Oklahoma Law Review

Volume 60 | Number 1

2007

# Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law

Michael English

# Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*

## *I. Introduction*

The first waves of European immigrants to land on American shores were often comprised of refugees fleeing various forms of persecution.[1] Throughout its history, the United States has considered itself a safe harbor where the oppressed and suffering of the world may find rest.[2] As early as 1783, George Washington declared the young nation "open to receive the persecuted and oppressed of all nations."[3] Congress recently affirmed this pledge by passing the International Religious Freedom Act of 1998.[4] Although the Act considered only the realm of religious persecution, it significantly reaffirmed the nation's commitment to the world's persecuted, receiving unanimous support in both chambers of Congress and officially incorporating religious freedom into American foreign policy.[5]

---

* The author wishes to thank John Rogers for his insightful advice during the drafting of this comment, and Marty Skrapa, Kristopher Jarvis, and the rest of the 2006-07 Editorial Board of the *Oklahoma Law Review* for their invaluable assistance throughout the editing process. The author would like to dedicate this comment to his grandfather, Eugene English.

1. Christy Cutbill McCormick, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L LEGAL STUD. 283, 317 (1998) (discussing the historical foundations of U.S. asylum law).

2. *See* Lance Hampton, *Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the Primacy of Asylum Within Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 453, 476 (2002); Mary McGee Light, Note, *The Well-Founded Fear Standard in Refugee Asylum: Will It Still Provide Hope for the Oppressed?*, 45 DRAKE L. REV. 789, 790 (1997). The persecuted foreigners who comprised so many of our early immigrants played a significant role in the development of the new country. *See* John V. Hanford III, *Introduction* to U.S. DEP'T OF STATE, 108TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2004, at xv, xv (J. Comm. Print 2004), *available at* http://www.internationalrelations.house.gov/archives/109/20429.pdf; Wendy Davis & Angela Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 120 (2000).

3. Light, *supra* note 2, at 790.

4. 22 U.S.C.A. §§ 6401-6481 (West 2005 & Supp. 2006). *See generally* Hampton, *supra* note 2, at 478 (calling the Act a "clear policy statement of religious freedoms" that creates "a bureaucratic mechanism by which the United States might monitor and encourage religious freedoms in the world"); Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act*, 2003 BYU L. REV. 541, 541 (2003) (describing the Act's purpose of counteracting "renewed and increased assaults on freedom of religion throughout the globe").

5. Steven Wales, Comment, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT'L L. 579, 582, 593 (2002). The Act

In light of America's strong tradition of protecting the persecuted and this recent congressional action affirming that heritage,[6] many were surprised and troubled when the U.S. Court of Appeals for the Fifth Circuit issued its ruling in *Li v. Gonzales*[7] on August 9th, 2005.[8] The court's holding placed into sharp relief a facet of U.S. immigration law that is deceptively straightforward in theory but obscure in practice: the distinction between true persecution and legitimate criminal prosecution. Accordingly, *Li* offers an instructive introduction to the difficulty courts regularly face in deciding whether a prosecuted alien is entitled to asylum.

On November 4, 1995, Xiaodong Li arrived in the United States after fleeing his native People's Republic of China.[9] Before leaving his homeland, Li had been active in an illegal underground church of six or seven members that met in his home each Sunday to study the Bible.[10] In December of 1994, Chinese police interrupted one of these gatherings to search for illegal

---

boldly articulated America's commitment to protect those persecuted on the basis of religious belief:

> The right to freedom of religion undergirds the very origin and existence of the United States. Many of our nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.

22 U.S.C. §6401(a) (2000).

6. This tradition is perhaps best articulated in the inscription at the base of the Statue of Liberty:

> 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-tossed, to me:
> I lift my lamp beside the golden door.

Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 36-37 (2004) (quoting EMMA LAZARUS, *The New Colossus*, *in* THE POEMS OF EMMA LAZARUS 2 (Boston, Houghton, Mifflin 1889)).

7. 420 F.3d 500 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005).

8. *See* Press Release, Alliance Def. Fund, Coalition Continues to Grow for Chinese Christian Denied Asylum in U.S. (Oct. 4, 2005), *available at* http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=3551; Press Release, U.S. Comm'n on Int'l Religious Freedom, China/Asylum Issues: USCIRF Deeply Troubled by 5th Circuit Decision in Li v. Gonzales (Oct. 3, 2005), *available at* http://www.uscirf.gov/mediaroom/press/2005/october/10032005_china.html; Brent Tantillo, *Taking Freedom's Side*, DEMOCRACY PROJECT, Aug. 15, 2005, http://www.democracy-project.com/archives/001781.html.

9. *Li*, 420 F.3d at 503.

10. *Id.* at 504.

religious materials, and finding none, they warned Li not to spread such contraband.[11] The group continued to meet until April of 1995 when the police again raided Li's home, this time finding religious materials prohibited by Chinese law.[12] The police identified Li as the group's leader, arrested him, and took him in handcuffs to the police station, where they told him to kneel.[13] When Li refused, the police kicked his legs from behind, struck his head, and pulled his hair, forcing him to his knees.[14] The police then sought Li's confession that he was involved in an illegal religious gathering and had organized an illegal church, but Li refused to plead guilty.[15] During this interrogation, the officials beat and shocked Li with a black electric baton when they disliked Li's responses.[16] After two hours of this treatment, Li signed a written confession pleading guilty to conducting an illegal gathering and leading an illegal underground church.[17] For the next five days, the police detained him under abusive conditions until his uncle paid his bail.[18] As a result of this incident, Li lost his job, and authorities forced him to clean public toilets without pay.[19]

Government officials set Li's hearing for six months after his release from jail. Li feared that a trial would result in a prison sentence, so he fled his homeland and arrived in the United States in late 1995.[20] In May of 1999, Li learned through family members that the police were still searching for him and that his friend and fellow church leader, Gao Ying, had been arrested and given a two-year prison sentence.[21] Later that year, Li applied for asylum, testifying to U.S. immigration officials that he believed he would face further arrest, torture, and imprisonment because of his religious beliefs if returned to China.[22] The immigration judge initially granted Li asylum, finding that he would probably face continued religious persecution if returned to China, but on appeal, the Immigration and Naturalization Service (INS)[23] convinced the

---

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 505.
17. *Id.* at 504-05.
18. *Id.* at 505.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Many sources in this discussion refer to the INS, or the Immigration and Naturalization Service. The Immigration and Naturalization Service is now within the Department of Homeland Security, renamed as the U.S. Citizenship and Immigration Services:

Board of Immigration Appeals that the Chinese government had not persecuted Li on account of his religious beliefs but had merely prosecuted him for his criminal activity.[24] On August 9, 2005, the U.S. Court of Appeals for the Fifth Circuit agreed, holding that because "Li's punishment was for his [criminal] activities and not for his religion," the United States would return him to the Chinese government.[25]

Did Xiadong Li's treatment amount to legitimate criminal prosecution for violating Chinese law, or had Li fled governmental persecution for his religious beliefs? The question became moot when the Fifth Circuit vacated its earlier opinion,[26] but *Li* emphasized a critical area within immigration law that remains poorly defined and unevenly applied.[27] The purpose of this comment is to provide a comprehensive understanding of the fluctuating boundary line that divides true persecution from mere prosecution.

---

> On March 1, 2003, service and benefit functions of the U.S. Immigration and Naturalization Services (INS) transitioned into the Department of Homeland Security (DHS) as the U.S. Citizenship and Immigration Services (USCIS). USCIS is responsible for the administration of immigration and naturalization adjudication functions and establishing immigration services policies and priorities. These functions include:
>
> . . .
>
> ● adjudication of asylum and refugee applications . . . .

U.S. Citizenship and Immigration Servs., About USCIS, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Feb. 2, 2007). For purposes of clarity, much of this discussion retains the "INS" terminology to follow the majority of cited literature and case law.

24. *Li*, 420 F.3d at 506.

25. *Id.* at 511.

26. Li v. Gonzalez, 429 F.3d 1153 (5th Cir. 2005), *vacating as moot* 420 F.3d 500. In vacating its earlier decision, the Fifth Circuit noted that the Department of Homeland Security cited "new evidence" in requesting that officials reopen Mr. Li's case. *Id.* at 1153. More likely, the Department found its position politically untenable in the wake of considerable public outcry. *See* Press Release, U.S. Comm'n on Int'l Religious Freedom, China/Asylum Issues: Fifth Circuit Vacates Troubling Asylum Decision on Religious Freedom in China (Nov. 4, 2005), *available at* http://www.uscirf.gov/mediaroom/press/2005/november/11042005_asylumDecision.htm1 (discussing the vacating opinion); *supra* note 8.

27. Observers often note the difficulty with distinguishing persecution from prosecution. *See* Dawn Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 311 (2003) (noting the importance of differentiating between lawful prosecution and persecution, and recognizing that "there is often a fine line distinguishing the two"); Shelley M. Hall, Comment, *Quixotic Attempt? The Ninth Circuit, The BIA, and the Search for a Human Rights Framework to Asylum Law*, 73 WASH. L. REV. 105, 127 (1998) ("Identifying when legitimate prosecution ends and persecution begins poses great difficulties in asylum law.").

Nonetheless, the following pages are not merely a synthesis, they are also a critique, for the merit of any such effort lies in its potential to help ensure that this ambiguous area of law becomes more coherent and consistent with the unambiguous American promise of protecting Earth's persecuted.

Part II begins by examining the development and structure of asylum and withholding of removal, the two chief legal mechanisms available to an alien fleeing persecution. Next, Part III considers the fundamental distinction between actual persecution and mere criminal prosecution by setting forth the general rule that prosecution is distinct from persecution and then noting several exceptions to this general standard, along with commonly applied factors that influence such determinations. Having constructed this analytical framework, Part IV then applies it to four scenarios where the persecution/prosecution distinction most frequently arises: illegal departure, compulsory military service, domestic intelligence gathering, and antigovernment activities. Finally, Part V emphasizes two areas of pronounced ambiguity and disagreement in this arena and confronts the tendency of lower immigration courts to apply incorrect legal principles to the prosecution/persecution analysis. Part V concludes by arguing that a uniform understanding of this distinction is essential to justly adjudicate asylum claims and that judges and policymakers must do more to harmonize this discordant area of law so that the United States can better live up to its historical commitment of protecting the truly persecuted.

## *II. Asylum and Withholding - The Legal Framework Protecting Victims of Persecution*

International and domestic protections for individuals fleeing persecution originated in the aftermath of World War II, when the international community acknowledged its failure to respond to the Nazi's persecution and extermination of millions of racial, religious, and political minorities.[28] Indeed, the Holocaust encouraged the creation of an international norm protecting the right to freedom of thought and belief,[29] which was subsequently enshrined in Article 18 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and

28. *See* Hampton, *supra* note 2, at 463; Karen Musalo, *Claims for Protection Based on Religion or Belief*, 16 INT'L J. REFUGEE L. 165, 166 (2004) (U.K.); Kathryn A. Dittrick Heebner, Comment, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F. L. REV. 549, 551-52 (2005).

29. Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1215 (1994).

freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[30]

Protecting these and other inherent and universal rights became "a matter of global concern after the horrors of World War II"[31] that eventually culminated in the 1951 United Nations Convention Relating to the Status of Refugees.[32] The Convention recalled that the Universal Declaration protects "fundamental rights and freedoms without discrimination"[33] and required signatory nations to offer asylum to refugees if they had been persecuted on account of political opinion, race, nationality, social group, or religion.[34] Although the United States was not an original signatory to the Convention,[35] it accepted that instrument's obligations by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees.[36] In 1980, Congress passed the Refugee Act,[37] which established a domestic basis for granting asylum in conformity with America's obligations under the 1967 Protocol,[38] as well as

30. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

31. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 23 (2005) [hereinafter 2005 ANNUAL REPORT].

32. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

33. *Id.* pmbl.

34. *Id.* art. 1(A)(2).

35. That the United States was not a signatory is particularly ironic given American ambivalence to the dangers facing European Jews leading up to the Second World War. This lack of concern was illustrated in 1939, when Cuba and the United States refused harbor to a passenger ship filled with 900 German Jews, forcing the refugees to return to Europe where they were ultimately killed by the Nazis. *See* Tuan N. Samahon, Note, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211, 2212 n.7 (2000).

36. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. For the proposition that America's accession to the Protocol ratified the obligations of the 1951 Convention, see Hampton, *supra* note 2, at 468; April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 797 n.39 (1996); Samahon, *supra* note 35, at 2213.

37. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42) (2000)) (incorporating the basic provisions of the 1967 Protocol).

38. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987); Hampton, *supra* note 2, at 465; Adell, *supra* note 36, at 797 (noting that the Refugee Act of 1980 was enacted to conform U.S. law to the 1967 Protocol and to "both safeguard international human rights and effectuate the humanitarian interests of the United States"); Heebner, *supra* note 28, at 552; Light, *supra* note 2, at 792. For additional discussion regarding the passage of the Refugee Act of 1980, see Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 312 (2001) (noting that the Supreme Court has held that if "one thing is clear from the legislative history of the

the 1951 Convention.[39] Current asylum and withholding provisions derive from this legislation.

*A. Asylum and Withholding*

U.S. immigration law affords persecuted aliens within the United States two primary avenues of protection: a grant of asylum under 8 U.S.C. § 1158(a) or withholding of removal under 8 U.S.C. § 1253(h).[40] To be eligible for asylum, an alien must demonstrate that she is a "refugee,"[41] defined as one who is unwilling or unable to return to her home 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 . . . ."[42] Thus, an alien may qualify as a refugee if she has suffered past persecution or if she has a well-founded fear of future persecution on account of one of the five enumerated factors.[43] The law presumes the applicant has a well-founded fear of future persecution if she has suffered past persecution, but immigration officials may rebut this presumption if her home country has undergone a "fundamental change in circumstances" or if she could avoid further persecution by relocating elsewhere within her home

---

definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37)); Andrew Bonavia, Note, *United States v. Rodriguez-Roman: Prosecuting the Persecuted*, 22 N.C. J. INT'L L. & COM. REG. 1039, 1049 (1997); John Hans Thomas, Note, *Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in* Lwin v. INS, 1999 BYU L. REV. 799, 802.

39. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 45 (2004) ("The Immigration and Nationality Act, as amended by the Refugee Act of 1980, regulates U.S. asylum policy as well as governing refugee procedures. The Act, for the first time, established a statutory basis for granting asylum in the United States consistent with the 1951 Convention Relating to the Status of Refugees.").

40. *See* Anwen Hughes, *Asylum and Withholding of Removal — A Brief Overview of the Substantive Law*, *in* BASIC IMMIGRATION LAW 2005, at 293, 297 (PLI Corporate Law & Practice, Course Handbook Series No. 1477, 2005); Daniel J. Smith, *Political Asylum — Well-Founded Fear of Persecution*, 13 AM. JUR. 3D *Proof of Facts* § 1 (1991).

41. 8 U.S.C.A. § 1158(b)(1) (West 2005) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien . . . if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.").

42. 8 U.S.C. § 1101(a)42(A) (2000); *see also* 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 39, at 40 (noting that this definition "generally conforms to the international definition of refugee found in the 1951 Convention relating to the Status of Refugees").

43. 8 C.F.R. § 208.13(b) (2006).

country.[44] Even if the asylum applicant has not suffered previous persecution, she may become eligible for asylum by showing a "well-founded fear of persecution" on account of one of the protected grounds.[45] This fear of persecution includes both a subjective and objective component.[46] The asylum applicant bears the burden, according to federal regulation,[47] of demonstrating the objective component through "'credible, direct, and specific evidence in the record of facts that would support a *reasonable* fear' of persecution"[48] and satisfying the subjective component through "credible testimony that he genuinely fears persecution."[49]

The Board of Immigration Appeals (Board or BIA)[50] has recognized four elements for a successful asylum claim: (1) the alien has endured past persecution or fears future persecution; (2) the fear is "well-founded"; (3) the persecution is on "account of race, religion, nationality, membership in a particular social group, or political opinion"; and (4) the alien is unwilling or unable to return to her native country or the country she last resided in because of persecution or her well founded fear of persecution.[51] Once an alien demonstrates her eligibility, the immigration judge exercises his discretion to grant or deny the asylum application,[52] but discretionary denial

---

44. *Id.*

45. *Id.*

46. *E.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987); Malty v. Ashcroft, 381 F.3d 942, 947 (9th Cir. 2004) ("Eligibility for asylum based on a well-founded fear of future persecution requires an applicant to satisfy both a subjective and objective test." (citing Singh v. INS, 134 F.3d 962, 966 (9th Cir. 1998))).

47. *See* 8 C.F.R. § 208.13(b)(1).

48. Kotasv v. INS, 31 F.3d 847, 851 (9th Cir. 1994) (quoting Rodriguez-Rivera v. INS, 848 F.2d 998, 1002 (9th Cir. 1988) (per curiam)).

49. Shirazi-Parsa v. INS, 14 F.3d 1424, 1427 (9th Cir. 1994) (quoting Acewicz v. INS, 984 F.2d 1056, 1061 (9th Cir. 1993)), *overruled on other grounds by* Fisher v. INS, 79 F.3d 995 (9th Cir. 1996).

50. The Board of Immigration Appeals is the ultimate authority within the Department of Justice in interpreting statutes and regulations affording protections to aliens fleeing persecution. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 326 (9th ed. 2004).

51. *Id.* at 329-30 (citing *In re* Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987)).

52. 8 U.S.C. § 1158(a) (2000); 8 C.F.R. § 208.13(b)(1)(i); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 443 (1987) (a successful asylum applicant "does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it"); *In re* Pula, 19 I. & N. Dec. 467 (B.I.A. 1987)). In exercising their discretion, immigration judges should consider the totality of the circumstances, and although the alien carries the burden of showing that a favorable exercise of discretion is called for, the threatened "persecution should outweigh all but the most egregious adverse discretionary factors." Hughes, *supra* note 40, at 313 (citing *In re* Kasinga, 21 I. & N. 357

cannot be arbitrary, for the government must show a reasonable basis for not granting asylum to an eligible alien.[53]

The second avenue open to an otherwise deportable alien fleeing persecution is withholding of removal, a remedy available when an alien meets her burden of establishing that her "life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion."[54] As with asylum, an alien seeking withholding can establish eligibility by showing either past persecution or a "future threat to life or freedom."[55] Mirroring the past persecution ground for asylum, if the alien has suffered previous persecution on account of a protected ground, a court presumes that persecutors would threaten her life or freedom in the future. The INS can rebut this presumption by showing a "fundamental change in circumstances" that removes the threat or by the applicant's ability to avoid future threats to her life or freedom by relocating within the proposed country of removal.[56] If the withholding applicant has not suffered past persecution, she may still establish eligibility by showing that:

> [H]is or her life or freedom would be threatened in the future in a country if he or she can establish that it would be more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country.[57]

If an applicant successfully demonstrates either past persecution or a future threat to life or freedom, immigration officials may not return her to the country where she fears persecution unless conditions there change so as to

---

(B.I.A. 1996)). Further, Kathryn Dittrick Heebner argues that the broad discretion immigration judges exercise in granting asylum is often "employed in a haphazard manner and produces illogical results," and as a result, she proposes several solutions for resolving the lack of uniformity in discretionary rulings. Heebner, *supra* note 28, at 550, 568-73.

53. Donald W. Yoo, *Exploring the Doctrine of Imputed Political Opinion and Its Application in the Ninth Circuit*, 19 GEO. IMMIGR. L.J. 391, 393 (2005); Sachin D. Adarkar, Comment *Political Asylum and Political Freedom: Moving Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act*, 42 UCLA L. REV. 181, 187 (1994) (citing Osorio v. INS, 18 F.3d 1017, 1022 (2d Cir. 1994)).

54. 8 C.F.R. § 208.16(b).

55. *Id.* § 208.16(b)(1)-(2).

56. *Id.* § 208.16(b)(1)(i)(A).

57. *Id.* § 208.16(b)(2).

make future persecution unlikely,[58] although officials may remove a successful applicant to a third country that does not threaten persecution.[59]

The fundamental difference between asylum and withholding of removal is the different level of proof required by each.[60] In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court held that the well-founded fear standard required for asylum is lower than the standard needed for withholding of removal.[61] The "would be threatened" element for withholding of removal requires the applicant to "establish by objective evidence that it is more likely than not that he or she will be subject to persecution upon deportation,"[62] or in other words, at least a fifty-one percent probability of persecution.[63] Less stringently, the "well-founded fear" required for asylum exists when "persecution is a reasonable possibility."[64] Thus, an alien seeking asylum need not demonstrate that future persecution is more likely than not to occur.[65]

Additionally, asylum and withholding differ in their respective forms of relief. After becoming eligible for asylum by showing a well-founded fear of persecution, an immigration judge affords the alien permanent resident status at the judge's discretion. Asylum is unavailable, however, to aliens who fail to apply within one year of arriving in the United States.[66] In contrast, when an immigration judge determines an applicant is eligible for withholding of removal, the judge has no discretion in withholding the alien's deportation to the country in question,[67] although the government may deport the alien to a

---

58. *Id.* § 208.16(b)(1)(A), (d)(1).

59. *Id.* § 208.16(f) ("Nothing in this section . . . shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.").

60. *See* Heebner, *supra* note 28, at 555.

61. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

62. *Id.* at 430 & n.10 ("The section literally provides for withholding of deportation only if the alien's life or freedom 'would' be threatened in the country to which he would be deported; it does not require withholding if the alien 'might' or 'could' be subject to persecution." (citing INS v. Stevic, 467 U.S. 407, 422 (1984))).

63. Heebner, *supra* note 28, at 555.

64. *Cardoza-Fonseca*, 480 U.S. at 440 (rejecting the notion that "because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening").

65. *Id.* at 431 ("That the fear must be 'well-founded' does not . . . transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

66. *See* 8 U.S.C. § 1158(a)(2)(B) (2000); Heebner, *supra* note 28, at 553.

67. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 443; Boctor v. Gonzales, No. 05-2530, 2007 WL 162839, at *4 (7th Cir. Jan. 24, 2007) ("Unlike asylum, which is discretionary, withholding of removal is a mandatory form of relief . . . ." (citing 8 U.S.C. § 1231(b)(3)(a))); Adarkar, *supra* note 53, at 187.

safe third country or return her to the original country if changed conditions sufficiently reduce the threat of persecution.[68]

Notwithstanding their distinct burdens of proof and remedies, asylum and withholding of removal essentially entail the same two-step analysis, requiring an applicant to show that she has (1) suffered past persecution or is threatened by future persecution and (2) that this persecution is "on account" of race, religion, nationality, membership in a particular social group, or political opinion.[69] Thus, the two central questions for both forms of relief are whether the conduct complained of rises to the level of "persecution," and if so, whether that persecution was "on account" of one of the five enumerated grounds. A brief discussion of these foundational concepts is instructive in understanding when state prosecution becomes protected persecution.

*B. Defining "Persecution"*

One of the most contentious issues in asylum law has been distinguishing between true, protected persecution and lesser manifestations of violence, such as "discrimination, harassment, civil strife, or random violence."[70] Neither the 1951 Convention, its 1967 Protocol, or the Refugee Act of 1980, which implemented the Convention, defines "persecution."[71] The Ninth Circuit has defined the term as the "infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive."[72] Courts generally require that the suffering or harm in question be severe, and recognize that persecution is "an extreme concept that does not include every sort of treatment our society regards as offensive."[73] Conduct

68. 8 C.F.R. § 208.16(b)(1)(A), (d)(1) (2006).

69. *Id.* § 208.16(b), (d)(1); *see also* 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 39, at 40.

70. Mousin, *supra* note 4, at 573.

71. *See* Sahi v. Gonzales, 416 F.3d 587, 589-90 (9th Cir. 2005); Eric T. Johnson, *Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?*, 1996 BYU L. REV. 757, 763 (1996); Mousin, *supra* note 4, at 574. Noting that the primary responsibility for defining "persecution" lies with the BIA, the *Sahi* court stated, "The Board has failed to discharge that responsibility. Neither the parties' research nor our own has brought to light a case in which the BIA has defined 'persecution.' . . . We haven't a clue as to what it thinks religious persecution is." *Sahi*, 416 F.3d at 588-89. *But see* Hughes, *supra* note 40, at 300 (noting that most commentators agree that arriving at a universal definition of persecution is "not a useful exercise" given the variety of harms inflicted and the varied contexts producing such harms, and that a general consensus exists that "threats to life and freedom[] are always persecution, as are serious physical harm or other serious violations of human rights").

72. Krotova v. Gonzales, 416 F.3d 1080, 1084 (9th Cir. 2005) (quoting Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998)); *see also* Ladha v. INS, 215 F.3d 889, 897 (9th Cir. 2000); Abdel-Masieh v. INS, 73 F.3d 579, 583 (5th Cir. 1996).

73. Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003); *see also* Gonzales v. INS, 82

falling below this threshold, such as harassment or discrimination, is not usually considered persecution,[74] but may rise to the level of persecution if sufficiently severe.[75] Moreover, although persecution is usually associated

F.3d 903, 908 (9th Cir. 1996); Fatin v. INS, 12 F.3d 1233, 1243 (3d Cir. 1993). Additionally, the government or persons the government is unable or unwilling to control must inflict the harm or suffering in question. *See, e.g.*, Avetova-Elisseva v. INS, 213 F.3d 1192, 1198 (9th Cir. 2000).

74. *See, e.g.*, Zhang v. Ashcroft, No. 04-1384, 2005 WL 375726, at *4 (3d Cir. Dec. 17, 2005) (holding expulsion from school and near arrest do not constitute persecution); Hidayat v. U.S. Attorney Gen., No. 04-1249, 2005 WL 1662139, at *1-2 (3d Cir. Jul. 27, 2005) (finding that conduct when a Muslim mob attacked an applicant's church, set it on fire, and beat him, "though troubling, did not rise to the level of religious persecution"); Li v. Gonzales, No. 04-3605, 2005 WL 1475649 (7th Cir. June 23, 2005) (holding Chinese officials did not persecute an alien for his religious beliefs when they only harassed him while he rebuilt a church, and never harmed, detained, or deprived him of his ability to earn a living, and where there was no suggestion the government would harm him if the United States returned him to China); Tamayo v. Ashcroft, No. 03-73955, 2005 WL 91612, at *1 (9th Cir. Jan. 18, 2005) (holding an applicant for withholding of removal failed to establish past persecution when she described one incident of militants throwing rocks at her church and a single attack on her husband and harassment of her children); Panggabean v. Ashcroft, No. 04-70656, 2005 WL 81124 (9th Cir. Jan. 14, 2005) (holding disruption of weekly religious meetings held at alien's residence did not rise to the level of persecution where the alien testified that the government never physically assaulted her on account of her religion); Ayad v. Ashcroft, No. 03-1079, 2004 WL 817381, at *3-4 (3d Cir. Apr. 14, 2004) (noting that threats by themselves only constitute persecution "under exceptional circumstances," and holding that a cleric's unwelcome proselytizing efforts in the alien's home, although offensive, rude, and even threatening, did not amount to persecution because the cleric never physically injured the asylum applicant); Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998) (holding 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"); Domingo v. INS, No. 96-1554, 1998 WL 24363, at *2 (4th Cir. Jan. 26, 1998) ("Although the employment actions and pressure by one of Domingo's bosses for her to become a Muslim were objectionable, this type of discrimination does not amount to persecution within the meaning of the Immigration and Nationality Act."); Bereza v. INS, 115 F.3d 468, 472 (7th Cir. 1997) (stating that persecution requires conduct amounting to more than mere harassment); Kazlauskas v. INS, 46 F.3d 902, 904, 906-07 (9th Cir. 1994) (holding harassment and ostracism from peers and teachers based on political and religious beliefs and being denied admission to university on these bases does not rise to the level of persecution).

