not constitute persecution so severe that it would be inhumane for a person to return to their native country.

15. 8 U.S.C. § 1101(a)(42)(A) (1999).

16. *See, e.g., In re Chen*, No. A-26219652, 1989 WL 331860, 20 I. & N. Dec. 16 (BIA April 25, 1989) (finding permanent hearing damage sufficient evidence of past persecution); *Vongsakdy v. I.N.S.*, 171 F.3d 1203 (9th Cir. 1999) (finding severed thumb evidence of past persecution).

17. *Bucur v. I.N.S.*, 109 F.3d 399, 405 (7th Cir. 1997).

statute, there is no evidence that Congress intended this alternative to be so restrictive.

If a petitioner's suffering does not rise to the level of atrocity required for humanitarian asylum, but the petitioner is able to prove the existence of some past persecution, a presumption of a well-founded fear of future persecution arises by operation of law.¹⁸ The government, however, may rebut this presumption, with evidence of improved conditions in the native country so the petitioner "no longer has a well-founded fear of being persecuted if he or she were to return."¹⁹

Because significant amounts of time can lapse between the occurrence of persecution and the time when the Immigration Judge ("IJ") finally hears the petition,²⁰ it is not unusual for the governments of these developing countries to change significantly during the intervening years.²¹ Often the opposition party or group, in which the petitioner participated, is now in power by the time of the Board of Immigration Appeals hearing.²² While in some situations it might be appropriate to deny an asylum claim because of changed country conditions, it is also important to note that political conditions in many of these developing nations remain extremely unstable. Moreover, changed political conditions do not necessarily translate into freedom from persecution. While conditions may have changed on a national level, the former party in power may continue to assert control over local politics. Similarly, the former opposition party, now in power, could be deposed after the petitioner is repatriated.²³ Consequently, repatriated individuals may face imminent danger from the government, opposition factions, or both.²⁴

On the other hand, the petitioner who experienced no persecution, perhaps because he escaped before the threats could be fulfilled, may fear persecution in the future.²⁵ Courts frequently find no reasonable grounds for a well-founded fear of persecution based on unfulfilled threats, without some evidence of past persecution.²⁶ Because courts interpret the statute in a much more restrictive manner than Congress intended, multitudes of deserving and desperate refugees are denied asylum.

18. 8 U.S.C. § 1101(a)(42)(A) (1999).

19. 8 C.F.R. § 208.13(b)(1)(i) (1999).

20. See Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 278 (1992) (noting delays of up to ten years before asylum cases are heard by an Immigration Judge).

21. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6262.

22. *Janusiak v. I.N.S.*, 947 F.2d 46, 47-48 (3d Cir. 1991).

23. See *Gallius v. I.N.S.*, 147 F.3d 34, 42-43 (1st Cir. 1998).

24. See *id.* at 43.

25. 8 C.F.R. § 208.13(b)(2) (1999).

26. See, e.g., *Kratchmarov v. Heston*, 172 F.3d 551, 555 (8th Cir. 1998).

A. *Demystifying Persecution*

Persecution can take many non-physical forms, including: economic disadvantage, educational deprivation, social ostracism, police interrogation, false arrest, or any other loss of basic human rights.²⁷ Although the asylum statute defines persecution as a suffering in the past or a fear of future suffering, neither the statute nor the regulations specifically states that physical harm is required for asylum eligibility.²⁸ The courts have expressly agreed that a showing of physical harm is not required by the statute, yet in the vast majority of cases, courts will affirm a denial of asylum unless the petitioner produces evidence of physical injury. These court decisions are inconsistent with the statutory definition of persecution.

For instance, the Seventh Circuit defines persecution as “ ‘punishment’ or the ‘infliction of harm[,]’ which is administered on account of race, religion, nationality, group membership, or political opinion.”²⁹ This court notes that the conduct “need not necessarily threaten the petitioner’s ‘life or freedom,’ [but] it must rise above the level of mere ‘harassment’ to constitute persecution.”³⁰ Threats, under the proper circumstances, may amount to persecution, but unpleasant or even dangerous conditions may not necessarily be considered persecution.³¹ An earlier Seventh Circuit court opinion established an even more restrictive definition, stating that persecution entails “more than just restrictions or threats to life and liberty.”³² This definition is still followed by the Tenth Circuit.³³ The Ninth Circuit, on the other hand, defines persecution as, “[T]he infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.”³⁴ The Sixth Circuit, claiming agreement with these other circuit courts, held 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.”³⁵ Although the statute requires that the persecution be inflicted

27. For an excellent discussion of human rights, see VALERIE EPPS, *INTERNATIONAL LAW FOR UNDERGRADUATES* ch. VIII. (1998).

28. Under the asylum statute, a petitioner may qualify as a refugee if she has suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1101(a)(42)(A)-(42)(B) (1999); 8 § 208.13(b)(1) (1999).

29. *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998) (citations omitted).

30. *Id.* (citing *Balazoskiv v. I.N.S.*, 932 F.2d 638, 642 (7th Cir. 1991)) (citations omitted).

31. *Mitev v. I.N.S.*, 67 F.3d 1325, 1330-31 (7th Cir. 1995).

32. *Zalega v. I.N.S.*, 916 F.2d 1257, 1260 (7th Cir. 1990).

33. *Mroz v. Reno*, No. 96-1252, 1997 WL 139762, at *2 (10th Cir. Mar. 24, 1997) (unpublished) (quoting *Zalega v. I.N.S.*, 916 F.2d 1257, 1260 (7th Cir. 1990)).

34. *Lopez-Galarza v. I.N.S.*, 99 F.3d 954, 959 (9th Cir. 1996) (citations omitted).

35. *Mikhailevitch v. I.N.S.*, 146 F.3d 384, 390 (6th Cir. 1998).

because of one of the five statutory grounds,³⁶ only the Fifth Circuit requires that the persecutor be a member of the government, military, or a controlling regime.³⁷ The Fifth Circuit further defines persecution as:

[T]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. 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.³⁸

Although these courts have stated that physical harm is not required, it is rare for a court to find past persecution, or even reasonable fear of future persecution, in the absence of severe physical injuries.³⁹ The First and Ninth Circuits acknowledged that this trend leads to the “absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive.”⁴⁰ As this article will demonstrate, this absurd result occurs in a majority of asylum cases decided by all circuit courts.

B. Deconstructing Well-Founded Fear

A petitioner proves a well-founded fear of persecution by establishing that: (1) he has a fear of persecution in his country of nationality or last residence on account of one or more of the five statutory grounds enumerated in 8 C.F.R. § 208.13(a); (2) there is a reasonable possibility of suffering persecution if he were to return to his former residence; and (3) he is unwilling to return to the conditions he fled because of such fear.⁴¹ If a reasonable person in the same circumstances as the petitioner would also fear persecution, a petitioner will have proven his fear is well founded.⁴² The petitioner need not prove that persecution is certain or even more likely than not; the

36. See *supra* notes 9-10, and accompanying text.

37. See *Adebisi v. I.N.S.*, 952 F.2d 910, 912 (5th Cir. 1992).

38. *Mikhael v. I.N.S.*, 115 F.3d 299, 303 n.2 (5th Cir. 1997) (citing *Abdel-Mesieh v. I.N.S.*, 73 F.3d 579 (5th Cir. 1996)) (quoting *In re Laipenicks*, 18 I. & N. Dec. 433, 456-457 (BIA 1983)).

39. *Asani v. I.N.S.*, 154 F.3d 719, 723 (7th Cir. 1998).

40. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) (quoting *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)).

41. See 8 C.F.R. § 208.13(b)(2) (1999); *Osorio v. I.N.S.*, 18 F.3d 1017, 1031 (2d Cir. 1994).

42. See *Abankwah v. I.N.S.*, No. 98-4304, 1999 WL 476436 (2d Cir. July 9, 1999) (unpublished) (citing *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991)).

Supreme Court held reasonable fear is established when a petitioner has a ten percent or higher probability of being persecuted if deported.⁴³

Proving both a genuinely subjective fear and an objectively reasonable fear of future persecution satisfies a petitioner's burden of proof for a well-founded fear of persecution.⁴⁴ To satisfy the subjective element, a petitioner's fear must be genuine.⁴⁵ A petitioner's subjective fear may be based on his reaction to events that affect him personally.⁴⁶ Credible subjective fear can be established by detailed testimony by the petitioner, relating his experiences and fear of persecution.⁴⁷ The Ninth Circuit recognized in *Aguilera-Cota v. I.N.S.*,⁴⁸ that it "would be 'close to impossible for [any political refugee] to make out a case for [asylum]' " if a petitioner's undisputed testimony, regarding a death threat, was rejected because of no direct corroborative evidence.⁴⁹

III. Administrative Procedure

A final grant of asylum may be determined at five different levels of procedure: (1) INS Asylum Officers; (2) Immigration Judges; (3) Board of Immigration Appeals (BIA); (4) Federal District Courts or United States Court of Appeals; or (5) the United States Supreme Court. Asylum seekers must file an application for asylum with the INS within one year of entering the country.⁵⁰ The procedures are complex and contain many exceptions, which are beyond the scope of this article.

After filing an application for asylum, a hearing before an IJ may not occur for as long as 5 or 6 years.⁵¹ The decision of the IJ may be verbal, without a formal written opinion.⁵² If an IJ determines that a petitioner meets the statutory definition of refugee, then the IJ has the

43. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

44. See *Cordero-Trejo*, *supra* note 40, at 491; *Ravindran v. I.N.S.*, 976 F.2d 754, 758 (1st Cir. 1992); *Alvarez-Florez v. I.N.S.*, 909 F.2d 1, 5 (1st Cir. 1990).

45. See *Civil v. I.N.S.*, 140 F.3d 52, 55 (1st Cir. 1998) (quoting *Ravindran v. I.N.S.*, 976 F.2d 754, 758 (1st Cir. 1992)).

46. See *Abankwah*, *supra* note 42, at *9 (citing *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991)).

47. See *Id.* at *9.

48. See *Aguilera-Cota v. I.N.S.*, 914 F.2d 1375, 1379 (9th Cir. 1990).

49. *Id.* (quoting *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir.)) (alteration in original).

50. 8 C.F.R. § 207.8 (1999).

51. In one well-publicized instance, the delay for Haitian refugees escaping the brutality of the Ton Ton Macoutes, the paramilitary force of dictator Jean-Claude (Baby Doc) Duvalier, was as long as seven or eight years. This delay in the late 1980s convinced Congress that it would be inhumane to repatriate Haitians who established families and careers in this country while waiting for the hearings. This decision resulted in a windfall to the Haitians, who were granted permanent resident status, without the need for determination of persecution. See H.R. REP. NO. 105-845, at 202 (1999). See also National Immigration Forum, *Haitian Refugees Gain Permanent Residence*, NATIONAL IMMIGRATION FORUM WEBSITE, Oct. 16, 1998 at <<http://www.immigrationforum.org/archiveissues/haitians/HaitianVic.html>> (visited Jan. 22, 2000).

52. 8 C.F.R. § 240.12 (a) (1999).

discretionary power to grant asylum. If the IJ determines, after reviewing a petition, that the alien is not entitled to asylum, the alien may appeal the decision to the Board of Immigration Appeals (“BIA”).⁵³ If the BIA agrees with the IJ that there is no basis for asylum, the alien may appeal the BIA decision to the United States Court of Appeals.⁵⁴ The decision of the court of appeals may be subject to a writ of certiorari to the United States Supreme Court.