75. *See, e.g.*, *Krotova*, 416 F.3d at 1084 (quoting *Korablina*, 158 F.3d at 1043) (finding persecution and rejecting the Board's finding of mere discrimination where anti-Semitic groups violently assaulted alien three times, once at a synagogue and once with her nine-year-old daughter; murdered a close family friend; and severely beat her brother); Mkrtchyan v. Gonzales, No. 03-72461, 2005 WL 1541040, at *1-2 (9th Cir. July 1, 2005) (overruling the immigration court in finding that the "combination of job loss, vandalism, confrontation with a violent mob, harassment, detention, beatings, and threats of arrest compel a finding that the harm rises to the level of persecution"); Sandhu v. Ashcroft, No. 03-71744, 2004 WL 2203937, at *1 (9th Cir. Sept. 27, 2004) (reversing the Board's determination that the police's rape of an

with an alien suffering severe physical abuse, such as torture or beatings, threats of harm may in some instances be sufficient to amount to persecution.[76] Similarly, even if an alien suffers no physical abuse, pure economic harm may also constitute persecution if it is sufficiently severe.[77] Persecution may also arise in the absence of violence where a government compels an individual to renounce his or her religious beliefs or completely prohibits religious practice.[78]

---

alien, who called her a "Sikh whore" and "wife of a deserter," did not rise to the level of persecution); Baballah v. Ashcroft, 367 F.3d 1067, 1074-75 (9th Cir. 2004) (citing Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)) (holding Israeli officials persecuted a Muslim Israeli on account of his religion and ethnicity where the officials had thwarted his attempts to gain employment as a lifeguard and accountant and where Israeli Marines "deliberately interfered with his attempts to maintain a fishing business through the dangerous intimidation tactics")); Yadegar-Sargis v. INS, 297 F.3d 596, 602 (7th Cir. 2002) (finding persecution where police repeatedly confronted an Iranian Christian at her home, forced her to the end of food rationing lines, forced her to wear Muslim attire, and frequently harassed her at her church).

76. Khup v. Ashcroft, 376 F.3d 898, 903 (9th Cir. 2004); *see also* Thomas v. Ashcroft, 359 F.3d 1169, 1179 (9th Cir. 2004) (holding that escalating intimidation and a serious threat of physical violence established persecution); Salazar-Paucar v. INS, 281 F.3d 1069, 1075 (9th Cir. 2002) (holding death threats along with beatings of family members and murders of political allies constitute persecution); Ernesto Navas v. INS, 217 F.3d 646, 658 (9th Cir. 2000) ("[W]e have consistently held that death threats alone can constitute persecution.").

77. *See Baballah*, 367 F.3d at 1075(holding that purely economic harm may amount to persecution when there is "a probability of deliberate imposition of substantial economic disadvantage upon [an alien] on account of a protected ground" (quoting *Kovac*, 407 F.2d at 107)); Borca v. INS, 77 F.3d 210, 215-17 (7th Cir. 1996) (rejecting a test for persecution requiring a complete withdrawal of all economic opportunities instead of a substantial deprivation); *Abdel-Masieh*, 73 F.3d at 583 ("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." (quoting *In re* Laipenieks, 18 I. & N. Dec. 433, 456-57 (B.I.A. 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985))); *see also* Davis & Atchue, *supra* note 2, at 82 (noting the "failure of courts to link persecution to non-physical forms of harm such as economic deprivation, incarceration, harassment, and threats"). *Compare* Capric v. Ashcroft, 355 F.3d 1075, 1092-95 (7th Cir. 2004) (holding than an alien's loss of job and his economic hardship and harassment did not rise to the level of persecution), *with* Barreto-Claro v. U.S. Attorney Gen., 275 F.3d 1334, 1340 (11th Cir. 2001) (holding employment discrimination suffered by Cuban resulting from troubles with the Communist Party did not constitute persecution when the discrimination stopped short of depriving the alien of the means to earn a living).

78. *See, e.g.*, Fisher v. INS, 61 F.3d 1366, 1375 (9th Cir. 1994) ("*[T]he concept of persecution is broad enough to include measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs*. An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance." (alteration in original) (quoting Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993))); Doe v. INS, 867 F.2d 285 (6th Cir. 1989).

Government detentions and interrogations are a recurring theme in claims for asylum and withholding of removal, and courts typically consider the severity of treatment and the duration of the detention in determining whether to grant either form of relief, in addition to considering the other factors set forth in Part III. For example, an alien's four-hour detention without beatings or torture did not rise to the level of persecution,[79] and a two-day detention where police pulled an alien's hair and pushed her to the ground was also not sufficiently severe.[80] In contrast, an asylum seeker's single beating, resulting in facial bruising and a broken finger, was severe enough to amount to persecution,[81] as was another alien's arrest and fifteen-day detention, which included two beatings.[82]

### *C. The "On Account" Requirement*

Once an asylum or withholding applicant establishes that she has suffered abuse rising to the level of persecution, the alien must then show that this persecution or fear of future persecution is "on account" of one of the five protected grounds.[83] This element is central to this comment's investigation. The U.S. Supreme Court has held that an alien's persecution is "on account"

---

79. Sumadatha v. Ashcroft, No. 03-3898, 2004 WL 2278706, at *1, *3 (3d Cir. Oct. 6, 2004); *see also* Ye v. Gonzales, No. 04-1740, 2005 WL 1153976, at *2 (3d Cir. May 17, 2005) (holding a short detention including a "single slap and solitary kick" from the police was not severe enough to constitute persecution).

80. Liu v. Ashcroft, 380 F.3d 307, 310-11, 313 (7th Cir. 2004) ("Here, Mei Dan's detention was relatively short. As physical brutality goes, hair-pulling and pushing rank on the less serious end.").

81. Vaduva v. INS, 131 F.3d 689, 690 (7th Cir. 1997).

82. Zhuang v. Gonzales, No. 04-73820, 2005 WL 2271597, at *1 (9th Cir. Sept. 19, 2005); *see also* Quan v. Gonzales, 428 F.3d 883, 888-89 (9th Cir. 2005) (finding that officials had persecuted an alien when they arrested and beat her with an electrically-charged baton and later had her fired from her job because of her religious associations); Asani v. INS, 154 F.3d 719, 722-23 (7th Cir. 1998) (holding that persecution probably occurred where officials detained applicant for two weeks, beat him so that he lost two teeth, deprived him of food and water, and kept him in a cell chained to a radiator, where he was unable to sit). *But see* Singh v. INS, No. 01-71133, 2002 WL 465319, at *1 (9th Cir. Mar. 15, 2002) (stating that "[a]lthough troubling, Singh's treatment does not compel a finding of persecution," where police imprisoned him for twenty-four hours, slapped him, pulled his hair, punched his stomach, called him names and ridiculed his religion, and two weeks later again detained him for two days in a dark room, where they beat, slapped, and punched him and dragged him about by his hair); Zalega v. INS, 916 F.2d 1257, 1260 (7th Cir. 1990) (holding that detention for short periods without mistreatment and work-related harassment are not persecution).

83. *See supra* notes 43, 44, 54. For an examination of how this requirement is interpreted in the United States and in other common law countries, see Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265 (2002).

of a protected ground if the victim possesses a protected characteristic that motivated the persecutor to harm her.[84] Importantly, many courts hold that the victim's protected characteristic need not be the persecutor's sole motivation, but need only comprise part of the motivation for the persecution.[85] Further, some decisions interpret the "on account" language to require a "nexus" between the alleged persecution and one of the five enumerated grounds.[86] An adequate nexus exists where the alien demonstrates that his actual or imputed belief or status motivated the persecutor's efforts to harm him,[87] but the alien need not show the persecutor's exact motivation if he can produce evidence that would make a reasonable person fear danger on account of a protected ground.[88] Again, this "on account" element is critical in determining whether a foreign government has persecuted or legitimately prosecuted an asylum applicant. Having highlighted the general structure of asylum law by examining the two chief legal protections available to an alien fleeing

84. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992); *see also* Diab v. Ashcroft, 397 F.3d 35, 40 (1st Cir. 2005) (holding persecution "on account" of religion exists where the applicant can show he was "persecuted on the basis of his religion").

85. *E.g.*, Li v. Gonzales, 420 F.3d 500, 509 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005) ("The federal courts and the BIA have also recognized that an alien may demonstrate that a persecutor's actions were on account of a protected characteristic even if the persecutor had mixed motivations; a persecutor does not have to be motivated solely by the victim's possession of a protected characteristic."); Girma v. INS, 283 F.3d 664, 667 (5th Cir. 2002); *In re* S— P—, 21 I. & N. Dec. 486, 491 (B.I.A. 1996); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

86. *See, e.g.*, Khanuja v. INS, Nos. 99-70510, 00-70599 2001 WL 337847, at *1 (9th Cir. Apr. 4, 2001) (holding that asylum applicant failed to "demonstrate a nexus between the alleged persecution and his religion"); Kalajian v. INS, No. 99-70151, 2000 WL 1015899, at *1 (9th Cir. July 21, 2000) (finding insufficient evidence of a "nexus between his religion or ethnicity and the alleged persecution"); *see also* Hughes, *supra* note 40, at 305. Showing a nexus is particularly significant when claims are premised on religious belief, and one commentator cautions that a nexus test requiring detailed and extensive evidence of the relationship between the persecution and one's religion "poses a potentially insurmountable obstacle to protection," because religious-based persecution often results from multiple, complex factors occurring in environments where it is difficult to distinguish between religious biases and other ethnic or political motivations. Musalo, *supra* note 28, at 205.

87. *See, e.g.*, Desir v. Ilchert, 840 F.2d 723, 726 (9th Cir. 1988) (citing Hernandez-Ortiz v. INS, 777 F.2d 509, 513 (9th Cir. 1985)). Additionally, persecution can be "on account" even where the victim does not actually possess the belief or characteristic attributed to him. *E.g.*, Gao v. Gonzales, 424 F.3d 122, 129 (2d Cir. 2005) ("[T]he question in this case is not whether Gao was or is a practitioner of Falun Gong, but whether authorities would have *perceived* him as such or as a supporter of the movement because of his activities. If authorities would persecute him as an adherent or as a supporter of Falun Gong, then such persecution would be 'on account of' an enumerated ground.").

88. *In re Fuentes*, 19 I. & N. Dec. at 662.

persecution, this comment now turns to the crucial distinction between persecution and prosecution.

## *III. The Framework for Distinguishing Between True Persecution and Legitimate Prosecution*

An examination of American asylum jurisprudence reveals that courts have adopted a general framework for distinguishing legitimate prosecution from actual persecution. Part III presents this framework by first noting that courts make clear that an alien's legitimate prosecution, without more, is insufficient for a grant of asylum or withholding. This part then highlights the principal exceptions to this rule and concludes by discussing the most common factors the courts have looked to in determining when state prosecution has become protected persecution.

### *A. Legitimate Prosecution Is Not Persecution*

Courts uniformly recognize that a state's prosecution of its citizens does not automatically equate with persecution, and often explicitly articulate this, as when the U.S. Court of Appeals for the Ninth Circuit underscored the "distinction between legitimate criminal *prosecution* and *persecution* based on a protected ground,"[89] and noted that the two are "readily distinguishable."[90] Similarly, the Third Circuit adhered to the same "distinction between persecution and prosecution,"[91] while the Seventh Circuit recognized, in language recently adopted by the Sixth Circuit,[92] "the fundamental distinction between *persecution* on the one hand and the *prosecution* of nonpolitical crimes on the other."[93] In fact, the federal circuit courts universally accept a clear distinction between prosecution and persecution.[94]

---

89. Bandari v. INS, 227 F.3d 1160, 1168 (9th Cir. 2000); *see also* Ratnam v. INS, 154 F.3d 990, 995 (9th Cir. 1998) (following Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995)).

90. Kaurr v. INS, No. 97-70678, 1998 WL 416112, at *3 (9th Cir. June 17, 1998).

91. Shardar v. Ashcroft, 382 F.3d 318, 323 (3d Cir. 2004).

92. *See* Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003).

93. Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992).

94. *See* Ou v. U.S. Dep't of Justice, No. 02-4904, 2005 WL 1349874, at *2 (2d Cir. June 8, 2005) (holding that the prosecution an alien faced in China for illegal departure did "not present a situation where prosecution would amount to persecution"); Jiang v. U.S. Attorney Gen., No. 04-15394, 2005 WL 1052604, at *8 (11th Cir. May 5, 2005) (holding that a punishment for violating China's emigration policy would amount "more to prosecution for violating Chinese law than persecution on the basis of political opinion"); Atique v. Ashcroft, No. 02-3283, 2003 WL 1961208, at *3 (3d Cir. Apr. 28, 2003) (holding that an alien facing arrest for violation of a Bangladeshi law prohibiting unauthorized departures of military personnel would not "fear persecution rather than mere prosecution"); Morgan-Flores v. INS,

Uniformly recognizing the fundamental separation between persecution and prosecution, courts have adopted the general rule that the legitimate prosecution of an alien cannot be persecution.[95] The primary justification for this rule is that the government of "every sovereign nation has a legitimate interest in investigating criminal activity"[96] and has the right to prosecute individuals accused of criminal behavior.[97] Therefore, aliens merely seeking to avoid prosecution for common law crimes or for activities that would be illegal under U.S. laws are ineligible for asylum or withholding of removal.[98] To illustrate, an alien who commits armed robbery cannot claim that the government has persecuted him for his political views when authorities investigate or prosecute him for the robbery, because his government "has a

---

No. 02-70638, 2003 WL 1793335, at *1 (9th Cir. Mar. 31, 2003) ( holding that the prosecution of a Peruvian "constitute[d] legitimate prosecution and would not qualify as a form of persecution"); Qudus v. INS, No. 297-2815, 1998 WL 60399, at *1 (7th Cir. Feb. 10, 1998) (holding that an alien's fear of prosecution in Nigeria for selling social security cards "does not suggest a well-founded fear of persecution"); Nazaraghaie v. INS, 102 F.3d 460, 463 (10th Cir. 1996) (holding that the violation of Iranian exit restrictions would "constitute prosecution, not persecution"); Pinon-Maceo v. INS, No. 95-1925, 1996 WL 293158, at *1 (1st Cir. June 4, 1996) (holding that an alien who departed from Cuba illegally feared "possible prosecution, not persecution"); Balguiti v. INS, 5 F.3d 1135, 1136 (8th Cir. 1993) (holding prosecution for violation of Moroccan laws did not constitute persecution); Qasim v. INS, No. 90-2027, 1990 WL 209843, at *4 (4th Cir. Dec. 26, 1990) (holding that fear of prosecution under Bangladesh's currency exchange laws did not amount to fear of persecution).

95. *See* Carol A. Buckler, *Outline of Asylum Law and Procedure*, *in* 30TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 193, 203 (PLI Corporate Law and Practice, Course Handbook Series No. 1021, 1997) (noting the "general presumption that prosecution for a crime is not persecution").

96. Lakaj v. Gonzales, No. 04-3998, 2005 WL 3113512, at *4 (6th Cir. Nov. 18, 2005); *see also* Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996) ("[S]overeign nations have a recognized right to investigate suspected enemies of the government. Such investigation does not constitute persecution . . . ." (citation omitted) (citing Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1297, 1299 (11th Cir. 1990))).

97. *See* Funes-Torres v. INS, No. 99-70283, 2000 WL 519121, at *2 (9th Cir. Apr. 27, 2000) (holding that a government "has the right to prosecute individuals accused of criminal activity and that such prosecution is readily distinguishable from persecution" (quoting Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988))); Cynthia A. Isaacs, *The Torch Dims: The Ambiguity of Asylum and the "Well-Founded Fear of Persecution" Standard in* Sadeghi v. INS, 20 N.C. J. INT'L L. & COM. REG. 721, 730 (1995) ("It is a well-settled tenet of international law that the enforcement of the internal laws of a nation remains a sovereign right of that nation's government."); Yoo, *supra* note 53, at 404.

98. *See* Guchshenkov v. Ashcroft, 366 F.3d 554, 559 (7th Cir. 2004); Funes-Torres, 2000 WL 519121, at *2; Soric v. INS, 346 F.2d 360, 361 (7th Cir. 1965); *In re* Janus & Janek, 12 I. & N. Dec. 866, 876 (1968); John D. Griffin, Comment, *The Chinese Student Protection Act and "Enhanced Consideration" for PRC Nationals: Legitimizing Foreign Policy While Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1134 (1995).

legitimate bone to pick with him, regardless of any political views he may hold."[99]

Although courts recognize that mere "criminal prosecution does not in itself constitute persecution,"[100] they generally add the requirement that the law in question be legitimate.[101] Courts typically define this legitimacy in one of two ways. First, some courts have required that the law in question be generally applicable to all citizens, an approach the Second Circuit adopted, stating that "[p]unishment for violation of a generally applicable criminal law is not persecution."[102] Similarly, the Seventh Circuit relied on this concept of general applicability,[103] as did the Ninth Circuit in holding that merely being prosecuted under a law "applicable to all people in the country" is not persecution.[104] Instead of requiring general applicability, a second approach is to define the legitimacy element as requiring that the home nation fairly administer the law in question. For instance, the Eighth Circuit held that "[c]riminal prosecution for violation of a fairly administered law does not constitute persecution,"[105] and, accordingly, such legitimate prosecution cannot constitute grounds for asylum.[106] Further, the Third Circuit held that "fear of prosecution for violations of 'fairly administered' laws does not itself" make one eligible for asylum or withholding of removal.[107] Irrespective of the choice of terminology, however, a court will only determine that state prosecution is not persecution if the underlying law is legitimate.

---

99. Perkovic v. INS, 33 F.3d 615, 622 (6th Cir. 1994).

100. Gassama v. INS, No. 96-2004, 1997 WL 161692, at *1 (4th Cir. Apr. 8, 1997); *see also* Qasim v. INS, No. 90-2027, 1990 WL 209843, at *4 (4th Cir. Dec. 26, 1990) ("Fear of prosecution for a criminal offense generally cannot support allegations of fear of persecution.").

101. *See* Sequeira-Arauz v. INS, No. 95-70754, 1997 WL 51756, at *3 (9th Cir. Feb. 3, 1997) ("It is undisputed that legitimate government prosecution of criminal activity is not ordinarily persecution . . . .").

102. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992); *see also* Office of the U.N. High Comm'r for Refugees [UNHCR], *Guidelines on International Protection No. 6: Religion-Based Refugee Claims Under Article 1(A)(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, ¶ 26, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004) [hereinafter *Guidelines*], *available at* http://www.unhcr.org/publ/PUBL/40d8427a4.pdf ("Prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution . . . .").

103. Qudus v. INS, No. 297-2815, 1998 WL 60399, at *3 (7th Cir. Feb. 10, 1998) ("Prosecution for violation of laws of general applicability does not amount to persecution . . . .").

104. Chand v. INS, No. 92-70538,1994 WL 118026, at *1 (9th Cir. Apr. 5, 1994).

105. Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004).

106. El Balguiti v. INS, 5 F.3d 1135, 1136 (8th Cir. 1993).

107. Chang v. INS, 119 F.3d 1055, 1060 (3d Cir. 1997) (citing Janusiak v. INS, 947 F.2d 46, 48 (3d Cir. 1991)); *see also* Shi Fei v. Attorney Gen. of the U.S., No. 04-3407, 2005 WL 1140732, at *2 (3d Cir. May 16, 2005).

Thus, the foundational principle in this area of law is that a country's prosecution of its citizens for violating the law cannot, by itself, constitute persecution where the underlying law is legitimate. Considering several clear instances where courts have applied this principle to deny asylum or withholding applicant refuge can be instructive. According to the Ninth Circuit, the following conduct constitutes legitimate state investigation or prosecution, and therefore is not grounds for asylum or withholding of removal: painting slogans on the walls of a Chinese building,[108] illegal departure from China,[109] assaulting Chinese co-workers during a workplace demonstration,[110] deserting the military of El Salvador,[111] vehicular homicide in Fiji,[112] a French faith healer's alleged swindling,[113] an Iranian's selling goods without a permit,[114] an Iranian's distribution of western films and videos,[115] violating the Iranian dress code,[116] violating an Israeli curfew and traveling without proper identification,[117] illegally selling foreign currency on the Nicaraguan black market,[118] operating a business without a license and illegally possessing U.S. currency in Nicaragua,[119] defacing Nicaragua's government property,[120] embezzling funds from one's Nigerian employer,[121] violating Romanian travel restrictions,[122] possessing stolen weapons in Romania,[123] and committing fraud in Vietnam.[124]

These illustrations highlight the notion that Congress did not intend for either asylum or withholding of removal to protect ordinary suspects or criminals from prosecution in their home countries, and this remains true

108. Zongbiao Wei v. Ashcroft, No. 03-70882, 2004 WL 1931319, at *1 (9th Cir. Aug. 20, 2004).
109. Jin Ying Li v. INS, 92 F.3d 985, 988 (9th Cir. 1996).
110. Hong Sheng Xue v. Gonzales, No. 04-70070, 2005 WL 319118, at *1 (9th Cir. Feb. 10, 2005).
111. Rodriguez v. INS, No. 96-70504, 1997 WL 572164, at *1 (9th Cir. Sept. 12, 1997).
112. Lal v. Ashcroft, No. 02-74273, 2004 WL 1380103, at *1 (9th Cir. June 21, 2004).
113. Sauvage v. INS, No. 97-71189, 1999 WL 966479, at *2 (9th Cir. Oct. 21, 1999).
114. Moghadam-Falahi v. INS, No. 92-70490, 1993 WL 430075, at *1 (9th Cir. Oct. 22, 1993).
115. Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992).
116. Abbassi v. INS, No. 98-70375, 1999 WL 730365, at *1 (9th Cir. Sept. 16, 1999).
117. Alshiabat v. INS, No. 96-70590, 1997 WL 603878, at *2 (9th Cir. Sept. 30, 1997).
118. *In re* H-M, 20 I. & N. Dec. 683, 690-91 (B.I.A. 1993).
119. Ramirez-Altamirano v. INS, No. 95-70436, 1996 WL 442387, at *1 (9th Cir. Aug. 5, 1996).
120. Artola-Medal v. INS, No. 95-70006, 1996 WL 290057, at *1 (9th Cir. May 31, 1996).
121. Azanor v. INS, No. 98-70234, 1999 WL 173635, at *1 (9th Cir. Mar. 25, 1999).
122. Oancea v. INS, No. 94-70602, 1996 WL 183739, at *1 (9th Cir. Apr. 16, 1996).
123. Balla v. Ashcroft, No. 00-70852, 2002 WL 464702, at *3 (9th Cir. Mar. 25, 2002).
124. Bui v. Ashcroft, No. 03-70748, 2004 WL 2726104, at *1 (9th Cir. Dec. 1, 2004).

regardless of whether the alien faces harsher penalties if deported back to his homeland than he would if allowed to remain in the United States.[125] Thus, the Ninth Circuit denied asylum to an Iranian woman facing prosecution for violating Iran's generally applicable dress and conduct standards even though the punishment she feared "may seem harsh by Western standards,"[126] and the identical rationale led the Second Circuit to deny the religious persecution claim of a Yemeni citizen convicted of first degree manslaughter in an American court, who, while incarcerated in an American prison, was sentenced to death for the same offense by a *sharia*[127] court in Yemen.[128] The Second Circuit admitted that "the Yemeni dispensation is foreign to American laws and mores," but found that nothing in asylum law required the substitution of "domestic standards for those enforced under Yemeni law nondiscriminatorily in accordance with the Moslem religion."[129]

Courts disregard these differing societal norms more frequently in the investigatory phase of a prosecution, rather than in the sentencing phase. For instance, the Third Circuit refused to say that the government of Bangladesh persecuted one of its citizens suspected of illegally possessing weapons and explosives, when the government detained him at a police station for three days, severely beat him with canes and kicks to the face, and coerced him into signing a false confession, even though "[s]uch treatment is, to say the least, extremely troubling."[130] Other courts have held that prosecution for ordinary criminal behavior does not in itself constitute persecution[131] no matter how

125. *See* Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003) (citing Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992)); Yang Cheng Huan v. Carroll, 852 F. Supp. 460, 468 (E.D. Va. 1994); *In re* Liadakis, 10 I. & N. Dec. 252, 255 (B.I.A. 1963) (stating that "repugnance of a governmental policy to our own concepts of religious freedom cannot in itself justify our labeling actions taken under that policy as 'physical persecution'").

126. Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996).

127. For an introductory overview of this term, which is essentially Islamic law, see COUNCIL ON FOREIGN RELATIONS, ISLAM: GOVERNING UNDER *SHARIA* (2005), http://www.cfr.org/publication.html?id=8034.

128. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 236 (2d Cir. 1992).

129. *Id.* at 239.

130. Shardar v. Ashcroft, 382 F.3d 318, 320, 324 (3d Cir. 2004).

131. Although beyond the purview of this discussion, one should note that immigration law does not deny an alien all recourse in the event a court determines he or she is ineligible for asylum or withholding of removal. An alien who has suffered torture at the hands of her government may prevent deportation under the Convention Against Torture (CAT), which requires the alien to establish "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." Chhokar v. Gonzalez, No. 03-71599, 2005 WL 2108653, at *2 (9th Cir. Sept. 1, 2005) (quoting 8 C.F.R. § 1208.16(c)(2) (2005)); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 ("No State Party shall

"deplorable" the police conduct,[132] regardless of whether the conduct was "unacceptable by United States standards,"[133] and notwithstanding the severity of punishment facing a deported alien.[134] In order for law enforcement activities to constitute persecution and thus warrant asylum or withholding of removal, an alien must show something more than a harsher punishment.

*B. The Exception - When Prosecution Becomes Persecution*

Clearly, prosecution does not automatically amount to persecution, but in certain instances prosecution will rise to the level of actual persecution. As noted above, courts often qualify the general rule that a state's enforcement of its laws does not equate with persecution with phrases such as, "criminal prosecution does not, *without more*, establish persecution."[135] In other words, courts recognize that prosecution may indeed "equate with" or "include" persecution under certain circumstances,[136] and that "[t]he two terms are not mutually exclusive."[137] Therefore, the essential task is to determine the precise circumstances transforming prosecution into persecution. In general, prosecution becomes persecution where the state action at issue amounts to a mere pretext for actual persecution, and where prosecution proceeds from a mixture of legitimate and non-legitimate governmental motives.

---

expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."). The CAT is a seldom-awarded strategy of last resort for aliens if asylum and withholding fail, for under the Convention, an alien cannot prevail even if she demonstrates a fifty-percent chance that she will face torture from her government. "[M]ore likely than not" means that the chance of torture must be at least fifty percent. For an extensive examination of the Convention Against Torture, see Miller, *supra* note 27.

132. Ahmed v. INS, No. 98-71106, 2000 WL 297343, at *1 (9th Cir. Mar. 21, 2000) (describing "a single instance of mistreatment by [Bangladeshi] police when [Ahmed] was charged with criminal acts and did not admit to them").

133. Artola-Medal v. INS, No. 95-70006, 1996 WL 290057, at *1 (9th Cir. May 31, 1996) (describing the Chinese government's interrogation and beating of a citizen for defacing government property).

134. *See Saleh*, 962 F.2d 234.

135. Sauvage v. INS, No. 97-71189, 1999 WL 966479, at *2 (9th Cir. Oct. 21, 1999) (emphasis added).

136. Adam v. Gonzales, No. 04-60080, 2005 WL 3178205, at *3 (5th Cir. Nov. 29, 2005) (citing Li Wu Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001)); Berte v. Ashcroft, 396 F.3d 993, 996 (8th Cir. 2005); De Leon v. INS, No. 02-4148, 2004 WL 1088243, at *1 (6th Cir. May 12, 2004) ("Types of actions that might cross the line from harassment to persecution include: detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture." (quoting Begzatowski v. INS, 278 F.3d 665, 669 (7th Cir. 2002))); Toptchev v. INS, 295 F.3d 714, 720 (7th Cir. 2002) (quoting Mitev v. INS, 67 F.3d 1325, 1330 (7th Cir. 1995)).

137. Tuhin v. Ashcroft, No. 02-2661, 2003 WL 1342995, at *4 (7th Cir. Mar. 18, 2003).

*1. Pretextual Prosecution*

The primary exception to the rule distinguishing prosecution from persecution arises where prosecutorial conduct cloaks a government's intent to persecute with the veneer of legitimacy, or where an alien fears punishment "that is not legitimate, but instead masks an invidious motive" to persecute the alien on account of her race, religion, nationality, political opinion, or membership in a particular social group.[138] Thus, it is error for an immigration court to consider only the facial legitimacy of the government's charges against the asylum applicant.[139] Instead, appellate panels uniformly require the lower courts to rule that persecution has occurred when an improper governmental motivation drives an otherwise facially legitimate prosecution or punishment, which in reality stems from "one of the enumerated factors" or "a nefarious purpose,"[140] or where state action is "merely a pretext to persecute"[141] or is animated by "some improper government motive for pursuing the matter."[142]

Understandably, those fleeing persecution in their native lands are rarely in a good position to gather physical evidence detailing the alleged persecutor's motivations. Recognizing this dilemma, the U.S. Supreme Court held in *INS v. Elias-Zacarias* that direct evidence of the persecutor's motives is not necessary.[143] Instead, an alien must merely show "*some* evidence of it, direct or circumstantial."[144] This issue arises most frequently in political persecution claims, and importantly, the Court has held that the existence of a generalized "political" motive underlying the persecutor's actions is insufficient.[145] Rather, the persecutor must be motivated by a desire to

138. El Balguiti v. INS, 5 F.3d 1135, 1136 (8th Cir. 1993).

139. *Tuhin*, 2003 WL 1342995, at *4.

140. Shardar v. Ashcroft, 382 F.3d 318, 323 (3d Cir. 2004) (quoting *Li Wu Lin*, 238 F.3d at 244); Qudus v. INS, No. 297-2815, 1998 WL 60399, at *3 (7th Cir. Feb. 10, 1998) (internal quotation marks omitted) (quoting Sharif v. INS, 87 F.3d 932, 935 (7th Cir. 1996)).

141. Rodriguez-Roman v. INS, 98 F.3d 416, 426 n.16 (9th Cir. 1996) (internal quotation marks omitted) (quoting Abedini v. INS, 971 F.2d 188, 191-92 (9th Cir. 1992)) (holding that a potentially severe punishment for a Cuban who illegally departed Cuba was merely a pretext for persecution based on political opinion); *see also* Lakaj v. Gonzales, No. 04-3998, 2005 WL 3113512, at *4 (6th Cir. Nov. 18, 2005) (rejecting an Albanian's claim that government investigation was "a pretext for persecution based on political belief or affiliation").

142. Hamoui v. INS, No. 98-70679, 2000 WL 390660, at *1 (9th Cir. Apr. 14, 2000) (quoting Mabugat v. INS, 937 F.2d 426, 429 (9th Cir. 1991)); *see also* Behzadpour v. United States, 946 F.2d 1351, 1353 (8th Cir. 1991); Ramirez Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990).

143. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

144. *Id.*

145. *Id.* at 482.

overcome a political belief held by the victim.[146] Asylum applicants frequently fail to meet this requirement when they cannot show sufficient proof that their home government knew of their political or religious beliefs. For instance, the Iranian government arrested, interrogated, and detained Saideh Fisher for several hours when she illegally observed a male in a bathing suit.[147] Later, officials stopped and admonished her because she had inadvertently allowed a few pieces of hair to hang out of her chador, or veil.[148] The Ninth Circuit rejected Fisher's claim that the government persecuted her for her political and religious beliefs, for although she strongly disapproved of the Khomeini regime's treatment of Iranian women, neither incident "indicates that government officials knew of her political or religious beliefs or punished her on account of them."[149]

The same barrier confronted Francisco Elias Gomez-Mejia, a Nicaraguan soldier. After accusing him of failing to properly perform his duties, Gomez-Mejia's military superiors incarcerated him, almost naked, for several days in an unheated cell during cold weather and forced him to sleep on the cell's pavement.[150] After deserting the army, Gomez-Mejia sought asylum in the United States, claiming that his superiors had persecuted him for his political beliefs which questioned the Sandinista government.[151] The Fifth Circuit rejected this argument because "Gomez-Mejia's political opinion was never revealed to the Sandinistas."[152] Thus, in order to claim that government investigation or prosecution is merely a pretext for persecution on account of an alien's religious or political beliefs, that asylum or withholding applicant must present some quantum of evidence that the offending government knew of those opinions.

Even where an alien has shown the pretextual nature of the government's prosecutorial activities, finding an improper motive is only the first step in a two-step inquiry. As Part II revealed, courts require that an asylum applicant show he endured severe harm or suffering, for persecution is "an extreme concept that does not include every sort of treatment our society regards as

146. *Id.*

147. Fisher v. INS, 79 F.3d 955, 959 (9th Cir. 1996).

148. *Id.*

149. *Id.* at 960, 962.

150. Gomez-Mejia v. INS, 56 F.3d 700, 701 (5th Cir. 1995).

151. *Id.*

152. *Id.* at 702. While in the Nicaraguan army, the alien "never revealed his private opinions concerning the Sandinista government and he said further, that since he arrived in the United States he's not engaged in any political activity and hasn't spoke out against the Sandinistas here," and was unable to show that the Sandinistas had any knowledge of his political opinion. *Id.* at 702-03.

offensive."[153] Thus, if one of the five enumerated factors motivates a criminal prosecution and if the punishment under the law is sufficiently serious to amount to persecution, then prosecution under a criminal law of general applicability can justify granting asylum or withholding of removal.[154] This combination of an improper governmental motive and severe mistreatment of the alien constitutes the most frequently applied exception to the general rule that prosecution is distinct from persecution.[155]

Demonstrating the severity of an alien's treatment is crucially important in prevailing under this exception, because no matter how invidious the government's motivation, a court will consider the state's behavior merely harassment, and not persecution, unless the conduct in question is truly extreme. Courts variously describe the requisite severity of the government's behavior as "excessive or arbitrary,"[156] "especially unconscionable,"[157] "sufficiently severe,"[158] or "disproportionately severe."[159] The Ninth Circuit has found improperly motivated prosecution to be sufficiently unconscionable to warrant asylum or withholding of removal in a variety of circumstances. Persecution existed, for example, where Indian police shot an alien in the leg and beat him so severely that he could not walk for two weeks,[160] and in another similar episode, persecution was found when Indian police brutally tortured an alien, forcibly stretching his legs to a 180 degree position in order to tear his leg and groin muscles, all the while taunting the alien's political beliefs.[161] Likewise, a court granted a Senegalese citizen asylum after two

153. Krotova v. Gonzales, 416 F.3d 1080, 1084 (9th Cir. 2005) (internal quotation marks omitted) (quoting Korablina v. INS, 158 F.3d 1038, 1044 (9th Cir. 1998)); *see also* Ladha v. INS, 215 F.3d 889, 897 (9th Cir. 2000); Abdel-Masieh v. INS, 73 F.3d 579, 583 (5th Cir. 1996); *supra* Part II.B.

154. Shardar v. Ashcroft, 382 F.3d 318, 323 (3d Cir. 2004) (citing Chang v. INS, 119 F.3d 1055, 1061 (3d Cir. 1997)).

155. *See* Adam v. Gonzales, No. 04-60080, 2005 WL 3178205, at *3 (5th Cir. Nov. 29, 2005) (citing *Abdel-Masieh*, 73 F.3d at 584); *Shardar*, 382 F.3d at 323 (citing *Chang*, 119 F.3d at 1061); Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004); Tuhin v. Ashcroft, No. 02-2661, 2003 WL 1342995, at *4 (7th Cir. Mar. 18, 2003); Rodriguez-Roman v. INS, 98 F.3d 416, 426, 430-31 (9th Cir. 1996); Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992); Qasim v. INS, No. 90-2027, 1990 WL 209843, at *4 (4th Cir. Dec. 26, 1990).

156. *Adam*, 2005 WL 3178205, at *3 (citing *Abdel-Masieh*, 73 F.3d at 584); Ramirez Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990).

157. *Rodriguez-Roman*, 98 F.3d at 426 n.16, 430-31 n.27 (citing Abedini v. INS, 971 F.2d 188, 191-92 (9th Cir. 1992)).

158. *Tuhin*, 2003 WL 1342995, at *4.

159. *Abedini*, 971 F.2d at 191; *see also* Balla v. Ashcroft, No. 00-70852, 2002 WL 464702, at *2 (9th Cir. Mar. 25, 2002) (quoting Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996)).

160. Singh v. Ilchert, 801 F. Supp. 313, 320 (N.D. Cal. 1992).

161. Chhokar v. Gonzales, No. 03-71599, 2005 WL 2108653, at *1 (9th Cir. Sept. 1, 2005).

arrests and detentions under extremely poor conditions, where officials accused him of supporting secessionists and threatened him with death.[162] This type of brutality during criminal investigations occurs frequently in asylum law, but aliens may also demonstrate their persecution by showing that they have been or will be improperly convicted or sentenced. For instance, a Fijian demonstrated persecution through a potential arrest, court-martial, and trial for treason,[163] as did a Filipino, upon showing illegitimate criminal charges involving misappropriation of funds.[164]

Therefore, the first exception to the rule separating prosecution from persecution requires an improper governmental motivation stemming from a protected ground and egregious prosecutorial conduct resulting from that improper purpose. To illustrate the pretextual motive exception, the discussion will now turn toward Iran and China.

*a) Bandari v. INS*

Andaranik Bandari was a Christian who met a Muslim girl named Afsaneh while attending high school in his native country of Iran.[165] They lived across the street from each other in Tehran, but for the first year of their acquaintance, they "just stared at each other."[166] Eventually they began to meet secretly, for although Bandari knew that interfaith dating was illegal, he stated that "I loved her very much and I wanted to get acquainted with her."[167] Bandari and Afsaneh continued their clandestine relationship, but one evening, as the two embraced in the street, three uniformed police officers approached the couple and handcuffed Bandari, informing him that he had violated a law banning public displays of affection.[168] When the officers discovered that Bandari was a Christian and Afsaneh was a Muslim, they called Bandari a "dirty Armenian" with "no right to go out with a Persian girl" and struck him so hard that he collapsed to the ground.[169] When he tried to protect his face, the officers continued beating and kicking him all over his body.[170] After the police took Bandari to the station, they whipped him with a rubber hose before throwing him into solitary confinement.[171] For the next

162. Ndom v. Ashcroft, 384 F.3d 743, 749 (9th Cir. 2004).
163. Tagaga v. INS, 228 F.3d 1030, 1032 (9th Cir. 2000).
164. Mabugat v. INS, 937 F.2d 426, 429 (9th Cir. 1991).
165. Bandari v. INS, 227 F.3d 1160, 1163 (9th Cir. 2000). For additional discussion of the *Bandari* case, see Musalo, *supra* note 28, at 215.
166. *Bandari*, 227 F.3d at 1163.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

four days the police demanded that Bandari confess to raping Afsaneh.[172] He refused to confess, and each refusal was accompanied with further torture that was so intense he lost consciousness on several occasions.[173] After five days of this treatment, a judge informed Bandari that he had violated the Ayatollah's edict prohibiting interfaith dating and marriage, and that he must convert to Islam or face punishment.[174] Bandari refused to convert, and, according to Bandari, the judge informed him that his punishment would be "making me stand underneath a wall and being thrown rocks on me until death."[175] The judge actually imposed a lesser sentence in light of the Bandari's youth — seventy-five lashes and a year in prison.[176]

Before the sentence was carried out, Bandari's grandfather bribed a government official to release his grandson, and Bandari spent the next three weeks in bed recovering from his wounds.[177] Shortly after his recovery, Bandari went for a walk where two police officers recognized him and began to beat him, while yelling "[y]ou raper [sic] of Moslem girl. You bastard Armenian. Leave and go and live in your Christian country."[178] Fearing for his life, Bandari fled Iran on foot and made his way to Turkey, where his grandfather informed him that the state had officially charged him with raping Afsaneh and that he must stay out of Iran.[179] He arrived in the United States on August 29, 1994, on a one-year tourist visa,[180] and in April of 1996, Bandari applied for asylum, telling the immigration judge at the hearing, "[I]f I go back, they'll kill me."[181]

The immigration judge denied Bandari's asylum claim because his was "a case of prosecution and not persecution," for "any man, whether Christian or Muslim who was caught openly kissing a woman in Tehran would have been subjected to the same type of treatment as the respondent."[182] The Board of Immigration Appeals affirmed the ruling and held that the evidence showed that the Iranian government had merely prosecuted Bandari for violating a neutral law prohibiting embracing in public, and had not persecuted him on account of a protected ground.[183]

---

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1163-64.
177. *Id.* at 1164.
178. *Id.* (alteration in original).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1165.
183. *Id.*

The Ninth Circuit rejected this reasoning in *Bandari v. INS*.[184] The court first acknowledged the general rule that legitimate criminal prosecution is distinct from persecution,[185] but then held that Bandari had clearly suffered persecution at the hands of the Iranian government.[186] Although the police's initial stop was perhaps legitimate law enforcement, the subsequent beatings, torture, detention and sentencing of Bandari was not legitimate prosecution for violating a neutral law against embracing in public. Instead, such acts constituted religious persecution for violating an edict prohibiting members of different religions from commingling.[187] Thus, *Bandari* exemplifies the pretextual motive exception because the Ninth Circuit granted asylum and withholding of removal,[188] after finding that (1) Iran had an improper motivation for prosecuting Bandari and (2) the government's treatment of Bandari was truly egregious.[189]

*b) Guo v. Ashcroft*

Fundamentalist countries such as Iran offer clear instances of state-sponsored religious *persecution*, but secular governments are equally capable of persecuting the faithful, as demonstrated in *Guo v. Ashcroft*.[190] Jian Gou became a Christian in 1998 and was baptized the following year by his Chinese pastor, Wang Kefei.[191] Several months after Gou's baptism, Chinese police interrupted a religious gathering at Pastor Kefei's home and arrested Gou and other members of the congregation for participating in an illegal religious gathering.[192] Police took Gou to the station, where they detained him for one and a half days while pressuring him to confess to committing a crime.[193] When he refused, telling his interrogators that "it is my freedom to

184. *Id.* at 1160.
185. *Id.* at 1168.
186. *Id.*
187. *Id.*
188. *Id.* at 1169.
189. *Id.*
190. 361 F.3d 1194 (9th Cir. 2004).
191. *Id.* at 1197.
192. *Id.*
193. *Id.* Article 36 of the Chinese Constitution now grants citizens the right of religious freedom: "Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion." XIAN FA [Constitution] art. 36 (1982) (P.R.C.), *translated in* THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (Pergamon Press 1983); *see also* Christopher Chaney, Comment, *The Despotic State Department in Refugee Law: Creating Legal Fictions to Support Falun Gong Asylum Claims*, 6 ASIAN-PAC. L. & POL'Y J. 130, 150 (2005). In reality, however, religious practice is restricted to places of worship sanctioned and registered by the government,

believe in Christianity," the officers struck Gou twice in the face and ordered him to perform pushups until he could no longer stand it.[194] While Gou did this, the officers kicked him in the stomach and told him that this abuse would continue unless he signed an affidavit promising not "to believe in such a[n] evil religion."[195] Gou signed the paper to stop the abuse.[196] A few days later, the police approached Gou and several other congregants who had gathered at the tomb of a fellow church member.[197] When an officer attempted to remove a cross from the tomb, Gou pushed him to prevent the cross's removal.[198] The officer quickly subdued Gou with an electric baton and held him while the police kicked his legs, causing him to fall to the ground.[199] Once at the police station, the officer Gou had pushed struck him repeatedly in the face, and during his fifteen-day detention, the police tied Gou to a chair and beat him with a plastic pole.[200] Upon his release, Gou discovered that his employers had fired him "[b]ecause they say I commit a crime," and he was unable to find other employment.[201] He fled to the United States, where he

---

which controls every aspect of religious activity in order to curtail the growth of religious practice and to ensure religion's harmony with the Communist Party. U.S. DEP'T OF STATE, 108TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2004, at 153 (J. Comm. Print 2004), *available at* http://www.internationalrelations.house.gov/archives/109/20429.pdf; Darin W. Carlson, *Understanding Chinese-U.S. Conflict over Freedom of Religion: The Wolf-Specter Freedom from Religious Persecution Acts of 1997 and 1998*, 1998 BYU L. REV. 563, 568; Ellen S. Reinstein, *Turn the Other Cheek, or Demand an Eye for an Eye? Religious Persecution in China and an Effective Western Response*, 20 CONN. J. INT'L L. 1, 15 (2004). The United States Commission on International Religious Freedom relates the government's suffocating control over official churches and the draconian consequences for anyone refusing to practice their faith in these state churches:

> The Chinese government continues to engage in systematic and egregious violations of religious freedom. . . . Chinese government officials control, monitor, and restrain the activities of all religious communities — including Uighur Muslims, Tibetan Buddhists, various spiritual movements such as the Falun Gong, "underground" Catholics, and "house church" Protestants — maintaining final authority over leadership decisions and doctrinal positions. Prominent religious leaders and laypersons alike continue to be confined, tortured, imprisoned and subjected to other forms of ill treatment on account of their religion or belief.

2005 ANNUAL REPORT, *supra* note 31, at 55.

194. *Guo*, 361 F.3d at 1197.
195. *Id.* (alteration in original).
196. *Id.* at 1198.
197. *Id.*
198. *Id.* at 1198-99.
199. *Id.*
200. *Id.* at 1198.
201. *Id.* (alteration in original).

learned that Chinese officials had arrested Pastor Kefei and were aware of his flight.[202]

Gou applied for asylum and withholding of removal to escape further mistreatment from the Chinese government,[203] but the immigration judge denied his request because his first arrest was merely harassment that did not rise to the level of persecution, and his second arrest was legitimate prosecution resulting solely from Gou's altercation with a Chinese police officer.[204] The Board of Immigration of Appeals affirmed this ruling.[205]

The Ninth Circuit reversed, finding instead that Gou's first arrest constituted persecution because the state's mistreatment of him was greater than mere harassment and was inflicted on account of Gou's religious beliefs.[206] Similarly, Gou's second arrest and beatings comprised religious persecution and not a legitimate prosecution for hitting a police officer.[207] The court criticized the immigration judge for superficially focusing on the criminality of Gou's assault on the officer, noting precedent that "resistance to discriminatory government action that results in persecution is persecution on account of a protected ground."[208] Mirroring the analysis in *Bandari*, the *Gou* court held that Gou adequately demonstrated past persecution because (1) the Chinese government's beating and detaining him for fifteen days "rises to the level of persecution" and (2) because one of the five protected grounds for establishing refugee status clearly motivated the treatment.[209] In short, the Chinese government had not prosecuted Gou under a generally applicable law against striking police officers, but had persecuted Gou for his religious beliefs. This finding of past persecution created a presumption that Gou had a well-founded fear of future religious persecution if deported to China, which then shifted the burden to the INS to show by a preponderance of the evidence that conditions in China had improved sufficiently to make Gou's fear unreasonable.[210] The court remanded the case for this inquiry.[211]

---

202. *Id.*
203. *Id.*
204. *Id.* at 1202.
205. *Id.* at 1197. The BIA affirmed the immigration judge's decision based on the latter's finding that Mr. Gou was not a credible witness. *Id.* at 1199. The Ninth Circuit rejected this finding of adverse credibility and analyzed the immigration judge's alternative finding that, even assuming Gou was credible, his treatment consisted merely of initial harassment followed by legitimate criminal prosecution. *Id.* at 1202.
206. *Id.* at 1203.
207. *Id.*
208. *Id.* (quoting Chand v. INS, 222 F.3d 1066, 1077 (2000).
209. *Id.*
210. *Id.* at 1204.
211. *Id.*

*c) Lin v. INS*

Immigration judges and federal appeals courts frequently hear asylum claims alleging prosecutions stemming from improper political motivations in addition to the religious motives seen in *Bandari* and *Gou*. One such example is *Li Wu Lin v. INS*.[212] Li Wu Lin was a fifteen-year-old middle school student who joined the student demonstrations leading up to the Tiananmen Square massacre.[213] From May 18 through June 2, 1989, Lin participated in four marches to protest the Chinese government's corruption, antidemocratic rule, and disregard for human rights.[214] Lin was a leader in these protests and often marched at the front of the demonstrations, holding signs calling for greater freedom in China.[215] During one of these marches, the protestors attempted to push through a police barricade in order to occupy a government building, but the police and soldiers used electric batons to beat the protestors away from the building.[216] On June 4, 1989, Chinese soldiers used automatic weapons and tanks to kill hundreds of demonstrators in Beijing, abruptly terminating the student protest movement.[217] Six days after what became known as the Tiananmen Square massacre, two police officers and their superior arrived at Lin's home and presented his mother with a subpoena demanding that Lin immediately appear for interrogation before the Public Security Bureau.[218] The police told Lin's mother that they would arrest and strictly punish her son if they apprehended him, so she refused their demands to disclose his whereabouts.[219] When Lin learned the authorities were looking for him, he fled to his aunt's house and spent the next two-and-a-half years in hiding while he waited for his family to earn enough money to smuggle him out of the country.[220] While Lin was in hiding, Chinese officials visited his home on five separate occasions and once detained and threatened his mother for refusing to disclose Lin's location.[221] Also during this time, police arrested, beat, and sentenced several of Lin's classmates to over one year of detention and forced labor for their part in protesting the government.[222]

212. 238 F.3d 239 (3d Cir. 2001).
213. *Id.* at 241.
214. *Id.* at 241-42.
215. *Id.*
216. *Id.* at 241.
217. *Id.* at 242.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 242-43.

Eventually smuggled out of China, Lin traveled through Singapore and Czechoslovakia before arriving in the United States in October of 1992.[223] In spite of his compelling story, the immigration judge and the Board of Immigration Appeals denied his request for asylum and withholding of removal.[224] Their logic was simple: because Lin admitted that he attempted to occupy a government building during one of the pro-democracy demonstrations, China's efforts to apprehend and punish Lin "merely showed that the Chinese government was interested in enforcing a neutral law of general applicability" that prohibited trespass on government property.[225]

On appeal, the Third Circuit began its analysis by recalling that prosecution under a law of general applicability amounts to persecution where an enumerated factor motivates the prosecution and where the punishment is sufficiently serious.[226] Applying this pretextual motive exception, the court adamantly rejected the notion that Lin's treatment was a legitimate prosecution for trespass, especially in light of his subpoena following a mere six days after the Tiananmen Square massacre. The court stated:

> It is difficult to believe that in the wake of political repression on that scale that the government was acting as a disinterested enforcer of neutral laws . . . . We do not understand why the government would send two police officers and a brigade leader if it did not believe more was at stake than a fifteen-year old's trespass. Nor does it make sense that if simple trespass was at issue, the police would return five more times over the course of the next year and a half. That is a long time to pursue a middle-school student's trespass. . . . Nor is it very plausible that the government would subject Lin's classmates to the punishment they received if trespassing was foremost on the government's mind.[227]

The court believed that the police targeted Lin for expressing his political beliefs, and not simply for violating a neutral law against trespassing.[228] Having found that an improper purpose of overcoming a protected characteristic motivated the Chinese government, the court next considered whether Lin's treatment was severe enough to constitute persecution. The court rejected the argument advanced by the INS that a year and a half of incarceration and forced labor for a fifteen-year-old was not sufficiently

223. *Id.* at 243.
224. *Id.*
225. *Id.*
226. *Id.* at 244.
227. *Id.* at 245.
228. *Id.* at 244-45.

severe punishment.[229] Rather, this "very long sentence for simply voicing opposition to the government" rose to the level of persecution.[230] Because China would punish Lin for his political beliefs, the court granted Lin asylum and withholding of removal.[231]

*Bandari*, *Gou*, and *Li Wu Lin* illustrate a general pattern in case of "pretextual" prosecution. First, an immigration judge denies an alien refuge, purportedly applying the general rule that an alien's prosecution under a generally applicable law is not persecution. Then a court of appeals reverses the lower immigration court, viewing the government's prosecution as a mask for invidious persecution where the alien's treatment is sufficiently egregious to merit asylum or withholding. Beyond this pretextual exception to the rule that prosecution is not generally persecution, courts often encounter a related scenario in which a government's prosecution is motivated by both legitimate and invidious motives. This comment now turns to the "mixed-motive" analysis some circuits apply in these circumstances.

*2. The Mixed-Motive Analysis*

The "on account" element in persecution cases is critical to fairly adjudicating asylum and withholding claims,[232] but the Refugee Convention and the documents interpreting that instrument do not provide meaningful guidance to courts on this requirement.[233] This lack of clarity may elicit little concern when prosecutorial actions are blatantly pretextual, such as the *Bandari* arrest for illegally embracing in public. In the majority of asylum applications, however, a foreign government has an arguably legitimate motive to prosecute an alien in addition to the alleged improper motive, for persecutors are rarely, if ever, motivated by a single improper purpose.[234] The 1980 Refugee Act's legislative history reveals that Congress rejected a rigid "on account" test in favor of a more flexible standard that comports with the broader humanitarian values Congress intended the Act to promote.[235] Thus, courts should not unrealistically interpret the "on account" element to require

229. *Id.* at 248.