IV. Standard of Review

Review of the IJ decision by the BIA is de novo; no deference need be given to the IJ’s decision. The court of appeals will review the BIA’s determination of law de novo, but will uphold the BIA’s findings of facts to the extent they are “supported by reasonable, substantial, and probative evidence on the record considered as a whole.”⁵⁵ A denial of asylum by the BIA will be upheld by the court of appeals unless it is not supported by substantial evidence.⁵⁶ If the BIA finds past persecution, but denies asylum based on its discretion, then the decision is reviewed by the court of appeals for an abuse of discretion.⁵⁷ The court will only remand the case to the BIA if the evidence “was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed.”⁵⁸ The court of appeals does not grant asylum. Cases, which the court finds worthy of asylum, are remanded to the BIA for further consideration.⁵⁹ Most BIA cases are not published. Therefore, it is not necessarily conclusive that each of these remanded cases results in a final determination of asylum.⁶⁰

V. Asylum Denied Because No Physical Harm

As stated above, although most courts will agree that physical harm is not the benchmark for asylum, even petitioners with convincing evidence of severe, but non-physical, injury will be denied asylum. Although not expressly stated by the courts, lack of physical harm plays an extremely important role in determining asylum eligibility. While the

53. 8 C.F.R. § 240.15 (1999).

54. 8 C.F.R. § 3.1(d)(3) (1999).

55. *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (citing 8 U.S.C. §1105a(a)(4) (1994)); *Refahiyat v. United States Dep’t of Justice*, 29 F.3d 553, 556 (10th Cir. 1994).

56. *Novoa-Umania v. I.N.S.*, 896 F.2d 1, 2 (1st Cir. 1990).

57. *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993).

58. *Elias-Zacarias*, *supra* note 55, at 481.

59. 8 C.F.R. § 240.15 (1999).

60. *Id.*

following cases cite different reasons for denying asylum, in each case the petitioners had no evidence of severe physical abuse. Threats alone, even death threats have rarely persuaded a court.⁶¹ Economic disadvantage, harassment, humiliation, intimidation, and even incarceration are likewise unpersuasive to most courts.⁶² Similarly, many courts will affirm decisions to deny asylum because subsequent changes in the political climate of the petitioner's homeland have reduced the likelihood of persecution.⁶³

A. *Insufficient Nexus to One of the Five Statutory Grounds*

Courts often rely on an "insufficient nexus" to one of the five statutory grounds to affirm a denial of asylum. The petitioner must prove not only persecution, but also that the persecution was directly linked to the petitioner's political opinion, religion, social group, race, or nationality.⁶⁴ This places petitioners in the sometimes very difficult position of proving the motives of their persecutors. Failure to establish a nexus between one of the five statutory grounds and the persecution suffered will inevitably result in the denial of a petitioner's claim for asylum. Petitioners fearing retribution over non-statutory matters, i.e., personal matters, fleeing a civil war, or general conditions of violence, crime, and conflict will not qualify for asylum.⁶⁵ Mere threats to an individual's life "without any indication that the basis of the threat is related to a statutorily enumerated ground is insufficient to establish eligibility for relief."⁶⁶ Similarly, as will be discussed *infra*, despite obvious political overtones, punishment for aiding, joining, or refusing to join or aid guerrilla insurgents is generally not considered persecution related to political opinion or any other statutory ground.

1. *Persecution for Refusing or Fleeing Forced Conscription*

Courts will commonly affirm a denial of asylum under the rationale that an individual's action, or inaction, was not related to his

61. *See* *Civil v. I.N.S.*, 140 F.3d 52, 54, 56 (1st Cir. 1998).

62. *See, e.g.*, *Mitev v. I.N.S.*, 67 F.3d 1325, 1328 (7th Cir. 1991); *Boykov v. I.N.S.*, 109 F.3d 413, 415, 417 (7th Cir. 1997); *see also* *Baka v. I.N.S.*, 963 F.2d 1376, 1379 (10th Cir. 1992); *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir. 1991).

63. *See* *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir. 1991).

64. 8 U.S.C. § 1101(a)(42)(A) (1999).

65. *In re Mogharrabi*, No. A-26850376, 1987 WL 108943, I. & N. Dec. 439 at 447 (BIA June 12, 1987).

66. *Perlera-Escobar v. I.N.S.*, 894 F.2d 1292, 1297 (11th Cir. 1990) (quoting *Hernandez-Otiz v. I.N.S.*, 777 F.2d 509, 516 (9th Cir. 1985)).

political beliefs. In *I.N.S. v. Elias-Zacarias*,⁶⁷ one of the leading asylum cases, the Supreme Court squarely addressed the requirement of linking statutory grounds to a petitioner's claim for asylum. In the facts of *Elias-Zacarias*, guerrillas attempted to recruit the petitioner, a Guatemalan native, and his family, impliedly threatening them with retaliation if they did not join.⁶⁸ In addition to his fear of retaliation from the guerrillas, the petitioner stated he also feared reprisals from the government if he agreed to join the guerrillas.⁶⁹ In a 6-3 decision, the court found that the petitioner's refusal to join the guerrillas was not for political reasons but rather fear of combat or fear of government retaliation, which were not political motives.⁷⁰ Significantly, the Court refused to impute political opinion to the petitioner's efforts to remain neutral.⁷¹ Because the petitioner's fear of persecution was purportedly not related to his own political opinions, he failed to meet the statutory requirement.⁷² Consequently, the Court affirmed the asylum denial because of lack of a nexus to a statutory ground.⁷³

In a well-reasoned and impassioned dissenting opinion by Justice Stevens, joined by Justices Blackmun and O'Connor, the dissent admonished the majority opinion as a "narrow, grudging construction of the concept of 'political opinion.'" ⁷⁴ The dissent referred to *I.N.S. v. Bolanos-Hernandez*,⁷⁵ another factually similar case from the Ninth Circuit where the petitioner, a native of El Salvador, also feared for his life after refusing to join a guerilla movement.⁷⁶ The dissent noted approvingly the Ninth Circuit's observation that guerillas do not inquire as to the petitioner's reasons for refusing to join.⁷⁷ The dissent additionally stated, "It is important to emphasize that the statute does not require an applicant for asylum to prove exactly why his persecutors would act against him" ⁷⁸ Ironically, this is exactly the quantum of proof required by the majority.

This unfortunate decision has resulted in a string of cases involving guerilla insurgencies where asylum was denied because any fear of persecution stemming from the petitioner's actions or refusal to act was held not related to the petitioner's political opinion.⁷⁹

67. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

68. *Id.* at 479.

69. *Id.* at 480.

70. *Id.* at 482-83.

71. *Id.* at 482.

72. See *Elias-Zacarias*, *supra* note 67, at 482.

73. *Id.* at 483-84.

74. *Id.* at 487 (Stevens, J., dissenting).

75. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277 (9th Cir. 1985).

76. *Id.* at 1280.

77. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 489 (1992) (Stevens, J. dissenting).

78. *Id.*

79. Practitioners should particularly note that pleading persecution because of neutrality, without expressly articulating neutrality as an expression of one's political philosophy, is fatal to a claim for asylum.

In countries torn by civil war, where human rights abuses run rampant, individuals are commonly caught between a rock and a hard place: Either help the insurgents and be persecuted by the government, or refuse to help the insurgents and be persecuted by the insurgents. Our nation's rigid adherence to the five enumerated criteria significantly undermines " 'our national commitment to human rights and humanitarian concerns,' "80 and eliminates a significant number of refugees from asylum eligibility.

The Tenth Circuit relied on a lack of nexus theory as a rationale to affirm a denial of asylum in the unpublished case of *Vincente v. I.N.S.*⁸¹ Here, the petitioner, a Quiche Indian from Guatemala, was twice recruited by guerrillas, and twice he refused their conscription attempts.⁸² On both occasions, he was taken away by the guerrillas and beaten, but he managed to escape.⁸³ The court found the petitioner refused to join the guerrillas because he would be forced to fight and kill others.⁸⁴ This rationale for avoiding conscription, however, was held unrelated to the petitioner's political opinion.⁸⁵

In *Cruz-Diaz v. I.N.S.*,⁸⁶ a Fourth Circuit case also involving guerrilla insurgencies and civil war, the petitioner, a native of El Salvador, was conscripted and fought with the guerrillas as a child.⁸⁷ Ultimately, he fled their ranks.⁸⁸ The petitioner feared retribution from both the government and the spurned guerrillas.⁸⁹ Affirming the decision to deny asylum, the court held, "The guerrillas' conscription of Cruz-Diaz as a child, his fleeing from the guerrillas, and his hiding from both the guerrillas and the army and fleeing for fear of retribution from both does not establish a political opinion on his part."⁹⁰

2. *Persecution for Aiding or Refusing to Aid Guerrillas*

In *Juarez v. I.N.S.*,⁹¹ petitioners who were periodically visited by guerrillas and forced to provide food and assistance were found by the

80. *Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. June 7, 1999) (quoting 125 Cong. Rec. 23232 (1979)).

81. *Vincente v. I.N.S.*, No. 96-9544, 116 F.3d 1490 (10th Cir. 1997) 1997 WL 355331, at *1-2 (unpublished).

82. *Id.* at *1.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Cruz-Diaz v. I.N.S.*, 86 F.3d 330 (4th Cir. 1996).

87. *Id.* at 331.

88. *Id.*

89. *Id.*

90. *Id.* at 332.

91. *Juarez v. I.N.S.*, No. 97-1508, 1997 WL 693581, at *1 (4th Cir. Oct. 28, 1997) (unpublished). See also *Alvarez-Flores v. I.N.S.*, 909 F.2d 1, 7-8 (1st Cir. 1990) (Affirming finding that cheese

Fourth Circuit to have no well-founded fear of persecution based on political opinion or any other statutory ground.⁹² Although the Second Circuit appears to be more generous in granting asylum,⁹³ it affirmed a denial of asylum in the unpublished case of *Rivas v. McElroy*⁹⁴ because it found no statutory nexus to the petitioner's fear of persecution. Rivas was a citizen of El Salvador who experienced repeated home visits, threats, and questioning by both guerrillas and members of the Salvadoran military.⁹⁵ Nine members of petitioner's extended family were killed in separate incidents for giving food to the guerrillas.⁹⁶ Despite repeated threats, the court found no reasonable fear of persecution related to one of the five statutory grounds, reasoning the petitioner was not herself politically involved and had not been singled out for persecution.⁹⁷

3. *Persecution by Non-Government Individuals*

Unlike its sister courts of appeals, the Fifth Circuit has one of the more restrictive interpretations of the nexus requirement in that the persecutor must be a member of the government or military. This rule prevented a grant of asylum in *Adebisi v. I.N.S.*,⁹⁸ where the petitioner, a Nigerian citizen and member of the Yoruba tribe, claimed he was harassed by fellow members of his tribe and received voodoo death threats because he refused to assume his inherited position as chief.⁹⁹ Despite his position in the royal family, an obvious social group, the court found this persecution was linked to a personal dispute and that the petitioner was threatened because of his refusal to act.¹⁰⁰

makers were not a social group. Petitioner feared persecution from the El Salvadoran government because he sold cheese to guerrillas.)

92. *Juarez*, *supra* note 91, at *1.

93. *See, e.g.*, *Carranza-Hernandez v. I.N.S.*, 12 F.3d 4 (2d Cir. 1993); *Osorio v. I.N.S.*, 18 F.3d 1017 (2d Cir. 1994).

94. *Rivas v. McElroy*, No. 98-4012, 1999 WL 66171 (2d Cir. Feb. 10, 1999) (unpublished).

95. *Id.* at *2.

96. *Id.*

97. *Id.* at *3-4.

98. *Adebisi v. I.N.S.*, 952 F.2d 910 (5th Cir. 1992).

99. *Id.*

100. *Id.*

4. *Persecution Unrelated to Political Opinion*

Another illustration of the Fifth Circuit's unduly rigid interpretation of the asylum laws is exemplified in *Ozdemir v. I.N.S.*¹⁰¹ The petitioner was an ethnic Kurd and member of an organization that non-violently opposed the Turkish government's discrimination against Kurds.¹⁰² As part of the government's effort to obtain information about a Kurdish terrorist organization, Ozdemir was detained for three days, beaten, and interrogated.¹⁰³ The court found the beating related to a police investigation, not the petitioner's political opinion.¹⁰⁴

In a case decided by the Sixth Circuit, the rape of a Polish woman who had been previously harassed for her refusal to join the Communist Party, was held not related to her anti-communist beliefs. In *Klawitter v. I.N.S.*,¹⁰⁵ the chief of security and internal affairs in Poland "forced himself on her and used violence against her while threatening to destroy her career."¹⁰⁶ The court decided that this was a personal dispute, and any resulting harm was based solely on sexual attraction, and thus did not constitute persecution.¹⁰⁷

The First Circuit relied on an insufficient nexus theory to affirm a denial of asylum in *Civil v. I.N.S.*,¹⁰⁸ where a 15 year-old Haitian girl's expression of support for then-ousted President, Jean-Bertrand Aristide, was overheard by a man suspected of belonging to the Ton Ton Macoutes paramilitary organization.¹⁰⁹ The girl's home was stoned that evening and her dog was killed, but the court decided this was a random act of violence, and not politically motivated.¹¹⁰

5. *Persecution for Acts of Resistance*

Making the fine distinction between prosecution and persecution, the Tenth Circuit in *Sadeghi v. I.N.S.*,¹¹¹ affirmed a BIA denial of asylum finding that the petitioner's fear of persecution was related to his *actions*, not his *opinions*. Sadeghi was an Iranian teacher and a longtime member

101. *Ozdemir v. I.N.S.*, 46 F.3d 6 (5th Cir. 1994).

102. *Id.* at 8.

103. *Id.*

104. *Id.*

105. *Klawitter v. I.N.S.*, 970 F.2d 149 (6th Cir. 1992).

106. *Id.* at 151.

107. *Id.* at 152.

108. *Civil v. I.N.S.*, 140 F.3d 52, 56 (1st Cir. 1998).

109. *See id.* at 54.

110. *See id.* at 54, 56.

111. *Sadeghi v. I.N.S.*, 40 F.3d 1139 (10th Cir. 1994).

of an anti-government group that opposed Islamic fundamentalism.¹¹² He begged one of his fourteen-year-old students who wished to become “a martyr for God” not to fight in the Iraqi war.¹¹³ Shortly thereafter, a group of armed National Guardsmen came to the school to arrest the petitioner because he was “against the government and the Islamic revolution.”¹¹⁴ Corroborating evidence indicated the petitioner’s name was on a “wanted” list by the Iranian government.¹¹⁵ The court inferred that the petitioner’s persecution for his actions was comparable to the persecution of a guerilla for taking action against the government.¹¹⁶ The court found these threats unrelated to the petitioner’s religion or political opinion, but rather related to an attempt to prosecute the petitioner for interfering with Iran’s conscription laws.¹¹⁷

Similarly, the Sixth Circuit affirmed a denial of asylum in *Adhiyappa v. I.N.S.*¹¹⁸ The petitioner, a Sri Lankan Tamil and university instructor, opposed efforts to create a separate nation for ethnic Tamils.¹¹⁹ The petitioner acted as an informant to university and government officials regarding the activities of Tamil student separatists.¹²⁰ Members of militant separatist groups, aware of his role as an informant, would come to the petitioner’s home, confront him, call him a traitor, and threaten to kill him.¹²¹ The court found the petitioner was threatened for his actions, but that his actions were not related to any political opinion.¹²² The majority speculated that the petitioner’s actions may have been motivated by his desire to keep his job.¹²³

The opinion’s dissenter noted that Tamil separatists clearly intended to kill any person who opposed their separatist movement.¹²⁴ The dissent questioned the majority’s conclusion that the statutory definition of refugee “does not include all individuals who are persecuted because their actions tend to obstruct the activities of politically motivated organizations, even where those activities . . . [are] part[ially] motivated by political opinion,”¹²⁵ and thus persons like Adhiyappa, who act as informants for the government, are not entitled to asylum. The dissent opined that when political actions like those of the petitioner clearly express a petitioner’s political opinion, “persecution on account

112. *Id.* at 1141.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See Sadeghi, supra* note 111, at 1141.

117. *Id.* at 1142.

118. *Adhiyappa v. I.N.S.*, 58 F.3d 261 (6th Cir. 1995).

119. *Id.* at 263.

120. *Id.*

121. *Id.*

122. *Id.* at 268.

123. *See Adhiyappa, supra* note 118, at 269.

124. *Id.*

125. *Id.* at 269-70.

of those actions is persecution on account of political opinion.”¹²⁶ This broader interpretation of the required nexus to political opinion should be adopted by all courts, to permit those petitioners who most need asylum to be eligible.

B. Asylum Denied Because of Changed Country Conditions

Many petitioners who cannot prove atrocious past persecution will be denied asylum because subsequent improvements in the political climate of their native countries undermine the claim that their fear of future persecution is well founded.¹²⁷ In the First Circuit, general changes in country conditions will not render a petitioner ineligible for asylum if a specific danger to the petitioner remains.¹²⁸ Nevertheless, few petitioners can prove this specific danger.¹²⁹ More importantly, courts do not consider that these changes can often be temporary in nature and that danger may persist from opposition factions, or the possibility that State Department reports documenting improvements may be politically motivated or inaccurate. Indeed, one case expressed concern noting, “The advice of the State Department is not binding, either on the [INS] or on the courts; there is perennial concern that the Department soft-pedals human rights violations by countries that the United States wants to have good relations with.”¹³⁰

In *Gutierrez-Rogue v. I.N.S.*,¹³¹ the D.C. Circuit affirmed a denial of asylum based on changed country conditions. The petitioner, a Nicaraguan high school teacher, was married to a sergeant in the Nicaraguan Air Force. After the Sandinista revolution overthrew the dictatorship of Anastasio Somoza, the petitioner’s husband was arrested.¹³² In apparent retaliation for the petitioner’s refusal to spend several additional years in Cuba to study Marxism and teaching, the government assigned her to a school that required hours of commuting

126. *Id.* at 270 (Daughtrey, J., dissenting).

127. See *Mitev v. I.N.S.*, 67 F.3d 1325, 1332 (7th Cir. 1991); *Boykov v. I.N.S.*, 109 F.3d 413, 417 (7th Cir. 1997); *Nazaraghaie v. I.N.S.*, 102 F.3d 460 (10th Cir. 1996); *Wright v. I.N.S.*, No. 96-2123, 1997 WL 570872 (4th Cir. Sept. 16, 1997) (unpublished); *Gonahasa v. I.N.S.*, 181 F.3d 538, 542 (4th Cir. May 14, 1999).

128. See *Gailius v. I.N.S.*, 147 F.3d 34, 36 (1st Cir. 1998).

129. See *Tokarska v. I.N.S.*, 978 F.2d 1, 2 (1st Cir. 1992). The petitioner suffered past persecution while she was a member of the Solidarity movement in Poland. Since the time the petitioner fled Poland, country conditions changed. Solidarity became part of the coalition governing Poland, and therefore the United States Court of Appeals found the petitioner could not fear future persecution because of her Solidarity membership.

130. *Yakimchuck v. I.N.S.*, No. 99-1443, 191 F.3d 457 (7th Cir. Aug. 6, 1999) (quoting *Gramatikov v. I.N.S.*, 128 F.3d 619, 620 (7th Cir. 1997)) (unpublished).

131. *Gutierrez-Rogue v. I.N.S.*, 954 F.2d 769 (D.C. Cir. 1992).

132. *Id.* at 771.

time.¹³³ When her husband fled the country to fight with the “contra” rebels, the petitioner’s food rationing card was taken away and she received weekly visits from security officers trying to find her husband.¹³⁴ She also received a death threat from a civilian gang supporting the Sandinista Neighborhood Organization.¹³⁵ Her school director reported her to the State Security Agency for distorting the Sandinistas’ political message and encouraging counterrevolution.¹³⁶ The assistant director warned the petitioner that “something grave” would happen to her if she remained in the country.¹³⁷ The court stated, “The harassment that Gutierrez suffered, although no doubt very frightening, was not nearly so severe” as to warrant humanitarian asylum based on past persecution.¹³⁸ Because the Sandinistas had been voted out of power and conditions in Nicaragua had changed sufficiently to eliminate any reasonable fear of future persecution, the court found the BIA’s denial of humanitarian asylum was not an abuse of discretion.¹³⁹

The Seventh Circuit used similar reasoning in the case of *Bachkova v. I.N.S.*¹⁴⁰ Bachkova, a teacher in the ethnic Turkish area of Bulgaria, expressed her opposition to the government’s policy of forcibly assimilating ethnic Turks.¹⁴¹ As a result of her support for the Turks maintaining their cultural identity, she was arrested, interrogated, incarcerated, beaten, forced to participate in the government’s assimilation program, and was forced to report on the Turkish population.¹⁴² Despite her opposition to the government’s policy, the Turks identified her as a supporter of the communist regime. Her home was ransacked.¹⁴³ Two masked men, who she believed were Turks, attacked her on the street.¹⁴⁴ The severity of her persecution did not persuade the court, which stated, “Given their duration, intermittent occurrence, and, in two instances, tenuous connection to the earlier Bulgarian government, we are unable to conclude, considering our deferential role . . . that the Board abused its discretion in concluding that Bachova’s experience under the prior regime falls short of that which is required for asylum.”¹⁴⁵ Because her past persecution did not meet the atrocious standard and because a well-founded fear of future

133. *Id.*

134. *Id.*

135. *Id.*

136. *Gutierrez-Rogue*, *supra* note 131, at 771.

137. *Id.*

138. *Id.* at 772.

139. *Id.*

140. *Bachkova v. I.N.S.*, 109 F.3d 376 (7th Cir. 1997).

141. *Id.* at 377.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Bachkova*, *supra* note 140, at 379.

persecution was defeated by the fact her persecutors were no longer in power, the court affirmed the denial of asylum.¹⁴⁶

In *Mikhailevitch v. I.N.S.*,¹⁴⁷ the Sixth Circuit similarly affirmed an asylum denial because there was no evidence of physical harm. The petitioner was a Roman Catholic living in Belarus, a former republic of the Soviet Union.¹⁴⁸ His father and paternal grandfather were deported to Siberia for their religious beliefs.¹⁴⁹ The KGB interrogated and threatened the petitioner on several occasions.¹⁵⁰ The KGB also searched his home and place of work because of his religious activities.¹⁵¹ The court found no past persecution, and affirmed the denial of asylum because the changed political conditions in Belarus negated any reasonable fear of future persecution.¹⁵²

Changed political power in Poland resulted in the Third Circuit affirming a denial of asylum in *Janusiak v. I.N.S.*¹⁵³ The petitioner was active in the opposition trade union, Solidarity, at a time when membership in the organization was now outlawed by the communist government.¹⁵⁴ In support of his claim of fear of future persecution, the petitioner argued that while Solidarity was ostensibly in charge of the central Polish government, communists still controlled local political units and therefore maintained power to punish him.¹⁵⁵ The court found no reasonable fear of persecution because of the change in government, and no past persecution because the petitioner had never been detained, questioned, or harassed by the authorities while in Poland.¹⁵⁶

In another case where conditions in the homeland eliminated any well-founded fear of future persecution, the Ninth Circuit affirmed a denial of asylum in *Kazlauskas v. I.N.S.*,¹⁵⁷ where the petitioner, a Lithuanian youth, was socially ostracized, harassed by his teachers and peers, and prevented from advancing to the university because of his religious beliefs and his refusal to participate in programs sponsored by the Communist Party.¹⁵⁸ The court found this to be insufficiently atrocious for humanitarian asylum.¹⁵⁹ The court further found that the petitioner's fear of future persecution was not well founded because a

146. *Id.* at 378.