230. *Id.*

231. *Id.* For the view that the Chinese dissidents similarly situated to Mr. Li did not deserve asylum, see Griffin, *supra* note 98, at 1137.

232. *See* Musalo, *supra* note 28, at 205.

233. *Id.*

234. *See* Ratnam v. INS, 154 F.3d 990, 995 (9th Cir. 1998); Adarkar, *supra* note 53, at 218-20 ("The concept of a discrete unitary motive underlying each human action is a fiction."); Hall, *supra* note 27, at 111.

235. *See* Musalo, *supra* note 29, at 1194-95; Adarkar, *supra* note 53, at 220; Hall, *supra* note 27, at 111.

a single, true motivation underlying a government's action.[236] Rather, courts should hold that an alien is eligible for protection so long as one of the government's motives was improper.[237]

Many circuits adopt this type of "mixed-motive analysis," under which an asylum or withholding applicant need not prove that the treatment she endured resulted solely because of one of the five enumerated grounds.[238] Instead, she need demonstrate only that her treatment resulted, at least in part, from one of the protected characteristics.[239] Similarly, the Ninth Circuit recognized that "persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds," asylum and withholding grants are appropriate.[240] The Second Circuit similarly holds that persecution may arise from both protected and unprotected motives, for the "plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion."[241]

The Third Circuit has offered two clear applications of the mixed-motive analysis. First, a native of India established eligibility for asylum where his prosecution stemmed in part from the police imputing his father's political opinion to him, notwithstanding that the government had a legitimate security interest in accusing him of possessing stolen weapons.[242] Secondly, the leader of a Chinese scientific delegation to the United States feared criminal consequences for failing to report to the Chinese Embassy his suspicions that several members of his delegation were contemplating defecting to the United

236. Adarkar, *supra* note 53, at 219.

237. *See* Adam v. Gonzales, No. 04-60080, 2005 WL 3178205 (5th Cir. Nov. 29, 2005); Li v. Gonzales, 420 F.3d 500 (5th Cir. 2005); Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994).

238. *See* Singh v. Gonzales, 406 F.3d 191, 198 (3d Cir. 2005) (following Amanfi v. Ashcroft, 328 F.3d 719, 727 (3d Cir. 2003)); Girma v. INS, 283 F.3d 664, 667 (5th Cir. 2005); Li v. Gonzales, 420 F.3d 500, 509 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005) (per curiam) ("The federal courts and the BIA have also recognized that an alien may demonstrate that a persecutor's actions were on account of a protected characteristic even if the persecutor had mixed motivations; a persecutor does not have to be motivated solely by the victim's possession of a protected characteristic.").

239. *Singh*, 406 F.3d at 198. For further discussion of the mixed-motive analysis, see Hall, *supra* note 27, at 111-13.

240. Ratnam v. INS, 154 F.3d 990, 995 (9th Cir. 1998) (citing Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995)); *see also* Bandari v. INS, 227 F.3d 1160, 1168-69 (9th Cir. 2000) (citing Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999)); Kaurr v. INS, 151 F.3d 926, No. 97-70678, 1998 WL 416112, at *3 (9th Cir. June 17, 1998).

241. Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (noting also that "the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution").

242. *Singh*, 406 F.3d at 198, 200.

States, where Chinese law required such reporting.[243] The INS argued that the delegation leader did not deserve refuge because China's legitimate concerns of protecting confidential state information would motivate any future prosecution. The appellate court reversed, granting the alien asylum and withholding of removal, because even if China had a legitimate motivation of protecting state secrets, the alien's opposition to official policy would at least partially motivate the prosecution.[244]

Ninth Circuit jurisprudence also illuminates the application of the mixed-motive analysis. In *Ratnam v. INS*, the court rejected the argument that a Sri Lanka native's torture, conducted for intelligence gathering purposes to combat terrorist activity, did not constitute persecution when the alien's imputed political opinions at least partially motivated the government's conduct.[245] Additionally, a court granted asylum and withholding of removal to a Guatemalan who feared punishment for deserting the Guatemalan army, for although "the BIA suggests that Guinac merely fears *prosecution* for his desertion," the alien's superior officers frequently beat and insulted him on

---

243. Chang v. INS, 119 F.3d 1055, 1057-58 (3d Cir. 1997). For further discussion of the *Chang* case, see Davis & Atchue, *supra* note 2, at 111, and Michael A. Baldassare, Recent Development, Fengchu Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997)*, 28 SETON HALL L. REV. 699 (1997).

244. *Chang*, 119 F.3d at 1065. Interestingly, then-Judge Samuel Alito dissented from the majority opinion "for the simple reason that Chang ha[d] never specified any political opinion he holds and that is at odds with the Chinese government. . . . At no time ha[d] Chang said that he opposes the Chinese law prohibiting defection." *Id.* at 1069. This restrictive view finds some support in *Fisher v. INS*, 79 F.3d 955, 959-63 (9th Cir. 1996) (holding that persecution on account of political opinion cannot be established where the alleged persecutor is unaware that the victim holds the political opinion in question), and *Gomez-Mejia v. INS*, 56 F.3d 700, 701 (5th Cir. 1995). The *Chang* majority confronted Alito's objection:

> [On] the contrary, the evidence compels a reasonable fact finder to conclude that Chang has "manifested" opposition to the Chinese government. His actions in defying the orders of the Chinese government because he disagreed with how they would treat those suspected of trying to defect did exactly that. Simply because he did not call himself a dissident or couch his resistance in terms of a particular ideology renders his opposition no less political.

*Chang*, 119 F.3d at 1063.

245. *Ratnam*, 154 F.3d at 996; *see also* Ndom v. Ashcroft, 384 F.3d 743 (9th Cir. 2004); Singh v. Ilchert, No. 98-16549, 1999 WL 519002 (9th Cir. Jul. 20, 1999); Singh v. Ilchert, 69 F.3d 375, 379 n.1 (9th Cir. 1995) ("The government asserts that Singh was not tortured on account of his political opinion because . . . the real motive of the police was to gather information about the Sikh separatists. While that may have been one motive . . . at least in the first incident, the police beat Singh because they did not believe him when he told them he was not a separatist.").

account of his race and would impose a disproportionately severe punishment for his desertion on account of his minority racial status.[246]

A corollary to this mixed-motive approach is the scenario where the alleged persecution begins in a law enforcement effort with objectively pure motivations. Such an instance mirrors *Bandari*, where the Iranian police were initially unaware of Bandari's minority ethnicity and religious views and arrested him solely because he violated a neutral law against embracing in public.[247] Such benign beginnings will not shield subsequent state action when its motives improperly evolve once the government discovers an alien's protected characteristic. As the *Bandari* court noted, "[t]hat the police initially approached Bandari to enforce a neutral law does not affect our holding," because authorities later attacked him for his religious beliefs, and asylum applicants need only present evidence that the government inflicted harm *in part* because of a protected characteristic.[248] Similarly, the court in *Blanco-Lopez v. INS* found it irrelevant that the asylum applicant's conflict with the Salvadoran government may have been "instigated in the first instance through a personal dispute" involving non-protected grounds, for it soon developed into a situation where the government attempted to persecute him for his political beliefs.[249] Other courts addressing this issue agree with these holdings that the mixed-motive analysis applies irrespective of the possibly legitimate origins of the prosecution in question.[250]

In sum, the mixed-motive analysis bears fundamental importance in correctly adjudicating asylum or withholding claims when both legitimate and illegitimate objectives motivate a government's persecutory conduct. Although the foregoing cases may suggest the uniform adoption of this approach, several circuits refuse to apply that analysis.[251] This refusal is discussed more fully in Part V.

---

246. Duarte de Guinac v. INS, 179 F.3d 1156, 1159, 1163 n.7, 1164 (9th Cir. 1999).

247. Bandari v. INS, 227 F.3d 1160, 1163-65 (9th Cir. 2000).

248. *Id.* at 1168-69.

249. Blanco-Lopez v. INS, 858 F.2d 531, 533 (9th Cir. 1988).

250. *See* Chhokar v. Gonzales, No. 03-71599, 2005 WL 2108653, at *1 (9th Cir. Sept. 1, 2005) (holding that an alien from India established eligibility for asylum and withholding of removal irrespective of the fact that the police "initially detained [him] on both occasions because they believed he had assisted criminals attempting to flee the area" where police later severely abused the alien during his detention because of his disfavored political beliefs); Tuhin v. Ashcroft, No. 02-2661, 2003 WL 1342995 (7th Cir. Mar. 18, 2003). Although charges of looting, destroying property, and carrying a weapon leveled against citizen of Bangladesh might have been legitimate, his subsequent beatings from the police because of political beliefs were not. *Id.*

251. *See infra* notes 408-37 and accompanying text.

### *C. Three Influential Factors*

The central inquiry in determining if prosecution equals persecution is whether the governmental conduct stems from an improper motivation. Three factors stand out as the most influential guides in evaluating whether the government has an invidious motivation that transforms legitimate prosecution into persecution: (1) the judicial process received by the alien, (2) the nature of the underlying law the state is enforcing, and (3) the context in which the prosecution occurs. Although not the only factors relied on, these are the most prominently applied, and they often prove crucial in the disposition of an asylum applicant's case.

#### *1. The Level of Judicial Process Accompanying Prosecution*

The most influential consideration informing a court's decision is the level of meaningful judicial process the asylum applicant received. This concept encompasses (1) the judicial process accompanying the investigation or trial stages of prosecution, (2) the initiation of formal adversarial proceedings, (3) whether a state has a legitimate prosecutorial purpose, (4) whether punishment is extra-judicial, and (5) the evidence of the alien's culpability.

##### *a) Judicial Process at the Investigation and Trial Stage*

Courts are more likely to view prosecution as legitimate if the government has or will give the alien meaningful judicial process during the investigatory or adjudicatory phases of a prosecution. Conversely, a lack of due process at these points suggests that the prosecution may be a facade for persecution on account of a protected ground. For instance, the Ninth Circuit denied an Indian's claim for withholding of removal where authorities arrested the alien pursuant to a warrant, allowed the assistance of counsel, and where "some type of legitimate legal process occurred after the 1997 arrest."[252] Elsewhere, that circuit found persuasive the fact that a Filipino had not shown that he would "receive anything less than a fair trial" or that the government would subject him to unwarranted punishment.[253] Similarly, the Eighth Circuit denied asylum and withholding to a Kenyan, in part because he had not produced evidence that the criminal charges he faced would result in an unfair trial.[254] Further, the Third Circuit determined that a citizen of Bangladesh was not eligible for asylum or withholding where he could not show that he would be "unable to receive fair adjudication and punishment. In fact, even his own

252. Kapil v. Ashcroft, No. 03-71045, 2004 WL 1098784, at *1 (9th Cir. May 17, 2004).
253. Tadeo v. INS, No. 94-70643, 1996 WL 207141, at *2 (9th Cir. Apr. 26, 1996).
254. Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004).

testimony suggests that thus far the proceedings against him have been conducted in a fair manner."[255]

*b) The Initiation of Formal Proceedings*

Courts also consider whether adequate fairness or due process accompanies earlier stages in the prosecution, and find particularly relevant the absence of the initiation of formal proceedings against the asylum claimant. For instance, *Blanco-Lopez v. INS* contemplated the Salvadoran government's apprehension of a fisherman to investigate possible drug running.[256] The Ninth Circuit rejected the argument that because the government had the right to prosecute suspected criminals, the fisherman could not show persecution for his political belief.[257] The court concluded that the state persecuted the fisherman primarily because no "actual, legitimate, criminal prosecution was initiated against Blanco-Lopez" and that state security forces would possibly kill the fisherman "without undertaking 'any formal prosecutorial measures'" if the United States deported him back to El Salvador.[258] Thus, *Blanco-Lopez* stands for the rule that when a government punishes a citizen without undertaking any formal prosecutorial measures, the police activity is not legitimate criminal investigation or prosecution, but rather government-inflicted persecution based on a protected characteristic.[259]

Although the Ninth Circuit has found highly persuasive the fact that an "actual, legitimate, criminal prosecution" was or was not formally initiated,[260]

255. Shardar v. Ashcroft, 382 F.3d 318, 324 (3d Cir. 2004).

256. Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988). Other decisions also find outcome-determinative the fact that aliens may be "extra-judicially" executed or tortured without the state ever leveling formal charges or undertaking formal proceedings. Ayala-Martinez v. INS, No. 89-70032, 1990 WL 138584, at *3 (9th Cir. Sept. 25, 1990).

257. *Ayala-Martinez*, 1990 WL 138584, at *3.

258. *Blanco-Lopez*, 858 F.2d at 534.

259. Caceres-Cuadras v. INS, No. 89-70000, 1990 WL 124010, at *5 (9th Cir. Aug. 23, 1990); *see also* Kaurr v. INS, No. 97-70678, 1998 WL 416112, at *3 (9th Cir. June 17, 1998) (finding relevant the fact that there was no "actual, legitimate, criminal prosecution" initiated against the alien).

260. *See* Chhokar v. Gonzales, No. 03-71599, 2005 WL 2108653, at *1 (9th Cir. Sept. 1, 2005) ("Given that the authorities never charged Chhokar with any crime, this evidence is sufficient to establish past persecution on account of a protected ground." (citing Ndom v. Ashcroft, 384 F.3d 743, 755 (9th Cir. 2004))); Singh v. Ashcroft, No. 02-73091, 2003 WL 22435188 (9th Cir. Oct. 23, 2003) (providing that the fact that Indian police detained and severely beat an Indian alien without charging him with a crime contributed to the finding that his detention lacked a legitimate purpose); *Kaurr*, 1998 WL 416112, at *3 (citing *Blanco-Lopez*, 858 F.2d at 534) (acknowledging the general rule that governments have "the right to prosecute individuals accused of criminal activity and that such prosecution is readily distinguishable from persecution," and finding that the Indian government's detention and abuse of an Indian was

decisions from other circuits appear less concerned about the initiation of formal proceedings. For example, the Fifth Circuit dismissed an asylum applicant's appeal where Turkish officials arrested the applicant after participating in a Kurdish antigovernment demonstration, detained him for three days where they beat him on the soles of his feet, and on two later occasions interrogated him for alleged participation in terrorist activity.[261] The court found that the police had engaged in legitimate law enforcement activity, in spite of the fact that the Turkish government never filed charges against the alien.[262] Similarly, in *Kyambadde v. INS*, the Tenth Circuit held that an official in Uganda's Obote regime who was arrested by Okella forces the day after an Okella-led military coup toppled the Obote regime, and who "has been neither seen nor heard from since," was possibly the subject of legitimate prosecution for crimes he may have committed under the prior government.[263] The *Kyambadde* court ignored the tendency of many courts, especially in the Ninth Circuit, to construe the absence of formal charges as a strong indication of persecution.[264] Hence, the existence or lack of criminal

---

not a legitimate investigation into terrorist activity but was political persecution because "there [was] simply not evidence in this record indicating that 'an actual, legitimate, criminal prosecution was initiated' against Singh"); Sequeira-Arauz v. INS, No. 95-70754, 1997 WL 51756, at *3 (9th Cir. Feb. 3, 1997) (distinguishing *Blanco-Lopez*, 858 F.2d 531, and dismissing alien's appeal where alien, a Nicaraguan, was charged and convicted of a crime, even where his charge came well after his initial apprehension); Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (considering the Indian police's torture of a civilian to be political persecution where the state filed no charges); Singh v. Ilchert, 801 F. Supp. 313, 319 (N.D. Cal. 1992) (finding persecution when Indian authorities never charged an Indian with the crime of assisting militants, and where alien was instead "threatened with death, shot, beaten, and tortured when he didn't deliver the names of the militants").

261. Ozdemir v. INS, 46 F.3d 6, 7 (5th Cir. 1994).

262. *Id.* at 8. While the *Ozdemir* facts may have supported the conclusion that the alien was merely the target of antiterrorist activity unrelated to his political or ethnic status, the court ignored the lack of formal proceedings where similar facts would have suggested persecutory motives in other circuits.

263. Kyambadde v. INS, No. 91-9595, 1992 WL 158087, at *1-2 (10th Cir. July 6, 1992). Further, the Eleventh Circuit offered a curious decision which declined to follow the Ninth Circuit and oppositely concluded that the absence of formal charges militated against finding persecution instead of in favor of that determination. Kroi v. U.S. Attorney Gen., No. 04-12709, 2005 WL 1523509 (11th Cir. June 29, 2005).

264. *See* Singh v. INS, No. 00-70296, 2002 WL 1033562, at *1 (9th Cir. May 22, 2002) ("Extrajudicial beatings on account of political activity do not constitute a technique in furtherance of a legitimate prosecutorial purpose."); Ratnam v. INS, 154 F.3d 990, 995-96 (9th Cir. 1998) (rejecting "the argument that extraprosecutorial torture, if conducted for intelligence gathering purposes, does not constitute persecution"). Presumably, these holdings would also apply to the extra-judicial murder in *Kyambadde*.

charges or formal proceedings clearly represents an important factor for many courts, but by no means all.

*c) The Prosecution's Purpose*

Even among courts that look to whether a state has initiated formal proceedings, an affirmative answer is not necessarily dispositive. The Ninth Circuit confirmed that no single factor is conclusive in determining a prosecution's legitimacy, and noted that it "certainly ha[d] never held that if police don't charge someone with a crime this will automatically raise a presumption of political persecution."[265] Rather, the essential question is whether the purported criminal investigation lacked a "bona fide objective" so that persecution must have been the true motivation for it.[266] Accordingly, while formality is often an important indicator of a prosecution's legitimacy, determining the overall purpose animating the state's behavior should be the central focus, and several courts hold that if an alien's treatment is not shown to have been undertaken pursuant to a legitimate governmental purpose, a presumption automatically exists that the alien suffered persecution.[267]

---

265. Dinu v. Ashcroft, 372 F.3d 1041, 1044 (9th Cir. 2004) (providing that the presumption arises only "where there appears to be no other logical reason for the persecution at issue" (quoting Navas v. INS, 217 F.3d 646, 660 (9th Cir. 2000))). The *Dinu* court suggested caution in finding no logical motive existed because a lengthy period of time had elapsed:

> As we know from our own experience, criminal investigations often can take months or even years to complete, and [many] involve repeated contacts by the police with suspects and witnesses. The length of time an investigation is ongoing does not alone raise a presumption of political persecution, though protracted delay can certainly be taken into account.

*Id.*

266. *Id.* Further:

> So long as the police are trying to find evidence of criminal activity, neither the length of [time of] the investigation, nor the fact that they are pursuing suspects we believe to be innocent, nor the unsavoriness of their tactics, gives rise to an inference of political persecution. It is only "where there appears to be no other logical reason for the persecution at issue" that the IJ may draw the inference that police investigation is a subterfuge for political harassment.

*Id.* at 1045 (citation omitted) (quoting *Navas*, 217 F.3d at 657).

267. Singh v. Ashcroft, No. 02-73091, 2003 WL 22435188, at *1 (9th Cir. Oct. 23, 2003); *see also* Kaur v. INS, No. 00-70198, 2001 WL 724955, at *1 (9th Cir. June 27, 2001) (citing Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995)); *Ratnam*, 154 F.3d at 995 (citing *Singh*, 63 F.3d at 1509); *Singh*, 63 F.3d at 1509 (holding that where "there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person . . . there arises a presumption that the motive for harassment is political" (omission in original) (quoting Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985))).

*d) The Prospect of Extra-judicial Punishment*

Complementing the due process inquiry, courts are more likely to regard prosecution as a mask for persecution where the state has or will inflict unfair or extra-judicial punishment. In one case, an appeals court determined a Ghanaian eligible for asylum where the lower courts did not inquire if he would enjoy due process protections or be the victim of arbitrary punishment for treason.[268] For the same reason, an Iranian citizen's prosecution for illegally distributing Salman Rushdie's *The Satanic Verses* qualified for asylum because he would not receive a fair trial in Iran and the government would probably summarily execute him.[269] Similarly, this fact was relevant to a Salvadoran's asylum and withholding claim that the government punished guerrillas without any due process, "excessively punishing the guilty and sweeping in the innocent as well."[270] Case law therefore distinguishes between prosecution that imposes punishment "without any judicial process" and legitimate police efforts to arrest and prosecute those suspected of criminal conduct.[271]

*e) Evidence of the Alien's Culpability*

Several courts also consider the amount of evidence indicating that the asylum applicant actually committed the crime in question in determining whether her prosecution was legitimate, and a high likelihood of innocence often suggests the impropriety of the prosecutor's motivation. The Ninth Circuit generally holds that where a government prosecutes an alien with "no reason to believe that he has engaged in any criminal activity," a presumption arises that an improper purpose motivated the prosecution.[272] The application of this presumption has led courts to ask if the foreign government technically classifies the offense at issue as a crime,[273] but more commonly, appellate

268. Dwomoh v. Sava, 696 F. Supp. 970, 978 (S.D.N.Y. 1988). The court compared the alien's treatment with that of an American suspected of treasons: "No United States citizen is punished for treason without a formal charge, and the opportunity for a full trial and appeal. Mr. Dwomoh has no such protections; he might be executed without ever having been charged, no less tried." *Id.*

269. Zahedi v. INS, 222 F.3d 1157, 1165-68 (9th Cir. 2000).

270. Ramirez Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990). For further discussion of the *Ramirez Rivas* case, see Isaacs, *supra* note 97, at 731-32.

271. Singh v. Ilchert, 801 F. Supp. 313, 319 (9th Cir. 1992).

272. Funes-Torres v. INS, No. 99-70283, 2000 WL 519121, at *2 (9th Cir. Apr. 27, 2000) (citing *Ramirez Rivas*, 899 F.2d at 867); *see also Herandez-Ortiz*, 777 F.2d at 516.

273. *See* Mabugat v. INS, 937 F.2d 426, 431 (9th Cir. 1991) (questioning whether the temporary diversion of funds from a cooperating employer for political purposes constitutes the crime of "estafa" in the Philippines); *see also* Sadeghi v. INS, 40 F.3d 1139, 1143, 1145 (5th

courts assume the offense is "on the books," and inquire whether the alien committed that crime.

The Ninth Circuit often delves into the facts surrounding the alien's potential culpability, whether to evaluate the alien's innocence or guilt in order to apply the above presumption, or simply as another factor in determining the legitimacy of the prosecution. Illustrating this, one decision concluded that the alien probably did not commit the crime with which his home government charged him.[274] In deciding this, the court evaluated the alien's mens rea, his intent to permanently deprive, and whether he engaged in a non-consensual taking, "all of which presumably are necessary to convict," as well as several potential defenses the alien might raise.[275] Similar decisions have scrutinized the underlying basis for the charges, determining that there was "no basis for concluding that [an alien] was involved" in illegally funneling money to guerrillas,[276] and holding that another alien was "subjected to groundless prosecution for rape."[277]

Other courts hesitate to substitute their assessment of an alien's guilt or innocence for that of a foreign trier of fact, as shown by one court's refusal to consider an alien's culpability:

> We intimate no opinion on whether [the asylum applicant] is guilty of any of the charges which he fears may be brought against him, as neither we nor the BIA has jurisdiction to adjudicate whether [the applicant] is guilty of them. . . . If [the applicant] is charged upon his return, it will be for the Philippine courts to adjudicate any charges.[278]

Similarly, in *Adam v. Gonzales*, the Fifth Circuit considered the actual guilt of the asylum applicant irrelevant in determining whether his prosecution was legitimate, even where circumstances strongly suggested that the newly-installed government had filed criminal charges solely for political revenge and where the INS produced no evidence indicating the alien's guilt.[279]

---

Cir. 1994) (accepting as a "reasonable inference" that an Iranian's counseling a student not to fight in the Iraqi war was actually classified as a crime, and disregarding the dissent's finding that "[t]here has been no evidence produced [to] support [such an] assumption[]").

274. *See Mabugat*, 937 F.2d at 431.

275. *Id.*

276. *Funes-Torres*, 2000 WL 519121, at *2.

277. Abramov v. Ashcroft, No. 03-71856, 2004 WL 2411254, at *1 (9th Cir. Oct. 22, 2004).

278. Tadeo v. INS, No. 94-70643, 1996 WL 207141, at *2 (9th Cir. Apr. 26, 1996); *see also* Sauvage v. INS, No. 97-71189, 1999 WL 966479, at *2 (9th Cir. Oct. 21, 1999) (rejecting the lower court's conclusion that French authorities provided insufficient evidence to establish that a French faith-healer was guilty of fraud).

279. Adam v. Gonzales, No. 04-60080, 2005 WL 3178205 (5th Cir. Nov. 29, 2005).

Further, in *Castaneda v. INS*, the Tenth Circuit denied asylum to a Honduran mistakenly identified by her government as a bank robber, admitting the alien's innocence, but choosing not to let that finding have any bearing on determining the prosecution's legitimacy.[280]

In deciding if a prosecution was legitimate, courts look to the level of due process accorded an alien during investigation or trial, whether the government ever filed criminal charges, whether the state has a legitimate purpose behind the prosecution, if extra-judicial punishments might occur, and whether the alien is guilty of the crime she is charged with.[281] Even so, these factors are not universally applied, and the level of scrutiny each of these inquiries receives is often a function of the court considering an applicant's claim.

*2. The Nature of the Underlying Law*

Courts often evaluate prosecution in light of the legitimacy of the law the state is enforcing.[282] Thus, the second factor bearing on whether a government has persecuted an alien is the nature of the law underlying the prosecution.[283] In applying this factor, the Third Circuit chastised an immigration judge and the Board of Immigration Appeals for failing to examine the nature of the criminal statute China sought to enforce and the behavior the government wanted to compel, "both of which help determine the motives of the alleged persecutor."[284] Sharing this concern with the nature of the criminal law at issue, Judge Posner observed that the most likely form of systematic persecution is where a nation's laws expressly authorize the persecution, as exemplified by the persecution of the Jews under the Nuremberg Laws, for merely because that mistreatment had the official sanction of enacted law "doesn't mean that Jews were not persecuted."[285]

Following Posner's observation, the Sixth Circuit has held that punishment under laws prohibiting peaceful political expression would be political persecution,[286] and the Ninth Circuit found that India had persecuted an alien under that nation's antiterrorism laws that defined the crime of "terrorism" broadly to facilitate the suppression of political dissent and secessionist

280. Castaneda v. INS, 23 F.3d 1576, 1578 (10th Cir. 1994).

281. *See* cases cited *supra* notes 252-80.

282. Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996).

283. *See id.* at 301; Perkovic v. INS, 33 F.3d 615 (6th Cir. 1994); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990).