147. *Mikhailevitch v. I.N.S.*, 146 F.3d 384 (6th Cir. 1998).

148. *Id.* at 384.

149. *Id.* at 387.

150. *Id.*

151. *Id.*

152. *Mikhailevitch*, *supra* note 147, at 390.

153. *Janusiak v. I.N.S.*, 947 F.2d 46, 49 (3d Cir. 1991).

154. *Id.* at 47.

155. *Id.* at 48.

156. *Id.* at 47-48.

157. *Kazlauskas v. I.N.S.*, 46 F.3d 902 (9th Cir. 1994).

158. *Id.* at 904.

159. *Id.* at 907.

State Department report indicated that Lithuania had enforced human rights since the end of Soviet control.¹⁶⁰

In each of the above cases, courts affirmed asylum denials because State Department reports or other evidence indicated reductions in the level of human rights abuses in the petitioner's homeland. No consideration was given to the possibility of future changes in power or an inability of the new regime to control opposition groups, which could result in continued danger for persons forced to return home.

C. *Unfulfilled Threats*

Courts generally affirm BIA denials of asylum if the only persecution alleged by the petitioner is unfulfilled threats.¹⁶¹ Claims based on unfulfilled threats are particularly vulnerable to evidence of changes in country conditions, as the following cases will illustrate. In *Gebregiorgis v. I.N.S.*,¹⁶² the petitioner, a Jehovah's Witness, had been threatened with arrest for refusing to participate in political activities because religious grounds. Gebregiorgis had to practice her religion in secret and hide from government officials.¹⁶³ She was also told that, because of her religion, she would be denied a state-funded funeral.¹⁶⁴ Because the petitioner retained her government job and retired on a government pension, the Ninth Circuit upheld the BIA's finding of no past persecution and no reasonable fear of future persecution.¹⁶⁵ The threat of arrest was not sufficient to be deemed past persecution.¹⁶⁶

In the case of *Hadjimehdigholi v. I.N.S.*, the Tenth Circuit similarly affirmed a decision to deny asylum to a former high-ranking military officer who was instrumental in quelling a 1968 uprising by followers of the Ayatollah Kohmeni against the then-in-power Shah of Iran.¹⁶⁷ The "[p]etitioner felt that it was only a matter of time before the authorities learned of his past loyalty to the Shah."¹⁶⁸ The court affirmed the BIA's conclusion that the petitioner lacked a well-founded fear of persecution, because his fears were only based on threats made by his uncle, who

160. *Id.* at 906.

161. *See, e.g.*, *Mitev v. I.N.S.*, 67 F.3d 1325, 1332 (7th Cir. 1991); *Boykov v. I.N.S.*, 109 F.3d 413, 416 (7th Cir. 1997);

162. *Gebregiorgis v. I.N.S.*, No. 92-70670, 15 F.3d 1085, 1994 WL 8726 (9th Cir. Jan. 12, 1994) (unpublished).

163. *Id.* at *4.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Hadjimehdigholi v. I.N.S.*, 49 F.3d 642, 644 (10th Cir. 1995).

168. *Id.* at 645.

threatened to inform the authorities, and not on any action taken by the government.¹⁶⁹

In *Mitev v. I.N.S.*,¹⁷⁰ the Seventh Circuit affirmed the BIA's denial of asylum because it found the petitioner merely received death threats and the political climate in Bulgaria had changed favorably. The petitioner was an active member of an anti-communist trade union who received threats from Communist Party members at his workplace, warning him to leave Bulgaria if he cared for his life.¹⁷¹ In addition, a party official threatened him with jail because of his political activities.¹⁷² The court noted, "Mitev presented no evidence of detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture."¹⁷³ The court further opined, however, that a threat in the appropriate context could amount to persecution.¹⁷⁴ The court theorized that a death threat emanating directly from the secret police would be closer to persecution than mere comments from co-workers, especially in the context of heated political discussion.¹⁷⁵ Recognizing the political transformation of Bulgaria into a parliamentary republic with a democratically elected government, the court found no past persecution and no fear of future persecution.¹⁷⁶

In a later case, however, the Seventh Circuit apparently forgot its comments about threats from the secret police and followed an even more restrictive definition of persecution. In *Boykov v. I.N.S.*,¹⁷⁷ the petitioner, like Mitev, was a Bulgarian involved in an anti-communist trade union at his workplace.¹⁷⁸ In addition to his political activities, he witnessed his friend getting dragged away by the police after his friend denounced the police as "communist stooges."¹⁷⁹ Several days later, the friend's dumped body was discovered.¹⁸⁰ Following this incident, the petitioner received periodic visits from the police warning that he would be killed if he ever mentioned the incident to anyone.¹⁸¹

In relation to his union activities, the petitioner read a report that was critical of company management, all of whom were members of the Communist Party.¹⁸² A company manager later threatened him.¹⁸³

169. *Id.* at 647.

170. *Mitev v. I.N.S.*, 67 F.3d 1325, 1332 (7th Cir. 1991).

171. *Id.* at 1328.

172. *Id.*

173. *Id.* at 1330.

174. *Id.* at 1330-31.

175. *Mitev*, *supra* note 170, at 1331.

176. *Id.* at 1332.

177. *Boykov v. I.N.S.*, 109 F.3d 413, 416-17 (7th Cir. 1997).

178. *Id.* at 415.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Boykov*, *supra* note 177, at 415.

183. *Id.*

Following this incident at the workplace, the police came to the petitioner's home and told him that, " 'now . . . it would be much easier for them to get rid of' him."¹⁸⁴ While leaving open the possibility that "threats of a most immediate and menacing nature might, in some circumstances, constitute past persecution," the court affirmed the denial of asylum stating that unfulfilled threats were merely an indication of future persecution.¹⁸⁵ Moreover, the court found changed conditions in Bulgaria eliminated any reasonable fear of future persecution.¹⁸⁶

Even evidence of an arrest and direct threat of an immediate and menacing nature, did not convince the Eleventh Circuit that there was a reasonable fear of future persecution. The court, in *Lorisme v. I.N.S.*,¹⁸⁷ affirmed a decision to deny asylum because of the absence of physical harm. The petitioner, a Haitian, was arrested outside his church for singing a song interpreted by the paramilitary Ton Ton Macoutes as supporting then-ousted President Jean-Bertrand Aristide's return to power.¹⁸⁸ As the petitioner was being lead away by the Ton Ton Macoutes, he escaped.¹⁸⁹ The petitioner left the country immediately, before further incident.¹⁹⁰ The IJ expressed concern over the "lack of physical harm the Macoutes inflicted upon [the petitioner] during his arrest."¹⁹¹ The IJ also found that the petitioner lacked credibility and that country conditions had improved.¹⁹² In affirming the denial of asylum, the court found that the petitioner's lack of physical harm was only one factor in the IJ's order.¹⁹³

In each of the cases described above, the courts found no well-founded fear of future persecution because threats to the petitioners were not fulfilled. The petitioners escaped before the threats were carried out. And because mere threats are rarely sufficient to show fear of persecution, the petitioners were therefore deported to their homeland. Paradoxically, deportation granted the persecutors the opportunity to fulfill their threats. This is exactly the absurd result contemplated by the First and Ninth Circuit courts, of "denying asylum to those who have actually experienced persecution and were fortunate enough to survive."¹⁹⁴ A more rational result is contemplated by the dissent in

184. *Id.*

185. *Id.* at 416 (citing *Mitev v. I.N.S.*, 67 F.3d 1325, 1330-31 (7th Cir. 1991)).

186. *Id.* at 417.

187. *Lorisme v. I.N.S.*, 129 F.3d 1441, 1445 (11th Cir. 1997).

188. *Id.* at 1443.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Lorisme*, *supra* note 187, at 1443.

193. *Id.* Other factors included changed country conditions and failure to show a well-founded fear of future persecution premised upon one of the five statutory grounds, including political opinion.

Id.

194. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 489 (1st Cir. 1994) (quoting *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985)).

Elias-Zacarias.¹⁹⁵ Favoring a grant of asylum to a petitioner who was threatened, the dissent suggested any doubts concerning the nature of threats “delivered by . . . masked men carrying machine guns” should be resolved in favor of the petitioner.¹⁹⁶

D. Threatened for Refusal to Persecute Others

As previously noted, the asylum statute denies eligibility for asylum to any person who has persecuted others.¹⁹⁷ Courts, however, will also frequently deny asylum to petitioners who have been persecuted for their refusal to persecute others, reasoning that the petitioner illegally avoided or interfered with his country’s conscription laws.¹⁹⁸ This inevitably leads to a fatal asylum claim for individuals who face enlistment into the government’s military or paramilitary forces. If the petitioner refuses to join the military because it persecutes others, the petitioner can then be denied asylum for avoiding or interfering with the conscription laws of his native country, even if he was persecuted for his acts of avoidance. If instead the petitioner joins the military and participates in the persecution of others, he can also be denied asylum for having committed human rights violations.

In two recent decisions, the Eighth Circuit refused to grant asylum where the petitioners had placed themselves in danger by refusing to persecute others.¹⁹⁹ In *Cigaran v. Heston*,²⁰⁰ the petitioner resigned from the El Salvadoran military in part because he disapproved of the tactics of a fellow military unit, whose members “took opponents of the government from their homes for interrogation and, sometimes, ‘elimination.’”²⁰¹ After his resignation, the petitioner took a job as a security guard at the University of Central America in San Salvador.²⁰² The members of the rogue military unit threatened to kill the petitioner on two occasions if he did not cooperate with them, which he refused to do.²⁰³ In affirming the decision to deny asylum, the court noted, “[H]e was only threatened; no one, as far as the record shows, ever laid a hand on him.”²⁰⁴

195. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 489 (1992) (Stevens, J. dissenting).

196. *Id.* at 490.

197. 8 U.S.C. § 1158(b)(2)(A)(i) (1994).

198. *See*, *Cigaran v. Heston*, 159 F.3d 355 (8th Cir. 1998); *Kratchmarov v. Heston*, 172 F.3d 551 (8th Cir. 1999).

199. *Cigaran*, at 357-58; *Kratchmarov*, at 555.

200. *Cigaran v. Heston*, 159 F.3d 355 (8th Cir. 1998).

201. *Id.* at 356.

202. *Id.*

203. *Id.* at 357.

204. *Id.* at 358.

In *Kratchmarov v. Heston*,²⁰⁵ the Eighth Circuit followed the rule it articulated in *Cigaran*. The petitioner was a Bulgarian police officer who resigned because he refused to beat members of the Turkish minority, which he viewed as human rights abuse.²⁰⁶ After his resignation, Kratchmarov received physical beatings, suffered loss of job opportunities, received unjustified traffic citations, and was forced to have his hair cut.²⁰⁷ After Kratchmarov fled to the United States, his mother received military summons demanding he report to the military office.²⁰⁸ The petitioner argued that, if forced to return to Bulgaria, he would be conscripted into the military and would endure persecution once again for refusing to carry out human rights violations.²⁰⁹ The court affirmed the petitioner's denial of asylum, finding his testimony speculative.²¹⁰ If one of the goals of this country's asylum policy is, as stated by the statute,²¹¹ to protect the exercise of internationally recognized human rights, then it seems incongruent to deny asylum to those individuals who fear persecution because of their refusal to violate the human rights of others.

E. Incarceration Absent Severe Physical Abuse

Absent physical abuse, incarceration for days or weeks rarely persuades a court that the petitioner was persecuted. However, detention for more than several months, or detention combined with torture or deprivation, will generally be considered persecution sufficient to support a grant of asylum.²¹² In all of the following cases, asylum denials were affirmed.

In *Nazaraghaie v. I.N.S.*,²¹³ a case whose facts would tend to support a granting of asylum, the Tenth Circuit upheld a denial of asylum, relying on changed country conditions.²¹⁴ The petitioner, an Iranian, had been imprisoned twice, once for ten months and another time for sixteen months.²¹⁵ While in prison, the petitioner endured beatings and was deprived of water for periods of time.²¹⁶ The Tenth

205. *Kratchmarov v. Heston*, 172 F.3d 551 (8th Cir. 1999).