284. Chang v. INS, 119 F.3d 1055, 1063 (3d Cir. 1997).

285. Guchshenkov v. Ashcroft, 366 F.3d 554, 559 (7th Cir. 2004).

286. *Perkovic*, 33 F.3d at 622.

ideologies.[287] Similarly, the Seventh Circuit criticized an immigration judge for focusing solely on the facial legitimacy of charges against an alien under Bangladesh's Special Powers Act and Anti-Terrorism Act when it was clear that the government frequently used those "sweeping laws" to punish political expression.[288] Nevertheless, the notion that a law should not be expansively used to persecute does not require that a law is seen as illegitimate simply because the law is informed by a protected ground, such as religion. Thus, the Ninth Circuit implied that prosecution for the crime of accidentally striking and killing a sacred cow, if applied equally to all citizens, would not constitute religious persecution.[289] Analogously, the Second Circuit determined that religious persecution does not result merely because a state "takes religion into account in the provisions of its domestic criminal [code]," if that code imposes similar punishments to those in many secular nations.[290] Prosecution under an Iranian law criminalizing apostasy, however, did constitute persecution on account of religion.[291]

Significantly, prosecution may constitute persecution when the underlying law the foreign government seeks to enforce violates internationally accepted human rights principles.[292] This human rights exception fulfills congressional intent in passing the Refuge Act of 1980 to safeguard the human rights of refugees by conforming American asylum law with the country's obligations under the UN Protocol Relating to the Status of Refugees.[293] Indeed, the Refugee Act's legislative history reflects that Congress intended the Act to give "statutory meaning to our national commitment to human rights and humanitarian concerns . . . ."[294] In light of this clear congressional intent that

287. Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995).

288. Tuhin v. Ashcroft, No. 02-2661, 2003 WL 1342995, at *4 (7th Cir. Mar. 18, 2003).

289. Bal v. Ashcroft, No. 03-73663, 2004 WL 2829288, at *1 (9th Cir. Dec. 9, 2004).

290. Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (finding that a death sentence imposed by a Yemeni *sharia* court for alien's conviction of manslaughter while in the United States did not constitute persecution).

291. Bastanipour v. INS, 980 F.2d 1129, 1132-33 (7th Cir. 1992).

292. *See* Chang v. INS, 119 F.3d 1055, 1061 (3d Cir. 1997) (holding that prosecution under laws "that do not conform with accepted human rights standards — can constitute persecution"); Chanco v. INS, 82 F.3d 298, 301 n.3 (9th Cir. 1996) (citing Ramos-Vasquez v. INS, 57 F.3d 857, 863 (9th Cir. 1995)).

293. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . ."); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 469 (1993); Adarkar, *supra* note 53, at 208; Adell, *supra* note 36, at 797.

294. S. REP. NO. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141; *see also*

U.S. law protects the human rights of refugees, international human rights norms should inform asylum and withholding adjudications,[295] and courts should consider an alien's prosecution to be persecution when the underlying law the government seeks to enforce violates the alien's basic, international human rights.[296]

Courts have applied this human rights exception to grant asylum to a Honduran who deserted the military to avoid participating in atrocities, where he argued that the punishment he faced for desertion amounted to persecution for his political opinion.[297] Likewise, where a government does not respect the "internationally recognized human right to peacefully protest," prosecution for political expression is not a legitimate exercise of state sovereignty.[298] Nevertheless, as discussed further in Part V, while many courts apply the human rights exception, others refuse to apply or consider that doctrine, even where the law in question directly offends established human rights norms.

*3. Context*

Courts often examine the totality of circumstances in deciding if persecution has occurred,[299] and thus, the context in which an alien's prosecution takes place is crucial in deciding whether that prosecution is legitimate or merely a pretext for the government's invidious motives. Courts widely apply this contextual factor, which incorporates the broader political atmosphere within the prosecuting nation as well as the prosecuted alien's individual experience.[300] First, an assessment of the political conditions in a particular country during the alien's prosecution is necessary to determine whether that prosecution has become political persecution.[301] *Li Wu Lin v. INS* illustrates such attention to the larger societal picture, as the Third Circuit carefully considered context in rejecting the argument that a prominent participant in the pro-democracy student protest movement leading up to the Tiananmen Square massacre had been the target of legitimate prosecution for trespassing on government property instead of for the expression of his

---

Musalo, *supra* note 29, at 1182; Adell, *supra* note 36, at 797-98.

295. *See* Davis & Atchue, *supra* note 2, at 120; Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELY J. INT'L L. 1, 15, 20 (1997); Isaacs, *supra* note 97, at 732; Mousin, *supra* note 4, at 591-92; Musalo, *supra* note 28, at 174; Adell, *supra* note 36, at 790-91.

296. *See supra* note 292 and accompanying text.

297. *Ramos-Vasquez*, 57 F.3d at 863.

298. Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996).

299. *See* Gou v. Ashcroft, 361 F.3d 1194, 1203 (9th Cir. 2004).

300. *See infra* notes 302-17 and accompanying text.

301. *See* Dwomoh v. Sava, 696 F. Supp. 970, 976 (S.D.N.Y. 1988).

political opinion.[302] The Ninth Circuit has engaged in many similar inquiries into the broader political landscape. For instance, a court found persuasive that the Indian government extensively used amorphous antiterrorism laws to quell political dissenters and eradicate secessionist ideologies.[303] Equally outcome-determinative was the fact that near the time of a Ukrainian's prosecution for rape, the Soviet regime frequently fabricated rape charges against persons actively opposing official corruption, as the alien had done.[304] Further, in granting asylum and withholding to a Senegalese applicant, the court took special notice of Senegal's human rights abuses, including the arrest and torture of hundreds of civilians by security forces and numerous instances of extra-judicial executions and disappearances.[305]

Other circuits also recognize the injustice of considering an alien's prosecution in a political vacuum, as seen when the Second Circuit roundly criticized an immigration judge for making no effort to examine the broader context of government extortion and blackmail surrounding the prosecution of a Chinese businessman who had voiced opposition to his local government's corruption.[306] In another case, the Third Circuit rejected a Chinese political persecution claim, in part because prosecutions for illegal departure in China occur on a routine basis.[307] Moreover, the Third Circuit denied asylum to an alien from Serbia and Montenegro where the INS showed that the government allowed similarly situated persons who had also refused military service to perform alternative civilian service and that among the handful of those tried for evading service, only three received prison sentences.[308] Additionally, the Fourth Circuit noted the widespread conditions of violent upheaval in Sierra Leone in determining that the government had not persecuted an alien or his relatives.[309] Finally, the Eleventh Circuit

302. Li Wu Lin v. INS, 238 F.3d 239, 245 (3d Cir. 2001).

303. Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995); *see also* Tuhin v. Ashcroft, No. 02-2661, 2003 WL 1342995, at *4 (7th Cir. Mar. 18, 2003).

304. Abramov v. Ashcroft, No. 03-71856, 2004 WL 2411254, at *1 (9th Cir. Oct. 22, 2004).

305. Ndom v. Ashcroft, 384 F.3d 743, 748 (9th Cir. 2004); *see also* Jin Ying Li v. INS, 92 F.3d 985, 988 (9th Cir. 1996) (noting a report that of 118 illegal immigrants deported to Fiji from the United States, there was no evidence of any pattern of government harassment or imprisonment, and most were released within a few weeks of arrival after paying a fine).

306. Zhang v. Gonzales, 426 F.3d 540, 548 (2d Cir. 2005).

307. Shi Fei v. Attorney Gen. of the U.S., No. 04-3407, 2005 WL 1140732, at *2 (3d Cir. May 16, 2005).

308. Rugovac v. Attorney Gen. of the U.S., No. 04-4382, 2005 WL 2891736, at *2 (3d Cir. Nov. 3, 2005).

309. Bangura v. INS, No. 96-2805, 1997 WL 419253, at *2 (4th Cir. July 28, 1997).

evaluated a Salvadoran's claim of political persecution in light of "the context of civil war where fear permeates the life of every citizen . . . ."[310]

In addition to the broader political context, courts also give considerable weight to an alien's personal history with her government, for "[t]he key question is whether, looking at the cumulative effect of all the incidents a petitioner has suffered," her treatment rises to the level of persecution.[311] First, courts consider events occurring before or during the contested state behavior, as where a court determined an alien's prosecution by the Indian government illegitimate when the uncontested facts demonstrated a "pattern of persecution" of the alien and her family members by security forces.[312] Also, criminal charges against a Fijian folk singer did not comprise persecution per se, but that alien's treatment as a whole did amount to persecution where government allies threatened his son with kidnapping, armed men repeatedly stayed outside his front door, anonymous callers threatened him with death, and government supporters killed his fellow Marcos sympathizers.[313] An alien's relationship with her government before or during the purported prosecution may also caution against finding that persecution occurred, as evidenced when an appellate court determined that an Albanian's prosecution for illegally notarizing a confidential government document was legitimate, primarily because the alien stayed at her government job throughout the investigation, was given a passport during that period, and had the freedom to travel internationally without detention or arrest.[314]

Courts also frequently consider a foreign government's treatment of an alien following her prosecution in determining the prosecution's legitimacy. For instance, the fact that an Iranian asylum applicant, accused of illegally possessing Western films, was able to attend law school and continue his filmmaking career after his prosecution began suggested that the Iranian government was merely prosecuting the alien, and not persecuting him for his

310. Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1299 (11th Cir. 1990).

311. Korablina v. INS, 158 F.3d 1038, 1044 (9th Cir. 1998).

312. Kaur v. INS, No. 01-70805, 2002 WL 1136896, at *1 (9th Cir. May 30, 2002).

313. De Leon v. INS, No. 93-70584, 1995 WL 74783, at *5 (9th Cir. Feb. 23, 1995).

314. Lakaj v. Gonzales, No. 04-3998, 2005 WL 3113512, at *4 (6th Cir. Nov. 18, 2005); *see also* Singh v. INS, No. 00-70091, 2001 WL 259219, at *1 (9th Cir. Mar. 14, 2001) (finding relevant the fact that the Indian government had never arrested several of the alien's fellow political dissidents living nearby); Behzadpour v. United States, 946 F.2d 1351, 1353 (8th Cir. 1991) (attributing the failure to gain asylum and withholding in part to the finding that the Iranian government would not single out a woman for her political views and her husband had not endured mistreatment for affiliation with political dissidents or for his wife's absence from the country).

political beliefs.[315] Similarly, an appellate court denied asylum and withholding to a Vietnamese alien whom the government had detained and beaten for committing fraud, where he had remained in Vietnam for three years after the beating without suffering additional harm from the government.[316] Further, context may undermine an applicant's persecution claim when his family members continue to reside in the home country without difficulties from the government.[317] In sum, courts often evaluate the political context surrounding an alien's prosecution and the alien's own history with the government in determining whether prosecution is persecution or legitimate law enforcement.

## *IV. Four Common Scenarios*

Part III constructed a general framework for distinguishing prosecution from persecution by examining several rules, exceptions, and factors that have guided courts in that endeavor. This framework's application is illustrated by four scenarios that most frequently raise the persecution/prosecution distinction: (1) illegal departure, (2) compulsory military service, (3) domestic intelligence gathering, and (4) antigovernment activities.

### *A. Illegal Departure*

Asylum and withholding applicants often argue that if deported, they will face prosecution for illegally departing their home country, and that this prosecution for merely leaving one's country amounts to persecution. In 1963, the Second Circuit laid the groundwork for adjudicating these arguments by rejecting the notion that an alien's imprisonment for illegal departure may never constitute persecution within the meaning of U.S. immigration laws.[318] Generally, however, a state's restrictions on traveling

315. Abedini v. INS, 971 F.2d 188, 192 (9th Cir. 1992).

316. Bui v. Ashcroft, No. 03-70748, 2004 WL 2726104, at *1 (9th Cir. Dec. 1, 2004).

317. Kapil v. Ashcroft, No. 03-71045, 2004 WL 1098784, at *2 (9th Cir. May 17, 2004) ("[T]he fact that Kapil's family still resides in the Punjab, and Kapil's wife continues to work for the Indian government, undercuts Kapil's claim of future persection."); Hakeem v. INS, 273 F.3d 812, 816 (9th Cir. 2001); Artola-Medal v. INS, No. 95-70006, 1996 WL 290057, at *1 (9th Cir. May 31, 1996).

318. Sovich v. Esperdy, 319 F.2d 21, 29 (2d Cir. 1963); *see also* Rodriguez-Roman v. INS, 98 F.3d 416, 429 (9th Cir. 1996) ("[T]he IJ and the BIA erred as a matter of law in determining that aliens who face punishment for the crime of illegal departure cannot establish persecution within the meaning of the statute."); Coriolan v. INS, 559 F.2d 993, 1000 (5th Cir. 1977) ("If the immigration judge meant . . . to assert that prosecution for the offense of illegal departure can never amount to political persecution, his view was inconsistent with decisions both of the courts and of the INS itself.").

abroad do not amount to persecution,[319] and similarly, any prosecution arising from the violation of those restrictions is not in itself persecution.[320] This is true even where an alien's punishment by her home government for illegal departure would be harsher than the punishment imposed by the U.S. government upon an American citizen for violating the U.S. regulations governing international travel.[321] Thus, neither a Nigerian's detention for using a false passport to leave his country nor a Haitian's potential punishment for departing her nation illegally without an exit visa amounted to anything other than legitimate prosecution.[322]

Although Congress did not intend the United States as a refuge for common criminals fleeing prosecution under generally applicable travel laws, it did intend to grant asylum to those who would, "if returned, be punished criminally for violating a politically motivated prohibition against defection from a police state."[323] This has resulted in the "disproportionately severe punishment" exception, which holds that an alien who leaves her country because of one of the five enumerated grounds and who faces severe punishment if deported home for the crime of illegal departure is presumed to fear persecution within the meaning of asylum and withholding of removal.[324]

---

319. *See* Tesfamichael v. Gonzales, 411 F.3d 169, 177 (5th Cir. 2005); Lin v. Ashcroft, No. 03-2790, 2004 WL 2666934, at *1 (3d Cir. Nov. 23, 2004); Barreto-Claro v. U.S. Attorney Gen., 275 F.3d 1334, 1340 (11th Cir. 2001); Nazaraghaie v. INS, 102 F.3d 460, 463 (10th Cir. 1996); Li v. INS, 92 F.3d 985, 988 (9th Cir. 1996); Oancea v. INS, No. 94-70602, 1996 WL 183739, at *1 (9th Cir. Apr. 16, 1996) (quoting *Abedini*, 971 F.2d at 191); *In re* Sibrun, 18 I. & N. Dec. 354, 359 (B.I.A. 1983).

320. Jiang v. U.S. Attorney Gen., No. 04-15394, 2005 WL 1052604, at *8 (11th Cir. May 5, 2005); Liang v. U.S. Dep't of Justice, No. 02-4437, 2005 WL 147277, at *2 (2d Cir. Jan 24, 2005); *Lin*, 2004 WL 2666934, at *1; Kozulin v. INS, 218 F.3d 1112, 1118 (9th Cir. 2000); *Nazaraghaie*, 102 F.3d at 463; *Li*, 92 F.3d at 988; Pinon-Maceo v. INS, No. 95-1925, 1996 WL 293158, at *1-2 (1st Cir. June 4, 1996) (holding that prosecution for illegally jumping off ship to flee Cuba in violation of that country's laws is not persecution); *Oancea*, 1996 WL 183739, at *1 (quoting *In re* Matelot, 18 I. & N. Dec. 334 (B.I.A. 1982)); *Abedini*, 971 F.2d at 191; Janusiak v. INS, 947 F.2d 46, 48-49 (3d Cir. 1991) (holding that prosecution for violating passport law would not implicate a protected ground unless, perhaps, earlier passport requests were denied for political reasons or government would prosecute alien more severely because of his political opinions); Behzadpour v. United States, 946 F.2d 1351, 1353 (8th Cir. 1991); *Coriolan*, 559 F.2d at 1000 (finding that punishment for violating a generally applicable passport law is not political persecution).

321. Yang v. Carroll, 852 F. Supp 460, 468 n.15 (E.D. Va. 1994), *aff'd*, 70 F.3d 114 (4th Cir. 1995).

322. *See* Michaels v. INS, No. 90-70460, 1991 WL 199671, at *1 (9th Cir. Oct. 8, 1991); Edmond v. Nelson, 575 F. Supp. 532, 538 (E.D. La. 1983); *accord* Grigore v. INS, No. 95-70319, 1996 WL 183748, at *2 (9th Cir. Apr. 16, 1996).

323. Kovac v. INS, 407 F.2d 102, 104 (9th Cir. 1969).

324. *See Li*, 92 F.3d at 988; Rodriguez-Roman v. INS, 98 F.3d 416, 429 (9th Cir. 1996) ("A

This exception most often arises in the context of political persecution, where an alien may establish persecution where she flees her country because of her minority political opinion and who faces severe punishment for illegal departure.[325] The rationale for this rule is that a state that severely punishes unlawful departure "views persons who illegally leave as disloyal and subversive," automatically imputing to them "a political opinion that the state believes warrants an extreme form of punishment."[326] Aliens relying on this exception must show, in addition to the prospect of severe punishment, that their illegal departure was politically motivated.[327] Thus, the Ninth Circuit determined in *Rodriguez-Roman v. INS* that a Cuban was entitled to withholding of removal and was eligible for asylum where he illegally fled

---

petitioner may establish persecution within the meaning of the statute if he can show that he left or remained away from his homeland for political reasons and that, if returned, he would be subject to severe punishment, whether as the result of criminal prosecution or otherwise."); *Abedini*, 971 F.2d at 191. Many of these cases rely heavily on the U.N.'s *Handbook on Procedures and Criteria for Determining Refugee Status*, which states:

> The legislation of certain States imposes severe penalties on [nationals] who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons [of race, religion, political opinion, nationality, and membership in a particular social group]. . . .

Office of the U.N. High Comm'r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 61, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1, 1992) [hereinafter *Handbook*], *available at* http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58e13b4.

For a concise description of the *Handbook* and the weight given it by U.S. courts, see INS v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status."). Additionally, while the *Handbook* does not have the force of law, it "provides significant guidance in construing the Protocol, to which Congress sought to conform [and] has been widely considered useful in giving content to the obligations that the Protocol establishes." *Id.* at 439 n.22; *see also* Bonavia, *supra* note 38, at 1051-52.

325. *Rodriguez-Roman*, 98 F.3d at 430.

326. *Id.* For an instructive overview of the doctrine of imputed political opinion, see Yoo, *supra* note 53.

327. *Kovac*, 407 F.2d at 104; *see also Rodriguez-Roman*, 98 F.3d at 430 (holding that applicant must prove that "he is one of the persons at whom the illegal departure statute was directed — persons who flee their homeland for political reasons"); *In re* Janus & Janek, 12 I. & N. 866, 876 (B.I.A. 1968) (stating that an alien whose departure from her home country is "devoid of political motivation" is not entitled to relief).

Cuba on account of his political beliefs and faced a "harsh, if not fatal" punishment if deported.[328] Nevertheless, unless an alien can show both a protected motivation for flight and a potentially severe punishment, the general rule prevails that prosecution for violating a nation's travel laws constitutes prosecution and not persecution.[329]

*B. Compulsory Military Service*

Just as a nation may regulate the foreign travel of its citizens, it has an analogous "sovereign right" to require military service of its citizens.[330] It is well settled that prosecution for evading compulsory military service does not constitute persecution on a protected ground and may therefore not provide a basis for asylum or withholding.[331] For the same reason, a government does not persecute when it prosecutes a citizen for illegally assisting others in

328. *Rodriguez-Roman*, 98 F.3d at 431; *see also* Tesfamichael v. Gonzales, 411 F.3d 169, 177 (5th Cir. 2005) (holding that imprisonment for violating Ethiopian travel laws against smuggling amount to persecution on account of race, political belief, and membership in a disfavored social group where the smuggled "item" was the violator's Eritrean wife who would "otherwise be forcibly separated by a war zone"); *Li*, 92 F.3d at 988. *But see* Wang v. U.S. Attorney Gen., No. 05-11125, 2005 WL 2373450, at *10 (11th Cir. Sept. 28, 2005); Shi Fei v. U.S. Attorney Gen., No. 04-3407, 2005 WL 1140732 (3d Cir. May 16, 2005); Liang v. U.S. Dep't of Justice, No. 02-4437, 2005 WL 147277, at *2 (2d Cir. Jan. 24, 2005) (finding that the alien did not show that prosecution for her illegal exit from China would have any relation to her political beliefs); Li Wu Lin v. INS, 238 F.3d 239, 248 (3d Cir. 2001); Pilarte-Donaire v. INS, No. 89-70508, 1991 WL 153454, at *4 (9th Cir. Aug. 14, 1991) (holding that a Nicaraguan feared prosecution, not persecution, for illegally leaving his country because he could not prove that the potential criminal penalties would be severe). For further exploration of the Ninth Circuit's holding in *Rodriguez-Roman*, see Yoo, *supra* note 53, at 404; Bonavia, *supra* note 38; Hall, *supra* note 27, at 128-29.

329. *See supra* text accompanying notes 324-25.

330. *In re* A—G—, 19 I. & N. Dec. 502, 502 (B.I.A. 1987); *see also* Musalo, *supra* note 28, at 207.

331. *See* Rugovac v. Attorney Gen. of the U.S., No. 04-4382, 2005 WL 2891736, at *2 (3d Cir. Nov. 3, 2005); Movsisian v. Ashcroft, 395 F.3d 1095, 1097 (9th Cir. 2005); Vucic v. Ashcroft, No. 01-4178, 2002 WL 31355239 (2d Cir. Oct. 18, 2002); Castaneda-Gonzales v. INS, No. 99-71321, 2001 WL 238087, at *1 (9th Cir. Mar. 09, 2001) ("Compulsory military service and prosecution for desertion do not constitute persecution under the INA."); Vujisic v. INS, 224 F.3d 578, 581 (7th Cir. 2000); Foroglou v. INS, 170 F.3d 68, 71 (1st Cir. 1999); Sequeira-Arauz v. INS, No. 95-70754, 1997 WL 51756, at *3 (9th Cir. Feb. 3, 1997); Krastev v. INS, 101 F.3d 1213, 1217 (7th Cir. 1996); Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992); Khalaf v. INS, 909 F.2d 589, 592 (1st Cir. 1990) (following Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990)) (ruling that Salvadoran likely imprisonment for failing to fulfill military obligations constituted prosecution and not persecution); Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988) ("[R]equiring military service does not constitute persecution"); *In re A-G-*, 19 I. & N. Dec. 502 (holding that compulsory military service is a "sovereign right" that does not amount to persecution); *see also* Musalo *supra* note 28, at 207.

avoiding compulsory military service,[332] or when prosecuting a citizen for breaching military discipline.[333]

These broad rules are not without exception. For instance, prosecution for avoiding military service may rise to the level of persecution where "disproportionately severe punishment would result on account of one of the five . . . grounds,"[334] or where the deserter has endured constant beatings and verbal abuse from his superiors on account of his minority ethnicity.[335] The most notable exception exists when an alien refuses to serve for reasons of conscience.[336] Although some opinions may suggest that mere conscientious objection, by itself, transforms a prosecution for refusal to serve into persecution,[337] courts generally require that the alien's conscientious objection result from a refusal to commit abuses of internationally recognized human rights,[338] or "engage in inhuman conduct."[339] Many of these decisions rely

---

332. *See* Tooth v. INS, No. 96-70067, 1997 WL 265099, at *1 (9th Cir. May 19, 1997) (concluding that prosecution for hiding a draft dodger is prosecution and not persecution); *Sequeira-Arauz*, 1997 WL 51756, at *3 (holding that the Sandinista government's incarceration and investigation of an alien for smuggling draftees out of Nicaragua was not persecution); *Rodriguez-Rivera*, 848 F.2d at 1005.

333. Padilla-Rocha v. INS, No. 95-70432, 1996 WL 547992, at *1 (9th Cir. Sept. 25, 1996) (finding that an alien's punishment for failing to follow an order to draft underage boys into military service was not persecution).

334. *Vucic*, 2002 WL 31355239, at *2; *see also* Nguyen v. Reno, 211 F.3d 692, 696 (1st Cir. 2000); *Vujisic*, 224 F.3d at 581 (finding that an alien showed well-founded fear of persecution on account of political beliefs where "Serbian officials singled out Vujisic for persecution above that of other draftees, deserters and Slovenian sympathizers because of his Slovenian background"); *In re A-G-*, 19 I. & N. Dec. at 506.

335. Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999); *see also Vujisic*, 224 F.3d at 581 (holding that a Slovenian alien established persecution where the government targeted his ethnicity and physically abused him because of his cultural background).

336. For an early argument in favor of the conscientious objection exception, see Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 849, 877-78 (1989) (noting that the "right to conscienctious objection has long been recognized in the United States, and there is an emerging trend toward its recognition as a fundamental human right," and arguing that decisions to grant asylum to conscientious objectors "should be informed by domestic and international norms").

337. *See Vujisic*, 224 F.3d at 581 (stating that "in some cases, refusal to enter the army may render one a refugee if for instance, the reason for refusal is a 'genuine political, religious or moral conviction or to valid reasons of conscience'").

338. *See Vucic*, 2002 WL 31355239, at *2 (recognizing that forced military service can amount to persecution where "the applicant would be required to commit human rights abuses"); Rodriguez v. INS, No. 96-70504, 1997 WL 572164, at *1 (9th Cir. Sept. 12, 1997) (refusing to consider the argument - raised for the first time on appeal - that an alien's prosecution for desertion would be persecution where desertion was based on the alien's refusal to violate the Geneva Conventions); *see also* Musalo, *supra* note 28, at 207-11 (discussing the

heavily on the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, which states that if the military actions in which the alien refuses to participate are "condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could . . . in itself be regarded as persecution."[340] Applying this provision, prosecution for an alien's desertion of the Serbian military was political persecution where it arose from his opposition to his government's political and nationalistic policies, which included a genocidal strategy in the Balkan republics.[341]

This human rights exception reveals an interesting tension in the law surrounding compulsory military service. As noted above, a government does not normally persecute a citizen when it prosecutes him for assisting others in avoiding compulsory military service,[342] but the human rights exception suggests that a state persecutes an alien when it prosecutes him for helping a fellow citizen avoid military service, where that service would violate internationally recognized human rights norms. Courts often fail to reach this

---

conscientious objection exception generally and noting that asylum claims based on religiously motivated conscientious objection have faired poorly in American courts, and citing as a landmark case *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992), where the Ninth Circuit held that a state's punishment of a Jehovah's Witness for refusing to perform military service is not religious persecution).

339. Ramos-Vasquez v. INS, 57 F.3d 857, 864 (9th Cir. 1995). For additional discussion on the conscientious objection exception, see *Guidelines*, supra note 102 (noting that in cases of conscientious objection, a generally applicable law may, "depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, or where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions").