206. *Id.* at 553.

207. *Id.*

208. *Id.*

209. *Id.* at 555.

210. *Kratchmarov*, *supra* note 205, at 555.

211. *Perkovic v. I.N.S.*, 33 F.3d 615, 623 (6th Cir. 1994).

212. *See Zalega v. I.N.S.*, 916 F.2d 1257, 1260 (7th Cir. 1990) (detained five times up to 36 hours); *Mendez-Efrain v. I.N.S.*, 813 F.2d 279, 283 (9th Cir. 1987) (detained four days); *Kubon v. I.N.S.*, 913 F.2d 386, 388 (7th Cir. 1990) (detained 5 days).

213. *Nazaraghaie v. I.N.S.*, 102 F.3d 460 (10th Cir. 1996).

214. *Id.* at 464.

215. *Id.* at 462.

216. *Id.* at 461.

Circuit disagreed with the BIA's determination that there had been no past persecution.²¹⁷ However, it agreed with the BIA that this suffering was not sufficiently atrocious, and refused to grant asylum on humanitarian grounds.²¹⁸ Despite this finding, the court noted the petitioner's past persecution might create a rebuttable presumption of fear of future persecution.²¹⁹ Notwithstanding this finding, the court upheld the BIA's finding that changed conditions in Iran rebutted any fear of future persecution.²²⁰

In *Mroz v. Reno*,²²¹ a subsequent unpublished decision, the Tenth Circuit also affirmed a denial of asylum to a Polish member of the opposition group; "Youth Solidarity," who had been jailed for twenty-four hours and beaten twice.²²² Changes in Poland eliminated any well-founded fear of persecution and the court found the petitioner's experience insufficiently atrocious to warrant humanitarian asylum.²²³

In *Skalak v. I.N.S.*,²²⁴ the Seventh Circuit drew a distinction between mild and atrocious persecution.²²⁵ The court found the petitioner, an active member in the Solidarity movement, might have suffered past persecution.²²⁶ It held, however, that past persecution only created a presumption in favor of granting asylum, which could be rebutted by other facts.²²⁷ On two occasions, the petitioner was detained for three days for interrogation.²²⁸ She was also harassed at work because of her refusal to join the Communist Party.²²⁹ The court acknowledged the petitioner's past persecution. However, it held that because of changed country conditions and the lack of severity of the persecution suffered by the petitioner, it would not be inhumane to force her to return to her native country.²³⁰ Non-severe past persecution, absent a well-founded fear of future persecution, did not create eligibility for asylum.

The Fourth Circuit affirmed a denial of asylum in *Gonahasa v. I.N.S.*,²³¹ where the petitioner, a citizen of Uganda and member of an opposition political party, was detained for two weeks, was stripped and beaten, received cuts to his arms from bayonets, and was confined to a

217. *Id.* at 463.

218. *Nazaraghaie*, *supra* note 213, at 463.

219. *Id.* at 464.

220. *Id.*

221. *Mroz v. Reno*, No. 96-1252, 1997 WL 139162 (10th Cir. Mar. 24, 1997) (unpublished).

222. *Id.* at *1-2.

223. *Id.* at *2.

224. *Skalak v. I.N.S.*, 944 F.2d 364 (7th Cir. 1991).

225. *Id.* at 365.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Skalak*, *supra* note 224, at 365.

230. *Id.*

231. *Gonahasa v. I.N.S.*, 181 F.3d 538 (4th Cir. 1999).

small cell.²³² Despite the fact that petitioner submitted reports by human rights organizations that the Ugandan government continued to engage in human rights violations, the court of appeals affirmed the BIA's reliance on State Department reports of changed country conditions to rebut petitioner's reasonable fear of future persecution. The court cited approvingly cases from sister circuits, which held it was reasonable to suspect that the reports of independent human rights organizations such as Amnesty International might be "exaggerate[d]"²³³ and that such organizations might have "their own agendas."²³⁴ "Absent powerful contradictory evidence, the existence of a State Department report supporting the BIA's judgment will generally suffice to uphold the Board's decision. Any other rule would invite courts to overturn the foreign affairs assessments of the executive branch."²³⁵

The Fourth Circuit also affirmed a denial of asylum to a petitioner who had been briefly incarcerated but had no evidence of physical harm in the unpublished decision *Haileselasie v. I.N.S.*²³⁶ The Ethiopian native and member of an opposition political group had been twice arrested and detained without being charged, once as long as fifteen days.²³⁷ While in detention, she was slapped, threatened, and coerced into surrendering a key to a locked cabinet, contained a list of the organization's members, money, and documents belonging to the opposition group.²³⁸ The court affirmed her asylum denial, finding her testimony inconsistent.²³⁹ The court also found the harm suffered by petitioner did not rise to the level of atrocious past persecution and that the petitioner failed to establish a fear of well-founded future persecution.²⁴⁰

Incarceration alone is rarely sufficient persecution for a grant of asylum. As the aforementioned cases illustrate, even when combined with physical abuse, asylum may still be denied. However, noted herein, incarcerations for significant periods of time, combined with severe beating or torture, may be sufficient to support a finding of persecution.

IV. Past Persecution and Findings of Atrocious Physical Harm

Although courts acknowledge that physical harm is not statutorily required, courts will nonetheless often focus on the severity of physical

232. *Id.* at 540.

233. *Id.* at 542 (citing *Vaduva v. I.N.S.*, 131 F.3d 689, 691 (7th Cir. 1997)).

234. *Id.* (citing *M.A. v. I.N.S.*, 899 F.2d 304, 313 (4th Cir. 1990)).

235. *Id.* at 442-43.

236. *Haileselasie v. I.N.S.*, No. 98-2178, 175 F.3d 1014, 1999 WL 147726, at *2-3 (4th Cir. Mar. 18, 1999) (unpublished).

237. *Id.* at *2.

238. *Id.*

239. *Id.*

240. *Id.*

injury since the standard for past persecution must rise to the level of “atrocious” to be sufficient for a grant of humanitarian asylum.²⁴¹ Gruesome details of violent beatings and the harm caused thereby are often included in the court’s opinion.²⁴² As the cases below demonstrate, courts tend to favor those petitioners who are able to demonstrate their physical abuse by showing permanent harm, such as missing teeth, severed thumbs, or hearing loss.

A. Severe Physical Abuse as Persecution

The leading case for atrocious past persecution sufficiently severe to eliminate the need to show reasonable fear of future persecution, is a case entitled *In re Chen*.²⁴³ At the start of the Chinese Cultural Revolution, the petitioner, the son of a Christian minister, was eight years old.²⁴⁴ For over six months, the petitioner was confined to house arrest and locked in a room.²⁴⁵ During his confinement he was not allowed to attend school and was periodically deprived of food.²⁴⁶ On one occasion, rocks were thrown at him for sleeping at a political speech.²⁴⁷ The injury resulted in a loss of hearing and a month of intensive medical treatment.²⁴⁸ As a consequence of various “reeducation” efforts, the petitioner became suicidal.²⁴⁹ Despite evidence of changed country conditions, the BIA granted asylum on humanitarian grounds.²⁵⁰

In *Asani v. I.N.S.*,²⁵¹ the petitioner, an ethnic Albanian living in the former Yugoslavia, similarly endured severe injuries. Here, the Seventh Circuit remanded to the BIA for a grant of asylum.²⁵² He was arrested at a political demonstration in support of Albanian rights.²⁵³ Detained in jail for two weeks, the petitioner was confined to a cell where he had only enough room to stand.²⁵⁴ He was handcuffed to a radiator.²⁵⁵ Each

241. See, e.g., *In re Chen*, No. A-26219652, 1989 WL 331860, 20 I. & N. Dec. 16 (BIA Apr. 25, 1989) (finding permanent hearing damage sufficient evidence of past persecution); *Asani v. I.N.S.*, 154 F.3d 719, (7th Cir. 1998) (finding beating with sticks and fists, resulted in permanent scars and teeth being knocked out sufficient evidence of past persecution).

242. See *Asani*, at 721.

243. *In re Chen*, No. A-26219652, 1989 WL 331860, 20 I. & N. Dec. 16 (BIA Apr. 25, 1989).

244. *Id.* at *20.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Chen*, *supra* note 243, at *20.

249. *Id.*

250. *Id.* at *21-22.

251. *Asani v. I.N.S.*, 154 F.3d 719 (7th Cir. 1998).

252. *Id.* at 729.

253. *Id.* at 721.

254. *Id.*

255. *Asani*, *supra* note 251, at 721.

day he received only one glass of water and one slice of bread.²⁵⁶ In 1983, he fled to the United States.²⁵⁷ While living in the United States, Asani continued his support for Albanian rights, becoming a member of the Union of Kosovo and participating in several demonstrations.²⁵⁸ In 1987, Asani was deported and returned to his hometown.²⁵⁹ Upon his return the police picked him up and questioned him about his political activities in the United States.²⁶⁰ He was beaten repeatedly and had two of his teeth knocked out.²⁶¹ He again came to the United States and applied for asylum.²⁶² The court inquired, "If having two teeth knocked out and being deprived of sufficient food and water are not 'serious injuries' or 'physical harm,' what is?"²⁶³

In addition, the court distinguished *Chen*, a case based purely on the severity of past persecution from the instant case, which also involved Asani's fear of future persecution.²⁶⁴ It stated, "*Chen* is not the benchmark for past persecution in a situation where an alien relies on past persecution plus a well-founded fear of future persecution in his or her application for asylum."²⁶⁵ Remanding for application of the correct standard, the court noted that past persecution could be found only if the punishment or infliction of harm rose above the level of mere harassment, even if the persecution was not necessarily life threatening.²⁶⁶ Consequently, the court found incarceration, deprivation of food, and physical beatings sufficient cause for consideration as past persecution.²⁶⁷ Moreover, the petitioner possessed a well-founded fear of future persecution, therefore the court issued a limited remand allowing the petitioner to show whether or not Yugoslavia's government continues to punish people for their pro-Albanian political opinions and activities.²⁶⁸

In *Vongsakdy v. I.N.S.*,²⁶⁹ the Ninth Circuit found atrocious past persecution sufficient to grant asylum on humanitarian grounds.²⁷⁰ The petitioner, a native of Laos, was a 19-year-old student with strong pro-democracy beliefs.²⁷¹ His family supported the former Laotian monarchy, in opposition to the communist government.²⁷² The petitioner

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Asani v. I.N.S.*, 154 F.3d 719, 721 (7th Cir. 1998).

261. *Id.*

262. *Id.*

263. *Id.* at 723.

264. *Id.* at 726.

265. *Asani*, 154 F.3d at 726.

266. *Id.* at 723.

267. *Id.*

268. *Id.* at 726.

269. *Vongsakdy v. I.N.S.*, 171 F.3d 1203 (9th Cir. 1999).

270. *Id.* at 1207.

271. *Id.* at 1205.