340. *Handbook*, *supra* note 324, ¶ 171; *see also* Mark Muschenheim, M.A. v. INS*: No Asylum for Those Refusing to Associate with a Military Engaged in Human Rights Abuses*, 16 ILSA J. INT'L L. 39 (1993) (noting that American jurisprudence mirrors the *Handbook* in holding that avoiding compulsory military service does not generally result in prosecution, and discussing that document's exception to this rule).

341. *Handbook*, *supra* note 324, ¶ 171; *see also* Tagaga v. INS, 228 F.3d 1030, 1034 (9th Cir. 1995) (stating that "[i]t is well established, however, that a government may not legitimately punish an official for refusing to carry out an inhumane order," and holding that a Fijian who faced court-martial for refusing to persecute ethnic minorities faced persecution and not prosecution).

342. *See* Tooth v. INS, No. 96-70067, 1997 WL 265099, at *1 (9th Cir. May 19, 1997) (holding that prosecution for hiding a draft dodger is prosecution and not persecution); Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988) (finding that the Sandinista government's incarceration and investigation of alien for smuggling draftees out of Nicaragua was not persecution).

result, however, as seen in *Padilla-Rocha v. INS*, where the Ninth Circuit held that an alien's punishment for failing to draft underage boys into military service was not persecution but prosecution,[343] even though the use of child soldiers is a clear violation of global human rights norms.[344] In contrast, the Ninth Circuit held the previous year that a Honduran soldier faced political persecution for his desertion, which he undertook to avoid carrying out the improper summary execution of his friend, because that order would have forced the applicant to engage in inhuman conduct.[345]

*C. Domestic Intelligence Gathering*

A third scenario commonly requiring a court to distinguish between persecution and prosecution is where a government brutally interrogates an alien in an effort to gather intelligence concerning domestic terrorist or secessionist groups. These cases present a fine line between a state's legitimate or sovereign right to investigate suspected enemies of the government and "governmental persecution" based on an alien's political beliefs.[346] First, U.S. law considers torture an illegitimate tool of investigation,[347] and some courts apply a presumption of persecution on account of political opinion when the government tortures an alien and does not initiate a legitimate criminal prosecution.[348] Most cases, however, focus on the mixed-motive analysis and hold that an alien's severe mistreatment in the absence of any legitimate criminal prosecution, conducted at least partly on account of his political opinion, provides a proper basis for asylum and withholding of deportation, even where the government's motivation for detaining and mistreating a suspected terrorist partially stems from genuine intelligence purposes and security concerns.[349]

---

343. Padilla-Rocha v. INS, No. 95-70432, 1996 WL 547992, at *1 (9th Cir. 1996). This decision is somewhat reminiscent of *Sadeghi v. INS*, 40 F.3d 1139 (10th Cir. 1994) (reviewing a case where the government sought an Iranian high school principal when he counseled a fourteen-year-old boy to not participate in the Iraqi war).

344. *See infra* note 386 and accompanying text.

345. Ramos-Vasquez v. INS, 57 F.3d 857, 864 (9th Cir. 1995).

346. Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1299 (11th Cir. 1990).

347. *See* Senathirajah v. INS, 157 F.3d 210, 221 (3d Cir. 1998) (noting that even when used to interrogate potential terrorists, "torture does not constitute valid governmental investigation"); Balazoski v. INS, 932 F.2d 638, 642 (7th Cir. 1991); Rajaratnam v. Moyer, 832 F. Supp. 1219, 1222 (N.D. Ill. 1993) ("[W]hile the government has the legitimate right to combat terrorism through the arrest and interrogation of suspected terrorists, this right does not include the beating and torture of detainees.").

348. Ratnam v. INS, 154 F.3d 990, 993 (9th Cir. 1998).

349. Ndom v. Ashcroft, 384 F.3d 743, 755 (9th Cir. 2004) (quoting *Ratnam*, 154 F.3d at

In determining whether an alien's treatment occurred in part because of her actual or imputed political opinion, many courts scrutinize the legal framework governing the investigation or interrogation. For instance, a court found that an Indian was the victim of government persecution where the record revealed: "India defines 'terrorism' so broadly, and treats those accused or suspected of terrorism so harshly, that police 'investigations' of many suspected terrorists are not legitimate government functions but rather part of a pattern of political suppression."[350]

Most cases confronting government brutality in the context of antiterrorist intelligence gathering follow the general pattern of *Singh v. Ilchert*.[351] Surinder Pal Singh was a native of the Punjab region of India and a devout Sikh.[352] Many of the Sikh community in Punjab had been fighting for an independent Sikh state separate from India, and in 1988, several of these violent separatists forced themselves into Singh's home, demanding that his family provide them with food and shelter.[353] Singh had no choice but to comply.[354] When the Indian police learned of this, they surmised that Singh was a separatist supporter and promptly arrested him.[355] Despite Singh's repeated denials of this accusation, the police interrogated him and beat him for two-and-a-half hours until he lost consciousness, at which time they

996) (finding that torture "in the absence of any legitimate criminal prosecution, conducted at least in part on account of political opinion, provides a proper basis for asylum and withholding of deportation, even if the [torture] served intelligence gathering purposes"); *see also* Singh v. Gonzales, 406 F.3d 191, 198 (3d Cir. 2005) ("Singh may therefore establish eligibility for asylum even if, as the Government contends and the BIA found, there was some 'legitimate security purpose' . . . behind his arrest and mistreatment, if he establishes that the mistreatment was also motivated by the police's attribution of his father's political opinion to him."); Singh v. Ilchert, No. 98-16549, 1999 WL 519002, at *3 (9th Cir. July 20, 1999) (holding that the police's detention and torture of an Indian whom they considered a Sikh separatist was presumed political persecution where the police never filed any charges); Kaurr v. INS, No. 97-70678, 1998 WL 416112, at *3 (9th Cir. June 17, 1998) ("We are aware that one of the police's objectives in arresting and abusing Singh may have been to obtain information that would lead to the apprehension of terrorists. Nevertheless, . . . Singh was persecuted at least in part because of his political opinion."); Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) ("[E]xtra-judicial punishment of suspected anti-government guerrillas can constitute persecution on account of imputed political opinion."); Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988) (stating that state security forces' detention of a Salvadoran was not a legitimate criminal prosecution where those forces threatened the alien with death if he did not admit to being a guerilla).

350. *Singh*, 63 F.3d at 1508; *see also Ratnam*, 154 F.3d at 995.

351. 69 F.3d 375 (9th Cir. 1995).

352. *Id.* at 377.

353. *Id.*

354. *Id.*

355. *Id.*

revived him with water so the beatings could resume.[356] This initial detention lasted two days, and in the months that followed, the Sikh separatists periodically continued to force themselves into Singh's home.[357] The police arrested Singh again, and on each day of this six-day imprisonment, beat him and tightened a leather belt around his torso until he lost consciousness.[358] After this second episode, Singh feared that his arrests and torture would continue, so he fled his home to stay with relatives in another region of India and later left the country, eventually arriving in the United States.[359]

The Ninth Circuit ruled that Singh suffered persecution on account of imputed political opinion, because the police had tortured him for what they believed to be his sympathy with or support of the Sikh separatists.[360] The court held, "because the police imputed to Singh the beliefs of the Sikh separatists and harmed him on that basis, the punishment was inflicted with a political motive."[361] Also suggesting persecution, and not merely prosecution, was the fact that Singh's suffering did not occur in the context of a "legitimate government investigation or criminal prosecution."[362] The court rejected the contention that the Indian government had not persecuted Singh, because the police's real motive had been to gather intelligence regarding the Sikh rebels.[363] Although security and intelligence concerns may have partially motivated the police in detaining and torturing Singh, the court found that his mistreatment occurred in part because the police believed he shared the separatists' political beliefs.[364] Therefore, the court held Mr. Singh eligible for asylum and withholding of deportation.[365] Singh's story parallels that of several other aliens who received refuge when courts applied the mixed-motive analysis to conclude that while the government had abused them in part for intelligence gathering purposes, the state also had acted in part because of its perception that the aliens harbored disfavored political beliefs.[366]

---

356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.* at 379.
361. *Id.*
362. *Id.*
363. *Id.* at 379 n.1.
364. *Id.*
365. *Id.* at 380-81.
366. *See* Thangaraja v. Gonzales, 428 F.3d 870 (9th Cir. 2005); Ratnam v. INS, 154 F.3d 990, 993 (9th Cir. 1998); Rajaratnam v. Moyer, 832 F. Supp. 1219, 1222 (N.D. Ill. 1993) (finding that where no "actual, legitimate criminal prosecution was ever initiated against either petitioner . . . . it appears undeniable that the petitioners were arrested and abused because the

*D. Antigovernment Activities*

*Singh v. Ilchert* illustrates the tension between an alien's right to be free from political persecution and his government's right to protect itself from domestic enemies - a tension that resurfaces in cases regarding an alien's prosecution for engaging in anti-government demonstrations or attempted coups.[367] Although international law allows sovereign nations to protect themselves from revolutionaries and common criminals, it does not allow states to prohibit and punish peaceful political expression and activity.[368] Thus, where a state outlaws the peaceful expression of dissenting political opinion, an alien punished under that policy has been persecuted on account of his political belief.[369] Under this rule, Albania's arrest, detention and beating of an Albanian for participating in nonviolent demonstrations that publicly opposed the government's civil rights record constituted persecution for his political opinion.[370] Similarly, in *Li Wu Lin v. INS*, the government did not legitimately prosecute a Chinese middle school student for marching in the

---

authorities believed that they were members or supporters" of a dissident political group supporting separatism through terrorist methods); Singh v. Ilchert, 801 F. Supp. 313 (N.D. Cal. 1992); *cf.* Singh v. INS, No. 00-70091, 2001 WL 259219, at *1-2 (9th Cir. Mar. 14, 2001) (holding that the Indian police's arrest of a member of the All India Sikh Students Federation was precipitated by a legitimate investigation into illegal terrorist activity and not on account of the member's political opinion); Attal v. INS, No. 95-9514, 1996 WL 91929, at *3 (10th Cir. Mar. 4, 1996) (determining that the Jordanian government did not persecute a Palestinian citizen on account of his race or political opinions where Jordanian intelligence officials severely mistreated him in an effort to gain his cooperation in obtaining information about the Palestinian Liberation Organization's Syrian activities); Ozdemir v. INS, 46 F.3d 6, 7-8 (5th Cir. 1994) (considering the government's arrest of an ethnically Kurdish citizen of Turkey after his participation in a Kurdish antigovernment demonstration and its detention of him for three days where authorities beat him on the soles of his feet while interrogating him about his participation in several terrorist organizations, and finding that the Turkish government had not persecuted Ozdemir, because the police were merely searching for information on terrorist incidents and organizations).

367. For an introduction to the general right of foreign government's to protect themselves from domestic enemies, *see* Carolyn Patty Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to "Investigate Its Enemies*," 28 WILLAMETTE L. REV. 719, 721 (1992) (arguing that the BIA permits investigations, "often in an arbitrary and brutal fashion, by governments against persons engaged in antigovernment activity," and noting the heightened danger facing such aliens in this particularly incoherent facet of immigration law).

368. *See* Perkovic v. INS, 33 F.3d 615, 622 (6th Cir. 1994) (citing Universal Declaration of Human Rights, *supra* note 30).

369. *Id.*

370. *Id.*

pro-democracy demonstrations leading up to the Tiananmen Square Massacre.[371]

This protection of nonviolent political expression, however, does not shield aliens who have committed ordinary criminal actions. Thus, the government of Bangladesh merely prosecuted and did not persecute one of its citizens for his political beliefs when the government arrested him for participating in a violent demonstration where protestors carried hockey sticks and pipe bombs.[372] Likewise, Indian authorities legitimately arrested an alien for threatening violence to the police when his fellow demonstrators carried signs calling for "death to police officers."[373] Further, courts have denied asylum and withholding to a South African arrested for the arson of his school and his principal's car that occurred during anti-apartheid political strikes,[374] and have held that Israeli authorities did not persecute a Palestinian native of the Israeli-occupied West Bank for his political beliefs when officials detained and interrogated him on two occasions regarding incidents of rock-throwing.[375]

Although prosecution for an alien's peaceful efforts to change her government clearly amounts to political persecution, the result when a state prosecutes an asylum or withholding applicant for trying to change her government through violent means is less apparent. Clearly, prosecution for common crimes is distinct from persecution, but participating in an attempted coup raises an added political dimension, for a coup is an inherently political act.[376] The general rule is that prosecution for attempting to overthrow a

371. Li Wu Lin v. INS, 238 F.3d 239 (3d Cir. 2001); *see also* Hoque v. Ashcroft, 367 F.3d 1190 (9th Cir. 2004); Tuhin v. Ashcroft, 2003 WL 1342995, at *3 (7th Cir. Mar. 18, 2003) (holding that even where a citizen of Bangladesh participated in a protest that erupted into a violent clash with the police, the police's arrest and brutal treatment of the citizen was not legitimate prosecution, but persecution on account of political opinion where he was "repeatedly beaten by Bangladesh police for his activism on behalf of the Jatiya Party").

372. Ahmed v. INS, No. 97-71313, 1999 WL 1048665, at *1 (9th Cir. Nov. 18. 1999).

373. Kapil v. Ashcroft, No. 03-71045, 2004 WL 1098784, at *1 (9th Cir. May 17, 2004); *see also* Mullai v. Ashcroft, 385 F.3d 635, 638-39 (6th Cir. 2004); Shardar v. Ashcroft, 382 F.3d 318, 323-24 (3d Cir. 2004) (upholding immigration judge's ruling that government had not persecuted alien for his political opinions, but rather, he was "legitimately prosecuted for his participation in a violent political demonstration"); Ngure v. Ashcroft, 367 F.3d 975 (8th Cir. 2004) (determining that a Kenyan's prosecution for participation in a Nairobi pro-democracy demonstration-turned-riot was not persecution for political opinion).

374. Nkacoahng v. INS, 83 F.3d 353, 355 (11th Cir. 1996); *see also* Artola-Medal v. INS, No. 95-70006, 1996 WL 290057, at *1 (9th Cir. May 31, 1996) (ruling that the Nicaraguan applicant's prosecution was "consistent with an offense of defacement of government property and did not constitute a basis for finding that [he] was being sought out because of his alleged 'expression of political opinion'").

375. Gheith v. INS, No. 9470162, 1995 WL 555779, at *3 (9th Cir. Sept. 18, 1995).

376. *See* Chanco v. INS, 82 F.3d 298, 301 (9th Cir. 1996).

lawfully constituted government does not equal persecution because governments have an internationally recognized right to defend themselves against rebellious attacks.[377] This rule, however, is inapplicable in countries where a coup is the only avenue for changing the government and where the government punishes those who express opposition.[378] *Dwomoh v. Sava* articulated the widely-adopted rule that protects coup participants under certain circumstances by ruling that a Ghana native's punishment for participating in a coup amounted to political persecution:

> [I]n countries where there is no procedure by which citizens can freely and peacefully change their laws, officials or form of government, and where some individuals who express views critical of the government are arrested and held incommunicado for long periods without due process, a coup attempt is a form of expression of political opinion the prosecution of which can qualify as "persecution" within the statutory definition of "refugee." When a participant in an attempted coup has been beaten or tortured during detention, there is no doubt that he is being persecuted on account of his political opinion.[379]

British authorities would therefore legitimately prosecute a band of disenchanted Londoners for attempting to violently overthrow Parliament while the Iraqi government, during the 1990s, would have persecuted political dissidents for the same behavior in Baghdad. This rationale led the Ninth Circuit to rule that a Filipino's prosecution for participating in a *coup d'etat* was not persecution on account of his political opinion, because the record indicated that the government of the Philippines tolerated diverse political views and that the alien could have lawfully expressed his views "without resort to a violent attempt to overthrow the democratically elected

---

377. *See* Guchshenkov v. Ashcroft, 366 F.3d 554, 559 (7th Cir. 2004) (holding that prosecution for fomenting rebellion or civil war is not persecution within the meaning of asylum law); Perkovic v. INS, 33 F.3d 615, 622 (6th Cir. 1994); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1299 (11th Cir. 1990); Dwomoh v. Sava, 696 F. Supp. 970, 979 (S.D.N.Y. 1988); Griffin, *supra* note 98, at 1134-35 (noting the United States' authority to punish nonviolent treason, and arguing that the "exercise of the same authority by legitimate foreign governments should not be impugned lightly, if indirectly, through our asylum structure").

378. *Dwomoh*, 696 F. Supp. at 979.

379. *Id.* at 979, *followed in Chanco*, 82 F.3d at 302. For a discussion of the *Dwomoh* case, see Griffin, *supra* note 98, at 1135-36, and Michelle N. Lewis, Note, *The Political-Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEO. WASH. L. REV. 585, 601-02 (1995).

government."[380] To determine whether prosecution for a coup attempt amounts to persecution, it is essential to obtain an accurate understanding of the political conditions within a given country when that attempt occurred.[381] In sum, where peaceful and lawful means of protesting the government are available, prosecution for assisting in a *coup d'etat* is no different than prosecution for an ordinary, nonpolitical crime.[382]

### *V. Roadblocks to Refuge: Inconsistent Rules and Unaccountable Immigration Courts*

Although the general framework for distinguishing prosecution from persecution is clear, the jurisprudence concerning this distinction reveals two significant barriers to legitimate claims for refuge. First, asylum and withholding applicants confront the inconsistent application of the human rights exception and the mixed-motive analysis, both of which are crucial in reaching just outcomes. Secondly, aliens fleeing state-imposed persecution must confront the tendency of many immigration courts to inaccurately apply relevant legal principles and the inability of appellate courts to meaningfully review those flawed decisions. As a consequence, even where a government has truly persecuted an alien, the uneven interpretation and application of asylum law may deny that alien protection.

#### *A. Inconsistent Rules*

##### *1. The Human Rights Exception*

As noted above, many circuits adhere to the rule that an asylum applicant's prosecution constitutes persecution when the criminal law the state is enforcing violates internationally accepted human rights principles.[383] Many

380. *Chanco*, 82 F.3d at 302; *see also* Mbaye v. Ashcroft, No. 02-72832, 2003 WL 22977465, at *1 (9th Cir. Dec. 17, 2003) (finding that the Malian government prosecuted and did not persecute a Malian for an imputed political opinion when his father attempted a coup because a "a coup was not the only means of effectuating political change in Mali"); Baguma v. Ashcroft, No. 02-61136, 2003 WL 22770170, at *1 (5th Cir. Nov. 24, 2003) (holding that the punishment of a Ugandan for passing military secrets to rebels was not persecution for his political opinion); Tadeo v. INS, No. 94-70643, 1996 WL 207141, at *1 (9th Cir. Apr. 26, 1996) (concluding that the Philippine government had not persecuted a Filipino for his political beliefs in prosecuting him for attempting to overthrow the Aquino government, where he had the option of "engaging in peaceful dissent and political debate").

381. *Dwomoh*, 696 F. Supp. at 979.

382. *See Chanco*, 82 F.3d at 302 (holding that prosecution for attempting to violently overthrow a duly constituted government does not amount to persecution); Griffin, *supra* note 105, at 1134.

383. *See supra* note 292 and accompanying text.

decisions, however, fail to inquire whether the underlying law comports with global human rights norms, even when the facts warrant such an investigation. For example, in *Saleh v. U.S. Department of Justice*, the Second Circuit denied an alien asylum and deported him to Yemen to face a *sharia* imposed death sentence for committing the crime of manslaughter while in the United States.[384] The *Saleh* court chose not to inquire whether the alien's Yemeni death sentence violated global human rights norms, notwithstanding that international human rights principles preclude capital punishment for mere manslaughter. International human rights norms also dictate that a capital sentence should be carried out only when meaningful due process has been afforded a defendant, as opposed to Saleh's *in absentia* conviction and sentence, which were issued by religious leaders thousands of miles from the crime scene.[385] Likewise, in *Sadeghi v. INS*, the Tenth Circuit deemed legitimate the prosecution of an Iranian high school principal where his crime was counseling a fourteen-year-old boy not to go to war, in spite of the "universally held ideal that children should not be involved in armed combat."[386] Similarly, the Ninth Circuit held that punishment for a soldier's

---

384. Saleh v. U.S. Dep't of Justice, 962 F.2d 234 (2d Cir. 1992). For additional discussion of that holding, see Douglass Hollowell, *1991-92 Survey of International Law in the Second Circuit*, 19 SYRACUSE J. INT'L L. & COM. 93, 140-42 (1993).

385. For an illustration of the human rights concerns the *Saleh* court chose to ignore, see U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Status of the International Covenants on Human Rights: Question of the Death Penalty*, ¶ 24, U.N. Doc. E/CN.4/2003/106 (Jan. 30, 2003), *available at* http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/106/54/pdf/G0310654.pdf?OpenElement. The document states:

> Safeguards guaranteeing protection of the rights of those facing the death penalty . . . establish that: (a) capital punishment may be imposed only for the most serious crimes; . . . (d) capital punishment may be imposed only when the guilt is based upon clear and convincing evidence leaving no room for an alternative explanation of facts; and (e) the death sentence may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, including the right of a defendant to adequate legal assistance; (f) the right to appeal against the death sentence to a court of higher jurisdiction must be granted; (g) the right to seek pardon or commutation of sentence must be granted; (h) capital punishment shall not be carried out pending any appeal or other recourse procedure; and (i) when capital punishment occurs, it shall be carried out so as to inflict minimum suffering.

*Id.*

386. Sadeghi v. INS, 40 F.3d 1139, 1146 (10th Cir. 1994) (Kane, J., dissenting) (citing Colleen C. Maher, Note, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare*, 9 B.C. THIRD WORLD L.J. 297, 300 (1989)); *see also* Isaacs, *supra* note 97, at 733 (noting that Article 38 of the United Nations Convention on the Rights of the Child prohibits the recruiting of children below the age of fifteen into a state's military and that this prohibition has "attained the status of customary

failure to draft underage boys constituted legitimate criminal prosecution.[387] In each of these cases, the court held that a foreign government had not persecuted the alien, notwithstanding the fact that the underlying law the state sought to enforce ran directly counter to global human rights norms.

Another instance of the human rights exception's inconsistent application occurs in the treatment of women. For example, in *Fisher v. INS*, the Ninth Circuit held that the Iranian government's criminal prosecution of a woman for mistakenly exposing a few strands of hair from behind her veil was legitimate prosecution and therefore not grounds for asylum.[388] Although courts addressing such a scenario often note that fundamentalist regimes' gender-specific dress and conduct rules conflict with American views on gender equality, those courts nevertheless follow *Fisher* in denying claims for asylum arising from the imposition of these standards.[389] Many gender-based asylum claims arise from laws in Islamic countries that specifically target women because of their gender,[390] and one decision encountering such a claim illustrates the typical rationale for denying the applicant refuge:

> Abbassi testified that she, like other Iranian women, was arrested several times for not wearing a veil. Because Abbassi presented no evidence that she was disproportionately punished or pretextually prosecuted on account of her religious or political beliefs, or any other prohibited ground, her arrest for dress code violations do not amount to persecution.[391]

---

international law").

387. Padilla-Rocha v. INS, No. 95-70432, 1996 WL 547992, at *1 (9th Cir. Sept. 25, 1996).

388. Fisher v. INS, 79 F.3d 955 (9th Cir. 1996). For additional discussion of the *Fisher* case, see Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L.J. 221, 225-26 (2000); Audrey Macklin, Comment, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 43-44 (1998); Diana Saso, Comment, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263, 303-06 (1997).

389. *See* Najmabadi v. Ashcroft, , No. 03-71311, 2004 WL 1869307 (9th Cir. Aug. 18, 2004); Abbassi v. INS, No. 98-70375, 1999 WL 730365, *1 (9th Cir. Sept. 16, 1999); *Fisher*, 79 F.3d at 961 (stating that, "although enforcement of Iran's dress and conduct rules may seem harsh by Western standards, it does not 'rise to the level of persecution'").

390. Mahsa Aliaskari, Comment, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL'Y & L. 231, 271 (2000) (noting that the "legal and cultural conditions in Iran create the perfect environment for sex-based persecution and oppression"). *See generally* Michael F. Polk, Note, *Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States*, 12 GEO. IMMIGR. L.J. 379 (1998) (making a case for gender-based persecution in Pakistan that is facilitated by laws against extramarital sex).

391. *Abbassi*, 1999 WL 730365, at *1.

Even though the treatment of women in many societies clearly offends global human rights norms,[392] American courts have denied these and other gender-based persecution claims without inquiring as to whether the law in question is contrary to accepted principles of international human rights.[393] Precluded from arguing that their treatment violates human rights norms, female asylum applicants must instead contend that their persecution stems from membership in a disfavored social group. This argument has largely failed,[394] however,

---

392. *See* Musalo, *supra* note 28, at 213 (discussing legal, social and religious values restricting and dictating the status of women in many societies, and noting that a "broad range of penalties may be imposed for failure to comply with these norms, from flogging to stoning to death"); Aliaskari, *supra* note 390, at 271; Teresa Peters, Note, *International Refugee Law the Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 225, 240 (1996) (discussing several instances of egregious gender-based prosecution and concluding, "It is clear that the Islamic treatment of women under the tenets of the Koran is contrary to international human rights norms").

393. *See* cases cited *supra* notes 388-89.

394. *See* Thiele, *supra* note 388, at 229 (noting also that "[t]o date, there has been no case in which sex or gender on its own has been sufficient to establish membership in a particular social group," and arguing that reliance on the social group factor has been ineffective); Aliaskari, *supra* note 390, at 281 (arguing that the BIA's constricted "interpretation of a particular social group does not allow women who encounter violence to make successful claims"); Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 250 (2002) (noting that in gender-based claims of persecution, the narrow definition of "'social group' . . . persists as a barrier to women"); Saso, *supra* note 388, at 307 (discussing the BIA and the federal courts' "reluctance to construct broad social groups which could accommodate 'too many' asylum applicants"); *see also* Polk, *supra* note 390, at 379 (observing that women refugees fleeing violence generally seek asylum under persecution claims based on membership in a persecuted social group, and arguing that women persecuted under Islamic law should also argue that they have been persecuted on account of religion). One successful argument brought by women asylum-seekers proceeding under the social group theory is that certain victims or potential victims of female genital mutilation deserve protection based on their membership in a persecuted social group. *See* Eva N. Juncker, Comment, *A Juxtaposition of U.S. Asylum Grants to Women Fleeing Female Genital Mutilation and to Gays and Lesbians Fleeing Physical Harm: The Need to Promulgate an INS Regulation for Women Fleeing Female Genital Mutilation*, 4 J. INT'L LEGAL STUD. 253, 258 (1998) (discussing five asylum grants based on female genital mutilation (FGM) and noting that each was based on the victim's membership in a particular social group). One such case was *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996), where the court found that the alien, who feared being forced to submit to a FGM, was a member of a protected social group consisting of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Id.* at 365. Significantly, the court hinted at the human rights exception in noting that female genital mutilation amounted to persecution in part because the international community had condemned the practice. *Id.*; *see also* Fitzpatrick, *supra* note 295, at 17. Beyond FGM, however, gender-based persecution claims have not been successful.

because the gender-specific laws at issue are "generally applicable" to all women within a given country.[395] Denying asylum to women facing society-wide persecution for this reason is paradoxical in that "[c]oncern over the size of the group sharing the protected characteristic has generally not been a barrier for persons persecuted on account of their race or religion."[396]

Thus, the absence of a human rights inquiry coupled with the unavailability of the disfavored social group argument when gender-based persecution occurs on a mass scale means that courts often deny persecuted women asylum and withholding.[397] As a result, many criticize U.S. immigration law for failing to provide adequate protection for female refugees.[398] This

395. *See* Sharif v. INS, 87 F.3d 932, 935 (7th Cir. 1996) (denying an asylum claim where the female applicant feared persecution under Iranian laws that limited the rights and freedoms of women and subjected them to draconian punishment for violation because "punishment which results from violating a country's laws of general applicability, absent some showing that the punishment is being administered for a nefarious purpose," does not constitute persecution); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), *as recognized in* Rife v. Ashcroft, 374 F.3d 606 (8th Cir. 2004); Fatin v. INS, 12 F.3d 1233, 1243 n.12 (3d Cir. 1993) (denying an Iranian woman asylum because she "had not shown that she and the other members of her group would be persecuted but only that they would be subjected to the same restrictions and regulations applicable to the Iranian population in general" (internal quotation marks omitted)); Thiele, *supra* note 388, at 237 (arguing that claims of persecution based on membership in a particular social group have been ineffective, especially "where women come from countries and societies in which they are persecuted generally," because female applicants are required to distinguish their persecution as being greater than the average women in the particular country); Aliaskari, *supra* note 390, at 254 n.145.