272. *Id.*

was detained in a labor camp for over one year, where he suffered beatings, torture and harassment.²⁷³ While forced to perform hard labor ten hours per day, Vongsakdy received only one meal and inadequate water.²⁷⁴ The officials at the labor camp, who attempted to indoctrinate the petitioner, beat and tortured him.²⁷⁵ Armed guards threatened to kill him if he did not follow orders.²⁷⁶ During one beating, his thumb was severed and he was denied medical treatment for his injury.²⁷⁷ The court found the petitioner suffered “egregious” past persecution, comparable to that endured by the petitioner in *Chen*, and therefore was worthy of humanitarian asylum.²⁷⁸

The First Circuit found past persecution and potential eligibility for asylum in *Gebremichael v. I.N.S.*²⁷⁹ An Ethiopian of Amhara descent, the petitioner was arrested, incarcerated, tortured and interrogated by military authorities in an effort to force the petitioner to reveal his brother’s hiding place.²⁸⁰ The BIA originally denied asylum because the petitioner’s persecution did not relate to one of the five statutory grounds.²⁸¹ Disagreeing with the BIA’s ruling, the First Circuit held that a family is a cognizable “social group.”²⁸² It further held that because the petitioner was tortured in an attempt to obtain information about the other family member or to get him to come forward, the petitioner satisfactorily established a nexus to one of the statutory grounds.²⁸³

In *Fergiste v. I.N.S.*,²⁸⁴ a more recent First Circuit case, the court found a Haitian supporter of then-ousted President Jean-Bertrand Aristide suffered past persecution sufficient to raise a presumption of well-founded fear of future persecution.²⁸⁵ As a result of supporting Aristide, the petitioner was shot in the shoulder and hit with a rifle, his mother was shot, and his aunt was murdered.²⁸⁶ The court found sufficient persecution to raise the presumption of well-founded fear, which the INS inadequately rebutted.²⁸⁷

The petitioners in two Third Circuit cases, *Balasubramanrim v. I.N.S.*,²⁸⁸ and *Senathirajah v. I.N.S.*,²⁸⁹ were both detained several times

273. *Id.*

274. *Vongsakdy*, *supra* note 269, at 1205.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 1207.

279. *Gebremichael v. I.N.S.*, 10 F.3d 28 (1st Cir. 1993).

280. *Id.* at 31.

281. *Id.* at 32.

282. *Id.* at 36.

283. *Id.*

284. *Fergiste v. I.N.S.*, 138 F.3d 14 (1st Cir. 1998).

285. *Id.* at 19.

286. *Id.* at 17.

287. *Id.* at 20.

288. *Balasubramanrim v. I.N.S.*, 143 F.3d 157 (3d Cir. 1998).

289. *Senathirajah v. I.N.S.*, 157 F.3d 210 (3d Cir. 1998).

for as long as one year, and were tortured or beaten.²⁹⁰ Both were ethnic Tamils in Sri Lanka.²⁹¹ The BIA denied asylum in both cases because the petitioners' testimony lacked credibility.²⁹² Remanding both cases, the Third Circuit noted that the credibility findings were not supported by substantial evidence.²⁹³ In *Senathirajah*, the court stated, "we emphasize that torture does not constitute valid governmental investigation . . ."²⁹⁴ and based on its previous findings in *Balasubramanrim*, concluded, "[T]he treatment of the Tamil in Sri Lanka, and the persecution that has resulted from the activities of the Tigers could be sufficient to support a claim for asylum. . . ."²⁹⁵

B. Sexual Assault and Rape as Persecution

A lingering misconception about rape and sexual assault is that such acts are motivated by the perpetrator's physical attraction to his victim rather than as a means of asserting power and domination.²⁹⁶ Armed conflict, civil war, and political instability frequently create an environment where rape and sexual assault are used as a means of physically and psychologically subordinating women through fear, pain, and humiliation.²⁹⁷ Awareness of these motivating factors lead the United Nations High Commissioner for Refugees to officially acknowledge rape and sexual assault as forms of torture.²⁹⁸

As a threshold matter, victims of sexual assault seeking asylum in the United States must prove they were singled out and brutalized specifically because of their race, religion, nationality, social group membership, or political opinion.²⁹⁹ Failure to show the required nexus linking the sexual assault to one of these five statutory grounds will result in the denial of asylum.³⁰⁰ Courts justify these denials with the rationale that absent such a nexus, any rape victim could qualify for asylum as a refugee.³⁰¹

Many rape and sexual assault victims appeal their denials of asylum because the IJ and BIA mistakenly attribute their victimization to a persecutor's physical attraction and not a tool of persecution based

290. *Balasubramanrim*, at 159; *Senathirajah*, at 211.

291. *Balasubramanrim*, at 158; *Senathirajah*, at 211.

292. *Balasubramanrim*, at 158; *Senathirajah*, at 216.

293. *Balasubramanrim*, at 158; *Senathirajah*, at 222.

294. *Senathirajah v. I.N.S.*, 157 F.3d 210, 221 (3d Cir. 1998).

295. *Id.* at 222 n.11.

296. *See Angoucheva v. I.N.S.*, 106 F.3d 781, 792 n.2 (7th Cir. 1997) (Rovner, J., concurring).

297. *See generally* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES ("UNHCR"), SEXUAL VIOLENCE AGAINST REFUGEES: GUIDELINES ON PREVENTION AND RESPONSE 1 (1995).

298. *Id.*

299. *Angoucheva*, at 788, 799.

300. *Id.* at 787.

301. *Grajo v. I.N.S.*, No. 96-3894, 1997 WL 464095 (7th Cir. Aug. 4, 1997) (unpublished).

upon one of the five statutory grounds.³⁰² Surprisingly, the Courts of Appeals have only recently been willing to remand such cases.

Grajo v. I.N.S.,³⁰³ an unpublished case from the Seventh Circuit, is one of the more appalling examples of judicially misconstruing the reality of rape. The petitioner was a university professor and a secretary for an arbitration board in her municipality.³⁰⁴ A man with strong family connections to the ruling political party forced the petitioner to accompany him to a hotel, telling the petitioner he would kill her if she did not cooperate.³⁰⁵ The man raped her repeatedly and attacked her until she lost consciousness.³⁰⁶ Questioning the petitioner's credibility, the IJ stated, "you passed your prime a long time ago At 45 you lost . . . your beauty [W]hy would somebody be interested in you . . . [?]"³⁰⁷ The IJ also asked the petitioner how she could know that she had been raped, reasoning that she had passed out and further, that she could not physiologically prove rape because she had given birth to children.³⁰⁸ Despite the fact that the Seventh Circuit referred to these remarks as "insensitive" and "deplorable," the court affirmed the denial of asylum.³⁰⁹ The court speculated that the IJ's skepticism about the rape allegation might have been related to the petitioner's failure to mention the rape to I.N.S. officials any time before her asylum hearing.³¹⁰ The court held there was no nexus linking the rape to the petitioner's political opinion and stated, "[G]ranted asylum on a record without such a connection [to one of the five statutory grounds] would suggest that any rape victim may be granted asylum as a refugee."³¹¹

In *Angoucheva v. I.N.S.*,³¹² a Bulgarian woman was ordered to appear at a State Security office because of her pro-Macedonian political activities.³¹³ At the State Security office, a uniformed officer questioned her until evening when the building was deserted.³¹⁴ He then proceeded to sexually assault her.³¹⁵ The officer unbuttoned her blouse, touched her breast, and attempted to remove her skirt.³¹⁶ The officer was interrupted when the telephone rang.³¹⁷ Immediately after answering the call, the officer lost interest in the petitioner, allowing her to leave without further

302. *Angoucheva v. I.N.S.*, 106 F.3d 781, 790 (7th Cir. 1997).

303. *Grajo v. I.N.S.*, No. 96-3894, 1997 WL 464095 (7th Cir. Aug. 4, 1997) (unpublished).

304. *Id.* at *1.

305. *See id.*

306. *See id.*

307. *See id.*

308. *Grajo*, *supra* note 303, at *2.

309. *Id.* at *3, *6.

310. *Id.* at *2 n.2.

311. *Id.* at *6.

312. *Angoucheva v. I.N.S.*, 106 F.3d 781 (7th Cir. 1997).

313. *Id.* at 783.

314. *Id.* at 785.

315. *Id.* at 785-86.

316. *Id.* at 786.

317. *Angoucheva*, *supra* note 312, at 786.

harm.³¹⁸ The Seventh Circuit remanded the case for further consideration by the BIA, finding that the BIA failed to consider whether or not the incident was related to her pro-Macedonian activities.³¹⁹ The court admonished the BIA for suggesting the assault may not have been politically motivated but rather the result of the officer being sexually attracted to the petitioner.³²⁰ The court found this inference “insensitive to the more violent motivations that could be considered.”³²¹

In *Lopez-Galarza v. I.N.S.*,³²² the court acknowledged the physical and emotional damage that can result from rape. The petitioner, a Nicaraguan woman accused of being a “contra” rebel, was imprisoned for fifteen days.³²³ While incarcerated, she was “raped repeatedly, confined in a jail cell for long periods without food, forced to clean the bathrooms and floors of the men’s jail cells, and subjected to other forms of physical abuse.”³²⁴ The court found her past persecution sufficiently severe and atrocious to merit asylum without consideration of future persecution.³²⁵ The court noted two recent articles in the *Journal of the American Medical Association* describing the long-term psychological effects of rape.³²⁶ The case was remanded for a grant of asylum.³²⁷

In each of the above cases, the court focused on the details of the physical and sexual abuse and its resulting bodily injuries. Courts, however, rarely consider the long-term psychological damage caused by interrogation, threats, and harassment. The Ninth Circuit’s effort to chronicle the long-lasting psychological effects of rape in *Lopez-Galarza* is a very rare exception. The important issue of losing one’s human rights: freedom of speech, freedom of religion, and freedom from being forced to violate the rights of third parties, is often ignored.³²⁸

318. *Id.*

319. *Id.* at 790.

320. *Id.*

321. *Id.*

322. *Lopez-Galarza v. I.N.S.*, 99 F.3d 954 (9th Cir. 1996).

323. *Id.* at 957.

324. *Id.*

325. *See id.* at 959, 963.

326. *See id.* at 963.

327. The reader should not assume that rape is accepted by the courts as persecution. For an appalling discussion, see the unpublished decision *Grajo v. I.N.S.*, No. 96-3894, 1997 WL 464095 (7th Cir. Aug. 4, 1997).

328. *See, e.g.*, Gina Chon, *Everybody Should Be Allowed To Love Freedom: Why Asylum Is So Important*, HUM. RTS., Spring 1997 at 16 available at THE AMERICAN BAR ASSOCIATION WEBSITE <<http://www.abanet.org/irr/hr/ovidiuba.html>> (visited Jan. 25, 2000).

VII. Asylum Granted Based on Well-Founded Fear of Future Persecution Without Physical Harm

No cases were located where a petitioner was granted asylum based on past persecution alone without physical harm. If no physical harm is present, an asylum seeker's only hope is proving a well-founded fear of future persecution.³²⁹ In the following cases, the courts decided that the petitioners' fear of future persecution was well founded, even though they were not physically injured. Although many of the following cases resulted in a remand to the BIA after the court found a well-founded fear of persecution, it is not known whether the BIA ultimately exercised its discretion to grant asylum.

A. Prosecution as Persecution

Fear of prosecution for having violated fairly administered laws will not qualify one as a refugee.³³⁰ In an effort to prevent the United States from becoming a haven for common criminals, fugitives from justice are not eligible for asylum.³³¹ Nevertheless, if the law is based on punishment for race, religion, nationality, social group, or political opinion, and if the punishment is sufficiently extreme, then fear of prosecution can be viewed as persecution.³³² For instance, in *Chang v. I.N.S.*,³³³ while heading a delegation in the United States, the petitioner violated Chinese security laws: he failed to report to the Chinese Embassy two members of the delegation whom he suspected were planning to stay in the United States and sought asylum himself.³³⁴ These violations were punishable by one year in prison.³³⁵ The court found prosecution for illegally leaving the country a form of persecution based on political opinion and found it more than likely that Chang would be persecuted if he were forced to return to China.³³⁶ Therefore, the case was remanded to the Attorney General to determine if the petitioner was entitled to discretionary asylum.³³⁷

329. 8 U.S.C. § 1101(a)(42)(A) (1999); 8 C.F.R. § 208.13(2) (1999).

330. *Chang v. I.N.S.*, 119 F.3d 1055, 1060 (3d Cir. 1996). Interestingly, prosecution for a woman failing to wear a veil in Iran is not deemed persecution. *See Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993).

331. *Chang*, *supra* note 330, at 1060 (citing *Kovac v. I.N.S.*, 407 F.2d 102, 104 (9th Cir. 1969)).

332. 8 U.S.C. § 1101(a)(42)(A) (1999).

333. *Chang v. I.N.S.*, 119 F.3d 1055 (3d Cir. 1996).

334. *Id.* at 1057.

335. *Id.* at 1066.

336. *See id.* at 1062.

337. *Id.* at 1068. Although the opinion notes this case was remanded to the Attorney General to determine the discretionary asylum question, the Attorney General has the authority to delegate such

B. *Refusal to Aid Guerillas as Persecution*

As discussed in sections V(A)(1) and (2) *supra*, a majority of courts affirm decisions to deny asylum to those who join, assist, or are threatened for refusing to join or assist guerilla insurgencies.³³⁸ The Fifth Circuit made an extraordinary departure from this reasoning in *Rivas-Martinez v. I.N.S.*³³⁹ A guerrilla faction in El Salvador approached the petitioner and demanded food and assistance in distributing propaganda.³⁴⁰ The petitioner refused, for which the guerrillas threatened that “she would have to leave or something was going to happen” if she again refused their requests for aid.³⁴¹ To divert the threats, her husband cooperated in distributing the propaganda.³⁴² He was killed several months later in crossfire between the guerrillas and government troops.³⁴³ The guerrillas again requested the petitioner’s assistance and again she refused.³⁴⁴ Given an ultimatum of forty-eight hours to cooperate, the petitioner decided to flee the region.³⁴⁵ The court remanded the case to the BIA, finding there was some evidence that the petitioner’s opposition was based on political opinion.³⁴⁶ The court instructed the BIA to determine whether, under the standard articulated in *Elias-Zacarias*, this evidence was sufficient to merit a grant of asylum.³⁴⁷

C. *Threats as Persecution*

Although most courts are reluctant to find past persecution based on mere threats, this contradicts the leading Supreme Court case of *INS v. Cardoza-Fonseca*.³⁴⁸ The petitioner in *Cardoza-Fonseca* feared persecution based on the political activities of her brother, but although the brother had been tortured and imprisoned, the petitioner had not been

discretionary powers to the BIA. See 8 U.S.C.A. § 1103(a) (1999); *Wolf v. Boyd*, 238 F.2d 249, 254 (9th Cir. 1956).

338. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992); *Vincente v. I.N.S.*, No. 96-9544, 116 F.3d 1490 (10th Cir. 1997) 1997 WL 355331 (unpublished); *Rivas-Martinez v. I.N.S.*, 997 F.2d 1143 (5th Cir. 1993); *Cruz-Diaz v. I.N.S.*, 86 F.3d 330 (4th Cir. 1995).

339. *Rivas-Martinez v. I.N.S.*, 997 F.2d 1143 (5th Cir. 1993).

340. *Id.* at 1145.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Rivas-Martinez*, *supra* note 339, at 1145.

345. *Id.*

346. *Id.* at 1148.

347. *Id.*

348. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

physically harmed.³⁴⁹ The Supreme Court stated that the petitioner was not required to prove a clear probability of persecution, but merely reasonable possibility, and remanded the case for application of the correct standard.³⁵⁰ Following the reasoning of *Cardoza-Fonseca*, the following courts found a well-founded fear of future persecution based on the severity, repetition, and immediacy of the threats directed at the petitioners.

The Second Circuit appears more willing to grant asylum to petitioners who have been threatened than other circuit courts. In a leading case, *Melendez v. United States Department of Justice*,³⁵¹ the petitioner and his family were threatened for eight years by government forces, for their organizing activities in an opposition political party.³⁵² Despite moving continuously in an effort to evade physical harm or death, the petitioner's common-law wife and brother were killed by government troops.³⁵³ Shortly thereafter, the petitioner sought asylum in the United States because of his fear of future persecution for his political activities.³⁵⁴ The petitioner's claim for asylum was denied and he was deported back to El Salvador.³⁵⁵ In 1983, he again fled to the United States and sought asylum.³⁵⁶ Examining the "oppressive conditions" in El Salvador and treatment of similarly situated politically-involved individuals, the court found the petitioner's fear of future persecution reasonable.³⁵⁷

In a later Second Circuit case, *Carranza-Hernandez v. I.N.S.*,³⁵⁸ the petitioner, a Honduran citizen, had a lengthy history as a union leader and political organizer.³⁵⁹ As a result of his union activities, Carranza and other leaders of the union were harassed and ordered to report to a local military unit every week for questioning.³⁶⁰ On one occasion, Carranza agreed to help organize a march of Hondurans seeking guest worker status in the United States.³⁶¹ Afterwards, the petitioner received an anonymous note instructing him to leave his hometown.³⁶² During this time, a government representative informed the petitioner that because of his union activities and membership in various organizations, a military police order for his arrest had been issued.³⁶³ Carranza's

349. *Id.* at 424.

350. *Id.* at 450.

351. *Melendez v. United States Dep't of Justice*, 926 F.2d 211 (2d Cir. 1991).

352. *Id.* at 213.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Melendez*, *supra* note 351, at 213.

357. *Id.* at 218-19.

358. *Carranza-Hernandez v. I.N.S.*, 12 F.3d 4 (2d Cir. 1993).

359. *Id.* at 6.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Carranza-Hernandez*, *supra* note 358, at 6.

brother assisted him in leaving the country and shortly thereafter was killed, presumably by the military police in retaliation for helping Carranza escape arrest.³⁶⁴ The court stated, “[A] reasonable person who experienced and witnessed substantial harassment by the military in connection with union-organizing activities would share Carranza’s fears even absent the warning note and the uncertain circumstances surrounding his brother’s death” Furthermore, the court considered the petitioner’s weekly questioning by a military commander regarding his union activities and political affiliation “substantial harassment.”³⁶⁵ Although the petitioner never endured physical harm, incarceration or death threats, the court reversed and remanded, finding a reasonable fear of future persecution, without discussing whether substantial harassment was sufficient for past persecution.³⁶⁶

The petitioner, a Guatemalan union leader, in *Osorio v. I.N.S.*,³⁶⁷ similarly organized union demonstrations and lead strikes.³⁶⁸ During one particular strike, several union members were killed.³⁶⁹ Shortly thereafter, the petitioner received an anonymous note at his home, warning him to stop his public speaking or “something more serious would happen”³⁷⁰ The petitioner received a second note, which contained a death threat.³⁷¹ The BIA denied asylum, holding the actions taken against the union members were solely motivated by economics and not political opinion.³⁷² The court of appeals indicated, although there was an economic element to the dispute, economic beliefs and political opinion need not be mutually exclusive.³⁷³ Moreover, the court noted that the government viewed the union as a political threat.³⁷⁴ Finding a nexus to the petitioner’s political opinion, the court turned to whether the petitioner’s fears were reasonable.³⁷⁵ The court found, because of the depth of the petitioner’s fear, and the tragic events following the strike, it would be an abuse of discretion not to grant him asylum despite the fact he remained in Guatemala without being harmed for two and half years after the ill-fated strike.³⁷⁶

Following the reasoning articulated in *Carranza-Hernandez* and *Osorio*, the Second Circuit court also found reasonable fear of future

364. *Id.*

365. *Id.* at 8.

366. *Id.*

367. *Osorio v. I.N.S.*, 18 F.3d 1017 (2d Cir. 1994).

368. *Id.* at 1023.

369. *Id.*

370. *Id.* at 1024.

371. *Id.*

372. *Osorio*, *supra* note 367, at 1028.

373. *Id.*

374. *Id.*

375. *Id.* at 1031.

376. *Id.* at 1032. The First Circuit has considered the length of time during which the petitioner remains in the country after the incident of persecution as determinative of a lack of reasonable fear of future persecution. See *Ravindran v. I.N.S.*, 976 F.2d 754 (1st Cir. 1992).

persecution without physical harm, in *Sotelo-Aquije v. Slattery*.³⁷⁷ The petitioner, a native of Peru, participated in a coalition of approximately one thousand elected community leaders.³⁷⁸ Guerrillas purportedly left notes at the petitioner's home, some which threatened death if he did not leave the coalition.³⁷⁹ By the time the petitioner received his third death threat, thirty coalition members had already been killed.³⁸⁰ The petitioner fled Peru before he was harmed.³⁸¹ Agreeing with the court's reasoning in *Carranza-Hernandez*, the court held that the petitioner need not be physically harmed or have had a face-to-face confrontation with guerrillas to establish that he possesses a well-founded fear of persecution.³⁸² The court found the threat to the petitioner's life would cause a reasonable person to have a well-founded fear of future harm.³⁸³

In a recent Second Circuit case, *Abankwah v. I.N.S.*,³⁸⁴ the court granted asylum based solely on the petitioner's fear of future persecution. A native of Ghana, a member of the Nkumssa tribe and designated tribal Queen Mother, the petitioner sought asylum in the United States because of her fear of being forced to undergo female genital mutilation ("FGM") as a punishment for engaging in pre-marital sex.³⁸⁵ Nkumssa tradition requires a woman who is chosen to be the Queen Mother to remain a virgin until a ceremony is performed celebrating her enthronement.³⁸⁶ Fearing her non-virgin status would be discovered and she would consequently be forced to undergo FGM, the petitioner fled Ghana and sought asylum in the United States.³⁸⁷ Agreeing with the reasoning in *Melendez*, the court in *Abankwah* strongly suggested the petitioner's fear of FGM was "sufficiently 'grounded in reality' to satisfy the objective element of the test for well-founded fear of persecution."³⁸⁸ Given the customs and history of the Nkumssa tribe, the court stated a reasonable person would understand the petitioner's fear of FGM.³⁸⁹

377. *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994).

378. *Id.* at 35.

379. *Id.* at 35-36.

380. *Id.* at 36.

381. *Id.*

382. *Sotelo-Aquije*, *supra* note 377, at 37.

383. *Id.*

384. *Abankwah v. I.N.S.*, 185 F.3d 18 (2d Cir. 1999).

385. *Id.* at 20. Nkumssa non-virgins designated to be Queen Mothers are forced to undergo FGM by having the whole clitoris and all or part of the labia minora amputated. Although the government of Ghana criminalized the practice of FGM in 1994, the United States Department of State "estimated between 15 and 30 percent of all women and girls in Ghana had been subjected to FGM." *Id.* at 23, 25.

386. *Id.* at 20.

387. *Id.*

388. *Abankwah*, *supra* note 384, at 26 (quoting *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991)).

389. *Id.*

Similar to the Second Circuit cases discussed above, the First Circuit in *Cordero-Trejo v. I.N.S.*³⁹⁰ and in *Gailius v. I.N.S.*,³⁹¹ found the petitioners' lack of physical harm not a determinative factor weighing against whether each possessed a well-founded fear of future persecution.³⁹² The petitioner in *Cordero-Trejo*, was a member of a Catholic lay missionary organization that traveled to remote regions of Guatemala to provide medical care and other aid to the needy.³⁹³ Cordero's group especially traveled to regions of Guatemala that had been hard hit by fighting between guerillas and the army.³⁹⁴ As a result of his membership in the missionary organization, he began to receive frequent anonymous threatening phone calls.³⁹⁵ Once while on a mission, the petitioner was stopped by the army and interrogated at length.³⁹⁶ The army accused him and his fellow missionaries of "inciting rebellion."³⁹⁷ As an intended warning to the petitioner, armed men threatened and brutally wounded his two brothers.³⁹⁸ Several months later, a similar group of armed men identifying themselves as belonging to a "death squad" accosted the petitioner.³⁹⁹ The petitioner was never detained or harmed.⁴⁰⁰ The United States Court of Appeals reversed the BIA's decision for failing to "consider Cordero's testimony and evidence 'in light of general conditions' in Guatemala, as required by law."⁴⁰¹ By failing to consider the petitioner's allegations within the context of widespread documented evidence of persecution against Guatemalan clergy, lay church workers and others connected to church-related activities, the BIA erred in finding that the petitioner had no well-founded objective fear of future persecution.⁴⁰² While the case was remanded to the BIA for further consideration, the court noted, "[W]e apprise the Board that we have grave doubts whether a reasonable fact-finder making the full study this record calls for could deny refugee status to Cordero."⁴⁰³

The court in *Gailius v. I.N.S.*,⁴⁰⁴ was persuaded by the petitioner's evidence of nineteen written letters threatening his life, indicating "he was next" after they killed his friend. The First Circuit remanded the

390. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482 (1st Cir. 1994).