396. Condon, *supra* note 394, at 252.

397. *See* Najmabadi v. Ashcroft, No. 03-71311, 2004 WL 1869307 (9th Cir. Aug. 18, 2004); Abbassi v. INS, No. 98-70375, 1999 WL 730365 (9th Cir. Sept. 16, 1999); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996).

398. *See* Thiele, *supra* note 388, at 221 (maintaining that U.S. immigration law has "failed to establish an adequate framework within which to address the unique problems of refugee women"); Aliaskari, *supra* note 390, at 281; Macklin, *supra* note 388, at 27-28 (arguing that the architects of asylum law "have erected various obstacles to recognizing the validity of gender-related refugee claims," and criticizing immigration courts whose decisions require "a special effort of will *not* to apply existing principles to the situation of women"); Saso, *supra* note 388, at 265 (noting that asylum advocates have constantly tried to expose "the plight of refugee women by highlighting the inconsistencies in the case law and the uncertainty inherent in presenting asylum claims based on gender-related persecution"); Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1564 (2001) (finding that asylum applications based on gender-related persecution "continue[] to face difficulty before immigration tribunals," and arguing that female persecution victims "have been unable to overcome the cultural stereotypes and gender inequities that pervade asylum law").

situation has also led many to argue that the United States should add gender to the five enumerated factors currently providing the basis for asylum and withholding claims in order to adequately protect aliens who are persecuted on account of their sex.[399] These calls for legislative action found congressional support in 1996, when Congress modified the definition of "refugee" to include forced sterilization and coerced family planning as part of political persecution,[400] thereby setting a precedent for statutorily expanding asylum and withholding protections to encompass gender-based persecution. Another argument supporting the addition of a sixth gender category to the five enumerated grounds of protection is that gender is as unchangeable a characteristic as race, and the severity of gender-based persecution is often equal to or greater than other forms of persecution currently enjoying the protection of U.S. asylum law.

In addition to legislatively expanding asylum law, placing greater emphasis on whether the persecutor has violated global human rights standards could further protect female persecution victims.[401] Such a focus seems particularly appropriate in light of the emerging recognition that women's rights are human rights.[402] More broadly, international human rights norms should inform all asylum and withholding adjudications,[403] especially where an alien's persecution arises from state prosecution.[404] A greater emphasis on

399. *See* Thiele, *supra* note 388, at 237 (noting that "the omission of a gender category has resulted in a lack of protection for many women fleeing persecution"); Condon, *supra* note 394, at 248-56 ("Congress should act to honor the United States' international obligation to protect all refugees by amending the asylum statute."); Marian Kennady, Note, *Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?*, 12 FLA. J. INT'L L. 317 (1998); Todd Stewart Schenk, Note, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee*," 2 IND. J. GLOBAL LEGAL STUD. 301 (1994).

400. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, sec. 601(a)(1), § 101(a)(42), 110 Stat. 3009-546, 3009-689 (codified at 8 U.S.C. § 1101(a)(42) (2000)); *see also* Condon, *supra* note 394, at 254. *See generally* Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881 (2000).

401. *See* Aliaskari, *supra* note 390, at 281 (arguing that courts should use the principle of equality in Article 7 of the Universal Declaration of Human Rights to more effectively protect women refugees); Peters, *supra* note 392, at 226, 245, 250 (noting that international law adequately protects women from gender-based persecution but that the United States has ignored its obligations to these global norms, and concluding that America cannot reconcile a foreign policy that condemns persecution of women with "an immigration policy that rebukes efforts of those able to escape to gain admission and refugee status in the U.S. territory").

402. Thiele, *supra* note 388, at 221.

403. *See supra* note 295 and accompanying text.

404. *See* Fitzpatrick, *supra* note 295, at 15-16 (stating that U.S. courts often incorrectly decide asylum claims because they fail to consider basic principles of human rights, and arguing

these global norms would fulfill Congress's clear intent that the Refugee Act give "statutory meaning to our national commitment to human rights and humanitarian concerns . . . ."[405] Unfortunately, immigration and appellate courts have largely failed to meet this expectation by refusing to meaningfully apply global human rights standards,[406] and cases like *Fisher* and *Sadeghi* demonstrate that within the persecution/prosecution distinction, courts have narrowly and inconsistently applied the rule that a state cannot legitimately prosecute an alien for violating a law that is contrary to international human rights norms. Therefore, examining the "internationally unlawful character" of the prosecution in question would achieve results more consistent with the principles of refugee protection and would more fully comport with the humanitarian spirit animating the Refugee Act.[407]

*2. The Mixed-Motive Analysis*

The mixed-motive analysis is a second component of the prosecution/persecution distinction that has received disparate treatment among the circuits. As previously noted, many courts hold that an asylum or withholding applicant does not have to prove that her persecution resulted entirely from the government's improper motivation. Rather, demonstrating that the mistreatment resulted in part from one of the protected characteristics is sufficient.[408] Although this rule's application is critical for a just outcome, circuits often fail to apply the mixed-motive analysis, as demonstrated in *Adam v. Gonzalez*.[409]

In *Adam*, the citizens of the Mexican city of Reynosa, in the state of Tamaulipas, elected Higareda Adam, who was allied with two prominent

---

that this failure is particularly "acute where the distinction between legitimate prosecution for unlawful acts and retaliatory persecution on political or other grounds is at issue"); Isaacs, *supra* note 97, at 732 (noting that international law can facilitate distinguishing between legitimate prosecution and persecution under U.S. asylum law).

405. *See supra* notes 292, 296 and accompanying text.

406. *See* Adell, *supra* note 36, at 791 (noting the "failure of the United States judiciary and immigration administrative agencies to meaningfully apply international human rights law," which is not justified by policy considerations).

407. Fitzpatrick, *supra* note 295, at 20; Adell, *supra* note 36, at 798; *see also* Davis & Atchue, *supra* note 2, at 120 (stating that the legislative intent behind U.S. asylum laws was to protect "internationally recognized human rights and humanitarian concerns," and arguing that until courts "uphold the human rights purpose of the asylum statute . . . there will be no safe haven for refugees in America"); Kristine M. Fox, Comment, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 121 (1994).

408. *See supra* notes 237-50 and accompanying text.

409. No. 04-60080, 2005 WL 3178205 (5th Cir. Nov. 29, 2005).

political opponents of governor-elect Thomas Yarrington, as mayor in 1998.[410] Shortly after taking office, Yarrington informed Adam that he would "screw" him because of Adam's earlier opposition to Yarrington's candidacy,[411] and around this time, Adam implemented several measures Yarrington opposed, including efforts to combat drug trafficking.[412] One month after Yarrington threatened to "screw" Adam, Yarrington ordered an audit of a state agency overseen by Adam, and the audit quickly resulted in criminal charges against Adam, alleging embezzlement, abuse of authority, and falsification of documents. Yarrington supporters soon arrested Adam, removed him as mayor and replaced him with a Yarrington supporter.[413] In his asylum application, Adam argued that the government was politically motivated in bringing charges against him, and because his political opponents were still in power, he would be at great risk of arrest, torture, and death if returned to Mexico.[414] Human rights organizations testifying on Adam's behalf confirmed these apprehensions.[415]

Confronted with these facts, the Ninth and Third Circuits would have likely applied the mixed-motive analysis in determining Adam eligible for asylum or withholding, because the Yarrington-controlled government's prosecution of Adam seemed to stem, at least partially, from his political opinion.[416] The Fifth Circuit, however, affirmed the immigration judge's finding that Adam merely wished to avoid legitimate criminal prosecution instead of political persecution.[417] Although noting that "criminal prosecution can equate with persecution" where "the prosecution is motivated by one of the enumerated factors,"[418] the court failed to inquire whether political opposition to Yarrington partly motivated Adam's prosecution where such a motive seemed plausible, if not apparent.[419] By holding that Adam did not flee political

410. *Id.* at *1.
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *See* cases cited *supra* notes 242-49.
417. *Adam*, 2005 WL 3178205, at *3.
418. *Id.*
419. *Id.* The *Adam* court's refusal to apply the mixed-motive analysis is curious in light of other Fifth Circuit precedent explicitly adopting that approach. *See* Li v. Gonzales, 420 F.3d 500, 509 (5th Cir. 2005) ("The federal courts and the BIA have also recognized that an alien may demonstrate that a persecutor's actions were on account of a protected characteristic even if the persecutor had mixed motivations; a persecutor does not have to be motivated solely by the victim's possession of a protected characteristic." (citing Girma v. INS, 283 F.3d 664, 667-68 (5th Cir. 2002)).

persecution, "but rather appears to be fleeing from criminal prosecution,"[420] the Fifth Circuit adopted a narrow application of the pretextual motive exception and refused to consider the mixed-motive analysis, even though the facts suggested it was warranted.

*Sadeghi v. INS* mirrors *Adam* in that the Tenth Circuit also failed to apply the mixed-motive analysis when the facts arguably supported such an inquiry.[421] Ebrahim Sadeghi was an Iranian high school principal and political dissident.[422] One day, Hassan, a fourteen-year-old student, told Sadeghi that he would soon be going off to fight in the Iraqi war in order to become "a martyr for God," but Sadeghi pleaded with Hassan not to go.[423] Sadeghi later surmised that Hassan had reported this conversation to the Iranian authorities, because shortly thereafter, a group of armed national guards "came to the school looking for" Sadeghi, while telling others that they would arrest Sadeghi for his opposition to "the government and the Islamic revolution."[424] Sadeghi escaped from the school through a side door, and without returning home, managed to obtain an exit permit.[425] He eventually made his way to the United States and applied for asylum, claiming that the Iranian government would arrest, torture, and kill him if he returned to Iran.[426]

Although Sadeghi presented evidence that Iranians fleeing their country because of antigovernment activities face imprisonment or death if returned to Iran, the immigration judge and the Board of Immigration Appeals ordered immigration officials to deport Sadeghi back to Iran, reasoning that he merely feared prosecution, rather than political persecution, for opposing Hassan's military service.[427] On appeal, the Tenth Circuit affirmed, recognizing that although the INS had not demonstrated the existence of an actual law criminalizing Sadegui's counseling of Hassan, there was "a reasonable inference that Iran had laws which would punish interference with its wartime efforts."[428] The court then stated the general rule that prosecution for illegal activities is a legitimate government act and not persecution.[429] The Tenth Circuit ended its analysis without discussing the possibility that the Iranian

420. *Adam*, 2005 WL 3178205, at *3.

421. Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994). For additional analyses of the *Sadeghi* case, see Isaacs, *supra* note 97, and Kathleen M. Kelly, Tenth Circuit Survey, *Immigration Law*, 73 DENV. U. L. REV. 787, 798 (1996).

422. *Sadeghi*, 40 F.3d at 1141.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 1141-42.

428. *Id.* at 1143.

429. *Id.*

government had targeted Sadeghi at least partially for his antigovernment beliefs, rather than solely for violating a neutral law that prohibited counseling minors not to join the army.[430] In contrast, other circuits would likely have discussed, if not applied, the mixed-motive framework on analogous facts.[431]

Significantly, *Adam* and *Sadegui* are emblematic of a broader reluctance of courts to apply the mixed-motive analysis.[432] By refusing to adopt this

---

430. The *Sadeghi* court held that the applicant bore the burden of disproving the existence of the underlying law that was the basis of the purportedly criminal offense, *id.* at 1143, although the dissenting opinion argued that this burden was improperly placed on the applicant, instead of the INS, which had produced no evidence that the applicant had ever violated an Iranian law, *see* id. at 1145-46 (Kane, J., dissenting).

431. *See supra* notes 239-50 and accompanying text.

432. *See* Kroi v. U.S. Attorney Gen., No. 04-12709, 2005 WL 1523509, at *4-5 (11th Cir. Jun. 29, 2005); Shardar v. Ashcroft, 382 F.3d 318 (3d Cir. 2004); Attal v. INS, No. 95-9514, 1996 WL 91929, at *1 (10th Cir. Mar. 4, 1996); Ozdemir v. INS, 46 F.3d 6 (5th Cir. 1994); Kyambadde v. INS, No. 91-9505, 1992 WL 158087, at *3 (11th Cir. July 6, 1992). In *Shardar* case, the Third Circuit ignored the mixed-motive analysis by holding that the government of Bangladesh "legitimately prosecuted" a political dissident when it arrested him after a violent demonstration and detained him in jail, beat him and kicked him in the face, and forced him to falsely confess that he illegally possessed weapons and explosives, all the while shouting that the alien's political party leader's "time is over. . . . Now is, is [Bangladesh Nationalist Party] time." *Sharder*, 382 F.3d at 320. Nevertheless, the court refused to deem the alien's experience persecution, *id.* at 325, even though the alien's political opinions were clearly a driving motive behind the police's brutality. In *Attal*, Jordanian security forces beat and tortured a Palestinian for eight hours in what the court described as a legitimate attempt to "gain Attal's cooperation in obtaining information regarding the PLO activities of Attal's brother and others in Syria." *Attal*, 1996 WL 91929, at *1. The court refused to entertain the likely possibility that at least part of the government's motivation in torturing the alien arose from the suspicion that he shared his brother's sympathy with the Palestinian Liberation Organization. *Id.* Further, the alien was later involved in a car accident with an army vehicle, where the police verbally harassed the alien for being a Palestinian and detained him for five days after he engaged in a "diatribe against the Jordanian government." *Id.* at *2, *4. This treatment, and the probable prison sentence resulting from it, were deemed legitimate state activity, *id.* at *3-4, even though it was clear that the Palestinian's ethnicity and political opinions triggered the excessively harsh treatment for a mere automobile accident. In *Ozdemir*, the Fifth Circuit ignored the superfluous mixed-motive analysis in finding that the Turkish police's interrogation, three-day detention, and torture of an alien did not constitute grounds for asylum or withholding, as "the police interrogated Ozdemir because they were seeking information on terrorist organizations," even where it seemed undeniable that the police suspected the alien of sympathizing with the terrorist groups. *Ozdemir*, 46 F.3d at 8. Thus, the Fifth Circuit ignored the clear implication that the alien was tortured because of imputed political opinion. In *Kyambadde*, coup plotters abducted a Ugandan government employee who opposed the coup on the day the coup seized control of the government, and the employee was never heard from again. *Kyambadde*, 1992 WL 158087, at *1. Although this might seem a clear instance of a politically-motivated kidnaping and murder, the Tenth Circuit held that this apparent summary execution of a political opponent did not amount to persecution because it might possibly be viewed as a legitimate "prosecution" of

approach, courts implicitly require an alien to show that the allegedly invidious prosecution resulted solely from an improper motive.[433] Requiring an asylum applicant to demonstrate such "pure" persecution, however, is at best problematic, because persecutors act from a variety of motives, and rarely from a single impermissible purpose.[434] By not applying the mixed-motive analysis, U.S. immigration courts have at times denied asylum to aliens "who had the misfortune of suffering under an unfocused persecutor. Instead, the humanitarian purpose of the Refugee Act compels granting relief if persecution has at least partial links to the enumerated ground."[435] The refusal to apply the mixed-motive analysis means that two asylum applicants with identical stories of state-imposed persecution could possibly face two divergent futures, depending on which court happens to consider their claim.[436] Without a uniform application of the mixed-motive doctrine, courts differentiating between persecution and prosecution will continue to reach inconsistent results that contradict the humanitarian values animating the

---

one suspected of "engaging in past abuse of power." *Id.* at *3. Instead of applying the mixed-motive analysis to hold that the murder of the political opponent was persecution if it resulted in part from a political motive, the court suggested that such a politically-motivated, extra-judicial kidnaping and assassination could not be persecution, because it might have resulted in part from a legitimate motive. *Id.* This logic would bar even the most meritorious asylum and withholding claims. These cases are inconsistent with other decisions applying the more generous mixed-motive analysis. *See, e.g.*, Thangaraja v. Gonzales, 428 F.3d 870 (9th Cir. 2005); Ratnam v. INS, 154 F.3d 990, 993 (9th Cir. 1998); Singh v. Ilchert, 69 F.3d 375 (9th Cir. 1995); Rajaratnam v. Moyer, 832 F. Supp. 1219, 1222 (N.D. Ill. 1993); Singh v. Ilchert, 801 F. Supp. 313 (N.D. Cal. 1992).

433. *See* Adam v. Gonzales, No. 04-60080, 2005 WL 3178205 (5th Cir. 2005).

434. *See* Adarkar, *supra* note 53, at 219-20 ("The concept of a discrete unitary motive underlying each human action is a fiction."); Hall, *supra* note 27, at 111.

435. Hall, *supra* note 27, at 112; *see also* Foster, *supra* note 83, at 340 (contending that the broad humanitarian underpinnings of asylum law require that any nexus or "on account" test requiring the enumerated ground to be the only cause for fear of persecution should be rejected, and arguing that a mixed-motive approach is "the most appropriate method of fulfilling the aims and objectives of the [Refugee] Convention and of ensuring its contemporary relevance.").

436. *See* Isaacs, *supra* note 97, at 742 (noting that the inconsistent standards for establishing persecution "turns the asylum process into a game of venue roulette, where the interpretation of federal law depends on the circuit in which the asylum claim is heard"); Robert C. Leitner, Comment, *A Flawed System Exposed: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. MIAMI L. REV. 679, 681 (2004) (discussing how courts of appeals have "marked out strikingly different positions on aspects of immigration law," and arguing that "the outcome of an alien's case should not depend on his or her location in the country"). This heterogeneity among circuits in matters of immigration law stems largely from the U.S. Supreme Court's decision to consider relatively few cases in that area. *See* Isaacs, *supra* note 97, at 742 (arguing that the U.S. Supreme Court should provide more "illumination to the asylum standards in order to live up to our national and international obligations under the 1980 Refugee Act and the U.N. Protocol"); Leitner, *supra*.

Refugee Act's enactment and the generous construction Congress intended that Act to receive.[437]

*B. Unaccountable Immigration Courts*

In addition to the preceding barriers, victims of government-imposed persecution confront a second obstacle in the insufficient and incorrect analyses many immigration courts perform and in the diminished ability appellate courts have to correct these errors. First, immigration judges and the BIA frequently fail to properly apply relevant legal principles in asylum or withholding claims premised on state-imposed persecution. For example, in *Tuhin v. Ashcroft*, the Bangladesh police arrested Azim Tuhin during a political demonstration,[438] and then kicked him and hit him with batons before taking him to jail, where they repeatedly beat him while warning him to cease his political activism in the minority Jatiya Party.[439] The following day, authorities charged Tuhin with violating Bangladesh's Special Powers Act and Anti-Terrorism Act.[440] He spent the next month incarcerated, where officers beat him between seven and ten times and demanded that he renounce his loyalty to the Jatiya Party.[441] An American immigration judge denied Tuhin asylum and withholding, even though it seemed apparent that the government of Bangladesh had persecuted him for his political opinions.[442] Fortunately, the Seventh Circuit reversed, making clear that the immigration judge's legal conclusion that Tuhin had fled prosecution and not persecution "was based on a fundamental misunderstanding of the law" that "misses the entire point of Tuhin's asylum claim."[443] Further, the appellate court noted that the immigration judge "did not address any" of the evidence showing that the Bangladeshi laws Tuhin allegedly violated were commonly used to punish political minorities for such minor offenses as obstructing traffic, with sentences ranging from five years to death, "focusing instead solely on the facial legitimacy of the charges."[444]

The immigration judge's incomplete analysis and incorrect application of the law in *Tuhin* reflects a broader phenomenon within immigration law of lower level agency adjudicators issuing rulings that fail to properly apply legal

437. *See* Musalo, *supra* note 29, at 1194-95; Adarkar, *supra* note 53, at 207-08, 219; Hall, *supra* note 27, at 111.

438. Tuhin v. Ashcroft, No 02-2661, 2003 WL 1342995, at *4 (7th Cir. Mar. 18, 2003).

439. *Id.* at *1.

440. *Id.*

441. *Id*.

442. *Id.* at *2.

443. *Id.* at *3-4.

444. *Id.* at *4.

principles governing the persecution/prosecution distinction set forth by the courts of appeals. Moreover, the Board of Immigration Appeals often summarily affirms these incorrect rulings without sufficient analysis, which the circuit courts have found particularly frustrating.[445] Circuit courts often express their frustration in unusually strong language, criticizing immigration judges and the BIA for their faulty analyses. For example, the Third Circuit chastised an immigration judge for issuing a "delphic oral opinion" in denying an asylum claim,[446] while the Seventh Circuit criticized the BIA for its "scanty, illogical, and apparently ill-informed analysis of the record."[447] That circuit evaluated another immigration judge's decision by concluding, "[t]here is very deep confusion here."[448] Similarly, the Ninth Circuit granted asylum to a Cuban facing political persecution by overruling an immigration judge's "Kafka-esque decision,"[449] and overturned another BIA decision that had an "infirm legal basis."[450] This criticism is atypically harsh in a judicial climate tending toward subdued criticism of lower courts.

Although these critiques describe improper denials of asylum claims based on state-imposed persecution, they reveal a growing trend of circuit courts employing intensely disparaging language to describe the inadequate analyses and often unprofessional behavior characterizing adjudications in all types of asylum claims. For instance, the Third Circuit has lamented that it must constantly "caution[] immigration judges against making intemperate or humiliating remarks during immigration proceedings,"[451] and has noted that

445. *See* Thangaraja v. Gonzales, 428 F.3d 870, 875 (9th Cir. 2005) (stating that the immigration judge and the affirming BIA reached a decision that "ran squarely counter to our precedent"); Singh v. INS, No. 00-70296, 2002 WL 1033562, at *1 (9th Cir. May 22, 2002); Bandari v. INS, 227 F.3d 1160, 1168 (9th Cir. 2000) ("The police in this case beat Bandari repeatedly and daily demanded his confession to a crime he did not commit because they found him embracing a Muslim woman. No reasonable factfinder could conclude that the CPM's treatment of Bandari did not constitute persecution."); Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) ("The BIA failed to discuss, let alone attempt to distinguish, contrary Ninth Circuit authority holding that extra-judicial punishment of suspected anti-government guerrillas can constitute persecution on account of imputed political opinion.").

446. Chang v. INS, 119 F.3d 1055, 1058 (3d Cir. 1997).

447. Bastanipour v. INS, 980 F.2d 1129, 1133 (7th Cir. 1992).

448. Guchshenkov v. Ashcroft, 366 F.3d 554, 559 (7th Cir. 2004).

449. Rodriguez-Roman v. INS, 98 F.3d 416, 420 (9th Cir. 1996).

450. Kaur v. INS, No. 00-70198, 12 2001 WL 724955, at *1 (9th Cir. June 27, 2001).

451. Wang v. Attorney Gen. of the United States, 423 F.3d 260, 267 (3d Cir. 2005). The Third Circuit panel further observed in Wang's case that "[t]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding," and ultimately granted the petition for review on the grounds that "the [immigration judge]'s conduct so tainted the proceedings below that we cannot be confident that Wang was afforded the opportunity fully to develop the factual

"[a] disturbing pattern of [immigration judge] misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns."[452] Similarly, appellate judges from the Sixth Circuit have recognized that "horror stories persist of nasty, arrogant, and condescending immigration courts,"[453] and that such poor immigration court decision making is unacceptable because "[a] nation so concerned with freedom and liberty ought to accord a little more respect and dignity to those who seek from us that which we claim to be so proud to offer."[454] Further, another Sixth Circuit judge expressed the frustration running throughout many circuit court decisions over the inadequate performance of some immigration judges:

> Although I am sympathetic with the difficulties faced by immigration courts and its caseload, it should be responsible for providing a complete and accurate determination on asylum claims. Let us not forget the impact of these hearings on the lives of the individuals involved. The least we can ask of the immigration court is to provide a thorough and complete analysis for its determination beyond identifying minor inconsistencies, cultural differences, or language barriers.[455]

Echoing these concerns, the Court of Appeals for the Seventh Circuit has declared that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[456] Elsewhere, that circuit has found an immigration judge's factual conclusion "totally unsupported by the record,"[457] and in another case, the immigration judge's unexplained decision was "hard to take seriously."[458] Additionally, in *Dawoud v. Gonzales*, the Court of Appeals for the Seventh Circuit determined that "[t]he [immigration judge]'s opinion was riddled with inappropriate and extraneous comments,"[459] and in *Sosnovskaia v. Gonzales*, the same appellate court concluded that "[t]he procedure that the [immigration judge] employed

---

predicates of his claim." *Id*. at 269, 271.

452. *Id*. at 268.

453. Rexha v. Gonzales, No. 04-3700, 2006 WL 229796, at *5 n.3 (6th Cir. Jan. 31, 2006) (citing Sukwanputra v. Gonzales, 434 F.3d 627 (3d Cir. 2006)).

454. N'Diom v. Gonzales, 442 F.3d 494, 502 (6th Cir. 2006).

455. Metko v. Gonzales, No. 04-3881, 2005 WL 3420046, at *4 (6th Cir. Dec. 14, 2005) (Martin, J. concurring) (citation omitted).

456. Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

457. Soumahoro v. Gonzales, 415 F.3d 732, 738 (7th Cir. 2005).

458. Grupee v. Gonzales, 400 F.3d 1026, 1028 (7th Cir. 2005).

459. Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005).

in this case is an affront to [the asylum seeker's] right to be heard."[460] These excerpts are not isolated opinions, but instead represent a widespread conviction among federal appellate judges that immigration judges frequently fail to give asylum seekers a fair hearing.[461] Attorney General Alberto Gonzales has echoed the federal judiciary's conclusion that a great many immigration judges are "woefully inadequate,"[462] acknowledging that "there are some [immigration courts] whose conduct can aptly be described as intemperate or even abusive and whose work must improve."[463]

Academic and judicial criticism of immigration judges, as well as the BIA,[464] has "grown particularly severe" in recent years,[465] and has contributed

460. Sosnovskaia v. Gonzales, 421 F.3d 589, 594 (7th Cir. 2005).

461. *See, e.g., Benslimane*, 430 F.3d 828. In *Benslimane*, Judge Posner cites many cases outside Seventh Circuit jurisprudence which have been extremely critical of immigration judges. *Id*. at 829 (citing Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (stating that the immigration judge's finding is "grounded solely on speculation and conjecture"); Fiadjoe v. Attorney Gen. of the United States, 411 F.3d 135, 154-55 (3d Cir. 2005) (concluding that the immigration judge's "hostile" and "extraordinarily abusive" conduct toward the petitioner "by itself would require a rejection of his credibility finding"); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) (stating that "the [immigration judge]'s assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias and conjecture"); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) (remarking that "it is the [immigration judge]'s conclusion, not [the asylum applicant's] testimony, that 'strains credulity'")). For further examples of circuit courts of appeals' decisions expressing extreme frustration and disapproval of the immigration courts and the BIA, see *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560-61 (7th Cir. 2004) (Evans, J., concurring) ("[I]n failing to find substantial evidence in the record sufficient to affirm the decisions of the immigration judges, we have made disparaging comments about the quality of their work: The immigration judge 'took over the questioning so that in the end the judge, rather than the attorney, had elicited whatever testimony [the petitioner] was able to give.' The immigration judge 'made up his mind about the case and was subsequently unwilling to listen . . . .' 'There is a gaping hole in the reasoning of the . . . immigration judge.' These cases show 'a pattern of serious misapplications by the . . . immigration judges of elementary principles of adjudication.' The immigration judge's 'analysis was so inadequate as to raise questions of adjudicative competence.' The immigration judge 'ignored the evidence.' The immigration judge's analysis of the evidence 'was woefully inadequate.' The immigration judge displayed an 'astounding lapse of logic.' The immigration judge's opinion 'is riven with errors . . . .'" (omissions and second alteration in original)), and Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at 1.

462. *Guchshenkov*, 366 F.3d at 560-61 (Evans, J., concurring).

463. N'Diom v. Gonzales, 442 F.3d 494, 501-02 (6th Cir. 2006). Further, in addressing the immigration judges Gonzalez continued: "I urge you always to bear in mind the significance of your cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve." *Id*.

464. For a typical illustration of harsh appellate court criticism of the BIA, consider

to the sense that there are "vast disparities in grants of asylum," and that the outcome of an asylum adjudication has less to do with the merits of the application than with the identity of the particular immigration judge deciding the case.[466] The harsh language scholars and circuit judges have employed to describe the poor quality of asylum adjudications demonstrates that immigration judges and the BIA often reach incorrect outcomes and employ unfair proceedings in evaluating asylum claims. Nevertheless, recent procedural changes have, instead of addressing this problem, increased the likelihood that immigration judges will return true victims of state-imposed persecution to their home governments.[467]

In 2002, the Department of Justice announced several major changes to the BIA's structure and procedure known as the "Procedural Reforms to Improve Case Management,"[468] and these reforms have greatly "augment[ed] the discretion of immigration judges, by significantly limiting the ability of the

---

*Benslimane v. Gonzales*, 430 F.3d 828, in which the Seventh Circuit vacated a BIA order removing an asylum seeker to his come country. In that case, Judge Posner called the BIA's order, "completly arbitrary," *id*. at 833, and also noted the extraordinary rate at which his circuit reversed and remanded BIA decisions:

> In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent.

*Id.* at 829. He then noted that the Seventh Circuit Court of Appeals has used language that has "frequently been severe" in faulting the BIA for "fall[ing] below the minimum standards of legal justice." *Id.* at 829-30 (citing Ssali v. Gonzalez, 424 F.3d 556, 563 (7th Cir. 2005) (noting that "this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); Kourski v. Ashcroft, 355 F.3d 1038, 1039 (7th Cir. 2004) (finding that "[t]here is a gaping hole in the reasoning of the board and the immigration judge"); Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2003) (remarking caustically that "[t]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases")).

465. Aaron Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the Real ID Act*, 106 COLUM. L. REV. 1367, 1408 (2006).

466. *Id.* ("[A] recent study examining thousands of asylum decisions from 1994 to early 2005 found vast disparities in grants of asylum depending on the particular immigration judge and the applicant's country of origin." (citing Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15 (describing this study and quoting one commentator as stating that the study belies the government's "commitment to providing a uniform application of the nation's immigration laws in all cases"))); *see also infra* note 485 and accompanying text.

467. *See* Burkhardt, *supra* note 6, at 41.

468. The Department of Justice Published the Final Rule restructuring the BIA on August 26, 2002. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3 (2003)).

BIA to review their findings."[469] Prior to 2002, the BIA had issued written opinions "in the vast majority of appeals" from immigration judges,[470] but the Procedural Reforms directed the BIA to dispose of the majority of these appeals without issuing a written opinion.[471] Some feel that this change diminishes immigration judges' incentive to comprehensively engage an asylum seeker's claim with a rigorous legal analysis,[472] in addition to obscuring "the reasoning underpinning Board decisions, making it more difficult for appellate courts to review those decisions."[473] Further, the reforms of 2002 provided that single members of the BIA must dispose of appeals from immigration judges.[474] Critics charge, however, that single-member BIA decisions, when coupled with the "elimination of written

469. Shanyn Gillispie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of* In Re R-A-, 71 GEO. WASH. L. REV. 131, 136 (2003).

470. Burkhardt, *supra* note 6, at 75.

471. 8 C.F.R. § 3.1(e)(4) (2003); *see also* Burkhardt, *supra* note 6, at 49-50.

472. Burkhardt, *supra* note 6, at 75-76. Further, under the 2002 regulations, when the BIA affirms without a written opinion, it does not incorporate the immigration judge's reasoning, instead only affirming the result. *See* 8 C.F.R. § 3.1(e)(4)(ii); *see also* John Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 644 (2004).

473. Burkhardt, *supra* note 6, at 76. Burkhardt relied here on the reasoning of the First Circuit Court of Appeals:

> "[T]he very nature of the one-line affirmance may mean that BIA members are not in fact engaged in the review required by regulation and [appellate] courts will not be able to tell. Immigration decisions, especially in asylum cases, may have life or death consequences, and so the costs of error are very high."

*Id.* at 94 (quoting Albathani v. INS, 318 F.3d 365, 377 (1st Cir. 2003)). Burkhardt offers an excellent analysis of the problems associated with single BIA member one-line affirmance of immigration judges, and notes that BIA members frequently issue up to fifty decisions per day, or over one every ten minutes assuming a nine-hour work day. *Id.* (citing Georgis v. Ashcroft, 328 F.3d 962, 970 (7th Cir. 2003); *Albathani*, 318 F.3d at 378); *see also* Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1, *cited in* N'Diom v. Gonzales, 442 F.3d 494, 501 n.1 (6th Cir. 2006) ("The article discusses the speedy rate at which the Board of Immigration Appeals decides cases and describes how two Board members each decide more than fifty cases on one day. This means that if the Board members worked a 9 hour day without any breaks for the restroom, lunch, or otherwise, each case received approximately ten minutes of attention despite the fact that ordinarily, immigration cases produce records in the hundreds of pages, and that many of those seeking relief allege that they will be tortured or killed if deported.").

474. 8 C.F.R. § 3.1(e) (2003); *see also* Gillispie, *supra* note 469, at 136. However, a three-member panel of the BIA members is used in a few narrow categories. 8 C.F.R. § 3.1(e)(6) (2003).

opinions in the vast majority of cases, radically decreases both the number and thoughtfulness of viewpoints brought to bear on any give case."[475]

Perhaps more significantly, the 2002 Procedural Reforms altered the Board of Immigration Appeals' standard for reviewing asylum determinations at the immigration judge level.[476] Where the BIA previously conducted a de novo review of the immigration courts' findings of fact and credibility,[477] the reforms dictate that it now must evaluate "whether the findings of the immigration judge [were] clearly erroneous."[478] Opponents contend that substituting the "clear error" standard for de novo review "will increase the propensity of [immigration judges] to decide cases in accordance with their subconscious ideological predilections."[479] Moreover, critics make contentions like the following:

> The Procedural Reforms pose the risk that some IJs, knowing that their decisions are immune to review unless they have made an error and that error is "clear," may take less care in making thoughtful decisions based on a thorough examination of the facts, particularly in light of increasing caseloads and pressure to resolve cases promptly.[480]

These and other aspects of the 2002 Procedural Reforms have received vociferous criticism from scholars, immigration lawyers, and federal judges,[481]

---

475. Burkhardt, *supra* note 6, at 96.

476. *Id.* at 50.

477. *See* Woodby v. INS, 385 U.S. 276, 278 n.2 (1966) ("In conformity with its usual practice, the Board made its own independent determination of the factual issues after de novo examination of the record."); Cordoba-Chavez v. INS, 946 F.2d 1244, 1249 (7th Cir. 1991) ("[T]he BIA may determine a case *de novo* . . . ."); Matter of B——, 7 I. & N. Dec. 1 (B.I.A. 1955); Guendelsberger, *supra* note 472, at 614 (citing *In re* S-H-, 23 I. & N. Dec. 462, 463-64 (B.I.A. 2002) (explaining that "the Board had broad authority to engage in a de novo review of the record underlying the immigration judge's decision and make its own independent findings of fact, irrespective of those made by the immigration judge.")); 1 CHARLES GORDON, STANLEY MAILMAN, & STEVEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05[5][b], at 3-54 (rev. ed. 2006).

478. 8 C.F.R. § 3.1(d)(3)(i) (2003); *see also* Burkhardt, *supra* note 6, at 50-51; Guendelsberger, *supra* note 472, at 614-15.

479. Burkhardt, *supra* note 6, at 77.

480. *Id.* at 78; *cf.* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 113 (1999) (maintaining that a de novo standard is preferred because it presents "the prospective threat of reversal [that] may induce lower courts to draft more comprehensive and precise opinions").

481. The 2002 Procedural Reforms of the BIA also shortened the deadlines for immigration lawyers to brief and prepare for appeal. *Compare* 8 C.F.R. § 3.1(e) (2002) (permitting the BIA to fix a time for oral arguments at its own discretion), *and id.* § 3.3(c) (requiring briefs to be filed within thirty days of filing a notice of appeal), *with* 8 C.F.R. § 3.1(e)(8)(i) (2003)

who feel that the changes will dramatically "reduce the quality and care of the BIA's decision-making process"[482] to such an extent that BIA rulings will amount in practice to little more than "rubber-stamping" the decisions of immigration judges.[483] This prospect is troubling when one considers the harsh criticism federal appellate courts consistently level at these agency officials for their inept handling of asylum adjudications.[484] By further insulating these immigration judges from meaningful review at the BIA level, the 2002 Procedural Reforms increase the likelihood that similarly situated asylum applicants will receive disparate treatment depending on the immigration official that reviews their cases.[485]

This diminished accountability of immigration judges resulting from the 2002 reforms is particularly significant in light of the great deference appellate courts already accord the BIA and immigration judges. In *INS v. Elias-Zacarias*,[486] the U.S. Supreme Court established a "quintessentially

(establishing a nintey-day time limit for single-member adjudications and a 180-day time limit for three-member adjudications), *and id.* § 3.3(c) (requiring briefs to be filed within twenty-one days of filing a notice of appeal). For a detailed criticism of this change, see Burkhardt, *supra* note 6, at 83-85; Bradley J. Wyatt, Note, *Even Aliens Are Entitled to Due Process: Extending* Mathews v. Eldridge *Balancing to Board of Immigration Appeals Procedural Reforms*, 12 WM. & MARY BILL RTS. J. 605, 636 (2004). Additionally, the reforms reduced the size of the Board of Immigration Appeals by over half, from twenty-three members to eleven. 8 C.F.R. § 3.1(a)(1) (2003). For more discussion of this reduction, *see* Burkhardt, *supra* note 6, at 80-83; Guendelsberger, *supra* note 472, at 612 & n.41; Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 475 (2006); Wyatt, *supra*, at 481. Also, the reforms eliminated oral arguments before the BIA in the vast majority of asylum appeals. *See* Burkhardt, *supra* note 6, at 83-85.

482. Wyatt, *supra* note 481, at 605; *cf.* Burkhardt, *supra* note 6, at 89; Letter from American Immigration Lawyers Ass'n to Charles K. Adkins-Blanch, Gen. Counsel, Executive Office for Immigration Review (Mar. 20, 2002), *available at* http://www.aila.org/content/default.aspx?docid=2093 (arguing that the reforms are unnecessary and that they will "tilt the balance in favor of expeditiousness, instead of fostering careful and just adjudications, thereby impairing the due process rights of individuals while undermining the Board's capacity to provide meaningful appellate review").

483. Emily Heller, *Clash over Plan for Immigrant Appeals*, NAT'L L.J., July 15, 2002, at A1. Many federal appeals decisions support this view of the BIA. *See, e.g.*, Guchshenkov v. Ashcroft, 366 F.3d 554, 558 (7th Cir. 2004) (complaining of the BIA's "characteristically perfunctory opinion affirming the immigration judge").

484. *See supra* notes 438-61 and accompanying text.

485. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 186 (2003) (describing the effects of the Procedural Reforms of 2002: "Similarly situated people will be treated quite differently, simply because of the political affiliation of the judges on the particular panel. As a result, the law is likely to have real inconsistency, in a way that does violence to the ideal of the rule of law. . . . Unfairness is an inevitable result"); Burkhardt, *supra* note 6, at 89; *see also supra* note 466 and accompanying text.

486. 502 U.S. 478 (1992).

deferential" standard of review for federal appellate courts reviewing the BIA's asylum and withholding decisions.[487] That decision rejected the view held by most courts of appeals that refugee status is a factual determination subject to the traditional substantial evidence standard of review.[488] Before *Elias-Zacarias*, a federal appellate court could reverse the BIA if substantial evidence did not support the BIA's decision, but that holding directed courts of appeals to apply a far more deferential standard resembling the abuse of discretion standard,[489] under which an appellate court could only reverse a BIA decision if the evidence would have compelled a reasonable fact-finder to reach an opposite result.[490] *Li v. Gonzalez* illustrates the practical

487. Johnson, *supra* note 293, at 470 (noting that the Court did not consider the nature or purpose of the Refugee Act in formulating the standard of review in asylum claims and ignored the "delicate life and liberty interests at stake"). For a broader examination of the *Elias-Zacarias* decision, see Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under* Elias-Zacarias, 20 GEO. IMMIGR. L.J. 133, 139 (2005); Matthew H. Joseph, Note, Immigration and Naturalization Service v. Elias-Zacarias*: Partially Closing the Door on Political Asylum*, 52 MD. L. REV. 478, 497 (1993); Andrew Pau & J. Nathan Diament, Recent Development, *Narrowing "Political Opinion" as Grounds for Asylum* — I.N.S. v. Elias-Zacarias*, 112 S. Ct. 812 (1992)*, 33 HARV. INT'L L.J. 610 (1992).

488. *See* Joseph, *supra* note 487, at 497-98.

489. Mere weeks after the Court handed down its opinion, one group of observers warned that the Court's new version of the substantial evidence standard of review closely "resemble[d] the abuse of discretion standard of review, which generally is considered to be more deferential to the agency." Deborah Anker, Carolyn P. Blum & Kevin R. Johnson, *The Supreme Court's Decision in* INS v. Elias-Zacarias*: Is There Any "There" There?*, 69 INTERPRETER RELEASES 285, 291 (1992). Similarly, another commentator during this time urged that after Elias-Zacarias, the standard of review in asylum appeals "is now virtually solidified as abuse of discretion for the entire decision, including the determination of whether an alien meets the definition of 'refugee'". Joseph, *supra* note 487, at 502. "No longer will immigration statutes be applied to favor aliens." *Id*.

490. Joseph, *supra* note 487, at 499 & n.147 ("To reverse the BIA finding we must find that the evidence not only *supports* the conclusion, but *compels* it . . . ." (omission in original) (quoting *Elias-Zacarias*, 502 U.S. at 481 n.1)). In adding this "compelling" language to the standard of review governing asylum cases, *Elias-Zacarias* appeared to rely on a section of the Immigration and Naturalization Act codifying the substantial evidence test - a section that required federal courts of appeal to affirm the agency's "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4) (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306(b), 110 Stat. 3009-546, 3009-612. This language is nearly identical to the standard for factual review under the Administrative Procedure Act, which provides that an agency may not issue an order unless it is "on consideration of the whole record . . . supported by and in accordance with the reliable, probative, and substantial evidence." Administrative Procedure Act, 5 U.S.C. § 556(d) (2000). Curiously, *Elias-Zacarias* "interpreted this language to mean that a court of appeals could reverse the BIA only if the evidence existed so strongly in the alien's favor that it *compelled* any

consequence of the highly deferential standard of review announced in *Elias-Zacarias* and its subsequent codifications.[491] In *Li*, the Fifth Circuit affirmed the immigration judge and the BIA in holding that a Chinese Christian was not a victim of religious persecution, but it did so reluctantly:

> [W]hile we may abhor China's practice of restricting its citizens from gathering in a private home to read the gospel and sing hymns, and abusing offenders, like Li, who commit such acts, that is a moral judgment not a legal one. We are restricted by the confines of the withholding of removal standard and the record before us. Based on both, we cannot conclude that the BIA erred in denying Li withholding of removal.[492]

*Li* reveals the dilemma facing many appellate courts that disagree with the lower courts' findings of fact or law but are unable to reverse because of the highly deferential standard of review set forth in *Elias-Zacarias*.[493] This decision, widely criticized,[494] imposes upon asylum applicants a uniquely

---

reasonable fact-finder" to find the requisite persecution that gives an applicant refugee status and asylum eligibility. Joseph, *supra* note 487, at 499.

491. Li v. Gonzales, 420 F.3d 500 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005). In 1996, Congress amended the Immigration and Naturalization Act's provision governing judicial review to codify the heightened substantial evidence standard of Elias-Zacarias, requiring that when federal courts of appeal review BIA decisions, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, sec. 306(a), § 242(b)(4)(B), 110 Stat. at 3009-608 (codified at 8 U.S.C. § 1252(b)(4)(B) (2000)). For additional discussion of this codification, see Knight, *supra* note 487, at 140.

492. *Li*, 420 F.3d at 511 (footnote omitted).

493. *See, e.g.*, Metko v. Gonzalez, No. 04-3881, 2005 WL 3420046, at *4 (6th Cir. Dec. 14, 2005) (Martin, J., concurring).

494. Scholars have criticized *Elias-Zacarias* for adopting its novel interpretation of the substantial evidence standard of review in a footnote to a "notably short opinion" that gave little, if any, indication in those few paragraphs that a new and important doctrine [was] being announced." Knight, *supra* note 487, at 139. Further, scholars fault the decision because "it is not apparent what legal or policy basis underlies" its "weak and unsettled basis":

> Prior to the *Elias-Zacarias* decision, several years of litigation over the appropriate standard of review in asylum adjudication had resulted in the widespread adoption of the substantial evidence standard over the government's preferred abuse of discretion standard. The standard of review was not briefed in *Elias-Zacarias*, and the Court did not discuss the issue at any length, weigh the legal or policy arguments, or cite any of the cases that had previously considered the issue. Instead, it issued a decision that appeared to recast the law with sweeping new language. In fact, the Court's language was not drawn from any precedent, and the case referenced to justify the Court's new rule provides no such support. There appears to be little legal basis on which to interpret the *Elias-Zacarias* decision as dramatically limiting the standard of review for asylum cases.

deferential application of the substantial evidence standard of review,[495] and circuit courts of appeals "now describe an asylum-seeker's overall burden on appeal in sweeping, restrictive language that appears all but insurmountable."[496] This novel formulation of the substantial evidence standard of review gives immigration adjudicators and the BIA almost unfettered discretion by "dramatically narrow[ing] the nature and quality of appellate review available to refugees seeking asylum."[497] Thus, this formulation increases the likelihood that persecuted aliens will face deportation after lower courts incorrectly apply the law.[498] According

---

*Id.* at 151; *see also* Joseph, *supra* note 487 at 499 ("The Court did not explain why it read this language in this particular way."); Anker, Blum & Johnson, *supra* note 489, at 286 (criticizing the "brevity of the opinion").

495. *See, e.g.*, Knight, *supra* note 487, at 151 (echoing the widely held belief that the decision "single[d] out asylum-seekers for [a] uniquely hands-off form of judicial review").

496. Knight, *supra* note 487, at 133. To illustrate, one member of the Sixth Circuit Court of Appeals recently complained that he was "bound in this appellate review by the congressionally prescribed standard of review that is, unfortunately, nearly insurmountable for the appealing alien." *Metko*, 2005 WL 3420046, at *4 (Martin, J., concurring). Paradoxically, these courts nominally maintain that they are applying a "substantial evidence" standard of review, but they describe this standard in far more deferential terms. *See, e.g.*, Maksakuli v. U.S. Attorney Gen., No. 05-16395, 2006 WL 2456542, at *1 (11th Cir. Aug. 25, 2006) (per curiam) ("The BIA's factual determination that an alien is not entitled to asylum must be upheld if it is supported by substantial evidence. Under this highly deferential standard of review, a denial of asylum may be reversed only if the evidence would compel a reasonable factfinder to find that the requisite fear of persecution exists. We recently explained that 'only in rare cases does the record compel the conclusion that an applicant suffered past persecution or has a well-founded fear of future persecution.'" (citations omitted) (quoting Silva v. U.S. Attorney Gen., 448 F.3d 1229, 1239 (11th Cir. 2006))); *see also, e.g.*, Singh v. U.S. Attorney Gen., No. 05-15393, 2006 WL 2134645, at *1 (11th Cir. Aug. 1, 2006) (noting that the standard of review in asylum law is "highly deferential"); Gu v. Gonzales, 454 F.3d 1014, 1018-19 (9th Cir. 2006) (describing the substantial evidence standard in asylum law as "strict"); Chen v. U.S. INS, 359 F.3d 121, 128 (2d Cir. 2004) (same (quoting Georgis v. Ashcroft, 328 F.3d 962, 968 (7th Cir. 2003)); Miah v. Ashcroft, 346 F.3d 434, 439 (3d Cir. 2003) (using "extraordinarily deferential" to describe the substantial evidence standard); Singh-Kaur v. INS, 183 F.3d 1147, 1149 (9th Cir. 1999) (describing the standard as "extremely deferential" (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995))); Wu Biao Chen v. INS, 344 F.3d 272, 275 (2d Cir. 2003) (terming the substantial evidence standard of review "exceedingly narrow").

497. Knight, *supra* note 487, at 140.

498. In the immediate wake of *Elias-Zacarias*, commentators warned that the decision would "significantly restrict the ability of the circuit courts to reverse BIA rulings," Joseph, *supra* note 487, at 497, and predicted that the heightened substantial evidence standard "will greatly limit the ability of the courts of appeals to review BIA decisions for consistency, fairness, and appropriateness. Only glaringly unreasonable decisions will be overturned. Thus, BIA decisions, and the ideological biases upon which they may be based, will go largely unchecked by the judiciary." *Id.* at 499-500 (footnote omitted). Others worried that it might be "used to justify a return to an era of judicial abdication to the executive branch in immigration matters."

appellate courts greater ability to meaningfully review the decisions of immigration courts and the BIA is necessary because those courts often reach haphazard and illogical results and strictly construe each element of the refugee definition in order to limit the number of successful applications.[499] Indeed, the INS has consistently received criticism for its "abuse, ineptitude, and overemphasis on enforcement with a concomitant lack of sensitivity to the delicate life and liberty interests at stake, particularly in deportation proceedings."[500] In sum, immigration officials frequently apply incorrect or insufficient analyses in denying legitimate claims for refuge based on state-imposed and other manifestations of persecution,[501] but recent immigration reforms and an inexplicably deferential standard of review preclude federal appellate courts from effectively remedying these errors.

### *Conclusion*

In passing the Refugee Act of 1980, Congress declared that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homeland."[502] To uphold this ideal, American courts encountering the persecution/prosecution distinction must work toward greater clarity and uniformity by expanding the human rights exception and by choosing to apply the crucial mixed-motive analysis. For their part, American policymakers should reevaluate the current asylum apparatus to

---

Anker, Blum & Johnson, *supra* note 487, at 291. The passage of more than a decade has confirmed this views, leading some observers to conclude that this decision's "compelling evidence" standard has significantly limited the role of judicial review in asylum and withholding determinations, and has "thus made the asylum review standard considerably more narrow than the kind of review available in other administrative contexts." Susan Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEG. STUD. 197, 212 (2000). Another echoes this belief, contending that the Supreme Court's "recasting of the substantial evidence standard is posing a perhaps unique obstacle to asylum-seekers." Knight, *supra* note 487, at 134. The feeling seems widespread that this "hyper-deferential approach" ignores the unique concerns, interests, and obligations at stake in asylum adjudications, and "creates a formidable barrier to correcting any erroneous denials of asylum eligibility." Kerns, *supra*, at 212; *see also* Burkhardt, *supra* note 6, at 89-90.

499. *See* Johnson, *supra* note 293, at 453-54, 499-500; Heebner, *supra* note 28, at 551; Samahon, *supra* note 35, at 2213.

500. Johnson, *supra* note 293, at 453. Indeed, there is a growing sentiment that the American asylum system "is not functioning to effectively protect victims of persecution abroad." Amy Hughes, Note, *Asylum Proceedings: A System Riddled with Deference*, 9 ROGER WILLIAMS U. L. REV. 233, 258-59 (2003).

501. *See supra* notes 438-66 and accompanying text.

502. *See* Thomas, *supra* note 38, at 799 (citing Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102).

ensure that each asylum and withholding application receives an adequate analysis at the immigration judge level and that reviewing courts are equipped with the necessary tools to correct lower court errors. These changes will significantly improve the equitable adjudication of cases deciding whether prosecution or other forms of abuse have become persecution. Further, the addition of gender to the five factors currently afforded protection under U.S. asylum law is necessary to fully realize America's commitment to protecting the persecuted.

This discussion began by observing that the United States has consistently remained a safe harbor where oppressed minorities may find shelter. Vigilantly upholding this unique American heritage by protecting a handful of the earth's persecuted is an obligation our history imposes upon us, and in keeping that promise, we not only keep faith with our past, we are given the opportunity to define our future. Let us agree that this future will be a better one if it welcomes the hurting and the hunted.

*Michael English*