391. *Gailius v. I.N.S.*, 147 F.3d 34 (1st Cir. 1998).

392. See *Cordero-Trejo*, *supra* note 390, at 492; see also *Gailius*, *supra* note 391, at 34.

393. *Cordero-Trejo*, at 485.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Cordero-Trejo v. I.N.S.*, 40 F.3d 482, 485 (1st Cir. 1994).

399. *Id.* at 486.

400. *Id.*

401. *Id.* at 490 (quoting 8 C.F.R. § 208.13(a)).

402. *Cordero-Trejo*, *supra* note 398, at 492.

403. *Id.*

404. *Gailius v. I.N.S.*, 147 F.3d 34, 47 (1st Cir. 1998).

case to the BIA, finding its conclusion that the petitioner lacked a well-founded fear of persecution was not supported by substantial evidence.⁴⁰⁵

Similar to these First Circuit decisions, the Eighth Circuit remanded the case of *Makonnen v. I.N.S.*⁴⁰⁶ for further consideration, where an Ethiopian national had not been physically harmed.⁴⁰⁷ Since her childhood, the petitioner assisted her father in political activities.⁴⁰⁸ Just days after the IJ denied asylum to the petitioner, her father was arrested and arbitrarily detained in Ethiopia.⁴⁰⁹ The court held the BIA erred in denying asylum without considering new relevant information, including her father's arrest and a report detailing a pattern of persecution against political dissidents.⁴¹⁰ The court remanded for consideration of new evidence not available to the petitioner during the original deportation proceeding.⁴¹¹

The Fourth and Sixth Circuit courts remanded cases involving Ethnic Albanians from Kosovo for further consideration of persecution, although neither petitioner suffered physical harm. In *Selgeka v. Carroll*,⁴¹² the Fourth Circuit vacated a federal district court ruling and a BIA decision denying an ethnic Albanian an asylum hearing.⁴¹³ The petitioner, a native of Kosovo, arrived in this country as a stowaway.⁴¹⁴ During an informal oral interview with an I.N.S. officer, the petitioner presented no evidence of physical harm, nor did he prove imminent conscription.⁴¹⁵ Nonetheless, the petitioner claimed fear of being drafted into the Serbian Army.⁴¹⁶ The petitioner stated that when Albanian soldiers are placed in the front lines by the Serbs, "the Albanians are not sure if they are killed by the Bosnians in the front or the Serbians behind them."⁴¹⁷ Under unknown circumstances, his brother and father were killed.⁴¹⁸ The I.N.S. officer denied the petitioner's request for an asylum hearing, reasoning that because he entered this country as a stowaway, he was not entitled to an asylum hearing.⁴¹⁹ The petitioner based his appeal on a constitutional argument that he was deprived procedural due process by not being allowed an asylum hearing. According to the Fourth Circuit, a clause in the asylum statute excluding stowaways from entitlement to a *deportation hearing* was erroneously applied to the

405. *Id.*

406. *Makonnen v. I.N.S.*, 44 F.3d 1378 (8th Cir. 1995).

407. *Id.* at 1386-87.

408. *Id.* at 1380.

409. *Id.* at 1381.

410. *Id.* at 1385.

411. *Makonnen*, *supra* note 406, at 1386-87.

412. *Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999).

413. *Id.* at 346.

414. *Id.* at 339.

415. *Id.* at 340.

416. *Id.* at 339-40.

417. *Selgeka v. Carroll*, 184 F.3d 337, 340 (4th Cir. 1999).

418. *Id.* at 340.

419. *Id.* See 8 U.S.C. § 1323(d) (repealed 1996).

petitioner's request for an *asylum hearing*.⁴²⁰ The court held, as a matter of law the petitioner was entitled to a hearing before an IJ.⁴²¹

In an unpublished opinion, the Sixth Circuit remanded the case of *Palushaj v. I.N.S.*⁴²² for further consideration by the BIA, not because the BIA erred in its original finding, but because conditions had significantly worsened in Kosovo.⁴²³ The petitioner was an ethnic Albanian in Kosovo.⁴²⁴ Despite the petitioner's testimony that on several occasions he was questioned by Yugoslav Secret Police for participating in demonstrations against the Yugoslav government and other pro-Albanian activities,⁴²⁵ the BIA determined the petitioner's claim lacked evidence showing that he was an individualized target of persecution.⁴²⁶ The Sixth Circuit ordered the BIA to reopen the case to consider a recent letter received by the petitioner from an attorney in Kosovo, informing the petitioner that he was being investigated for "counter-revolutionary" activities and could face up to fifteen years of imprisonment.⁴²⁷ After examining the letter, the court suggested it could be genuine evidence of persecution directed specifically at the petitioner, something previously missing from the petitioner's record.⁴²⁸

As the following cases demonstrate, the Ninth Circuit is more reluctant than other circuits to grant humanitarian asylum based on past persecution alone. In *Vallecillo-Castillo v. I.N.S.*,⁴²⁹ the court found past persecution, without physical harm.⁴³⁰ The petitioner, a Nicaraguan teacher, was accused by his co-workers of being a counter-revolutionary for his refusal to teach the Sandinista doctrine.⁴³¹ He was harassed and threatened by members of the civilian Sandinista Neighborhood Organization (CDS) for being a supporter of the former dictator, Somoza.⁴³² The petitioner was warned that he would have "more problems" if he did not support the Sandinista government.⁴³³ His home was set on fire, pelted with rocks, and vandalized by members of the CDS.⁴³⁴ The court found past persecution, but did not discuss whether this persecution was sufficiently severe for a humanitarian grant of asylum under the *In re Chen* doctrine.⁴³⁵ Instead, the court found the

420. *Selgeka*, *supra* note 417, at 343-44.

421. *Id.* at 346.

422. *Palushaj v. I.N.S.*, No. 93-3196, 23 F.3d 1049, 1994 WL 198169 (6th Cir. May 17, 1994) (unpublished) at *3.

423. *Id.*

424. *Id.* at *1.

425. *Id.*

426. *Id.* at *2.

427. *Palushaj*, *supra* note 422, at *2.

428. *Id.* at *3.

429. *Vallecillo-Castillo v. I.N.S.*, 121 F.3d 1237 (9th Cir. 1996).

430. *Id.* at 1240.

431. *Id.* at 1239.

432. *Id.*

433. *Id.*

434. *Vallecillo-Castillo*, *supra* note 429, at 1239.

435. *Id.* at 1240.

rebuttable presumption of fear of future persecution was inadequately rebutted by the INS.⁴³⁶ Therefore, the court declared the petitioner eligible for asylum based on a well-founded fear of future persecution and remanded the case to the Attorney General to determine whether the petitioner was entitled to a grant of asylum as a matter of statutory discretion.⁴³⁷

In *Singh v. I.N.S.*,⁴³⁸ another Ninth Circuit case, the petitioner, an ethnic Indian citizen of Fiji, was persecuted not by the government, but rather by ethnic Fijians as a result of widespread ethnic violence between the two groups.⁴³⁹ As a consequence of this violence, the petitioner was forced to leave his job, received persistent death threats, and his wife and daughter were threatened with rape during a break-in of their home.⁴⁴⁰ The court found the petitioner suffered past persecution. It also held that the BIA erroneously failed to make an inquiry into the statutorily presumed fear of future persecution, which necessarily accompanies a finding of past persecution. The court remanded the case to the BIA to allow the INS to rebut the presumption of well-founded fear.⁴⁴¹

The BIA found a well-founded fear of persecution without evidence of physical injury in *In re Mogharrabi*.⁴⁴² The petitioner, a native of Iran, was studying in the United States on a student visa.⁴⁴³ In an effort to document his continuing student status, he went to the Iranian Interests Section of the Algerian Embassy.⁴⁴⁴ An argument ensued and political insults were exchanged between the petitioner and a member of the Iranian government working at the Embassy.⁴⁴⁵ The argument was recorded on video cameras mounted throughout the Embassy and the petitioner was followed to his car.⁴⁴⁶ The BIA granted asylum, concluding that a reasonable person would fear persecution in Iran.⁴⁴⁷

436. *Id.*

437. *Id.*

438. *Singh v. I.N.S.*, 94 F.3d 1353 (9th Cir. 1996).

439. *Id.* at 1357. Persecution at the hands of the government or a quasi-government body is not necessarily required. In 1990 the I.N.S. adopted a regulation that:

specifically states that an applicant is *not* required to show that he has been 'singled out individually for persecution . . . if he establishes that there is a pattern or practice in his country . . . of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.'

Id. at 1360 (quoting 8 C.F.R. § 208.13(b)(2)(i)).

440. *Id.* at 1358.

441. *Id.* at 1361.

442. *See In re Mogharrabi*, No. A-26850376, I. & N. Dec. 439 at 447 (BIA June 12, 1987), 1987 WL 108943.

443. *Id.* at 448.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Mogharrabi*, *supra* note 442, at 448-49.

As indicated above, there are relatively few cases where a well-founded fear of future persecution was determined based on threats or other non-physical injury. No cases identified atrocious past persecution based on non-physical abuse such as threats, economic disadvantage, ostracism or interrogation.

VIII. Conclusion

Although the asylum statute, and courts' interpretations thereof does not require physical harm for asylum eligibility, most courts will affirm BIA decisions to deny asylum if the petitioners were not physically abused. As previously noted, in no instance did a court grant asylum based on past persecution alone without physical injuries. Few cases granted asylum based on a petitioner's well-founded fear of persecution without physical injuries. Such a result is contrary to the intent of the statute.

If the Pilgrims were to land at Plymouth Rock today, most courts would likely affirm a decision to deny them asylum because they were merely subjected to "unpleasant official harassment" and not physically harmed.⁴⁴⁸ Likewise, Jews fleeing the Nazi regime in the 1930s would today be denied asylum under the courts' present interpretation of persecution, because they had not yet been physically harmed.⁴⁴⁹

Similar to the Pilgrims and the Jews, many of the petitioners discussed in this article fled dangerous situations in their homelands to seek freedom in the United States. Denying a safe haven to people who were persecuted but not physically harmed because of their race, nationality, religion, social group status or political opinion, in a country founded by persecuted immigrants is an ironic twist of America's history and the foundation of its independence. It is also a renunciation of the legislative intent of the asylum statute: to make a national commitment to the protection of internationally recognized human rights and humanitarian concerns.⁴⁵⁰ Until the courts uphold the human rights purpose of the asylum statute to include non-physical harm as persecution, there will be no safe haven for refugees in America. As a nation founded and built by persecuted immigrants, we should not be so quick to close the door on those who also yearn to breathe free.

448. DOUGLAS HILL, *THE ENGLISH TO NEW ENGLAND* 12 (1975).

449. *See generally* AUSTIN T. FRAGOMEN, JR., & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS* 6-1 (1998).

450. *See* *Perkovic v. I.N.S.*, 33 F.3d 615, 623 (6th Cir. 1994); *Selgeka v. Carroll*, 184 F.3d 337, 343 (4th Cir. June 7, 1999) (citing 125 Cong. Rec. 23232 (1979)).