

THE NEW NEXUS

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United States asylum law provides protection to individuals fleeing their home countries due to “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” While significant scholarly and judicial attention has been paid to the interpretations of the five grounds—in particular to the “political opinion” and “particular social group” categories as they pertain to gender-based claims and claims involving private harms—relatively little debate has focused on the proper formulation of the “on account of,” or “nexus,” requirement. Yet, scant guidance exists (whether by statute, regulation, or case law) as to the standards that should apply when determining whether causation has been established. This Article argues that the lack of guidance has led to an improper focus on the intent or motivation of the persecutor (as opposed to the status of the victim), as well as inconsistent interpretation of the requirement, in large part to the detriment of applicants seeking protection from gender-based persecution or other private harms.

The Article further argues that a new nexus formulation in refugee law is sorely needed, and that the standard that should apply in most cases is the “but-for” standard commonly used in tort law and sometimes used in United States anti-discrimination law.

In making the argument that but-for causation should be applied in refugee law, the Article examines the current analysis

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of the nexus requirement in several different contexts: forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, gangs, and membership in a family. The Article concludes that application of the but-for standard would lead to more consistent and fair results in the adjudication of refugee claims. It further concludes that shifting the focus from the intent of the persecutor to the status of the victim more effectively carries out the goal of refugee law: to provide surrogate protection to individuals who face persecution because of a characteristic they cannot or should not be required to change and who are unable to receive protection from their home countries.

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INTRODUCTION

Mariana, a native and citizen of Honduras, was the victim of severe domestic violence at the hands of her boyfriend, Emilio Perez, an officer with the national police.¹ Emilio hit Mariana for the first time when she commented on the household finances. One week later, when Mariana told Emilio that he should treat her like an equal, he pulled her by her hair and threw her onto the bed. When she told him she would leave him, he strangled her and told her he would never let her live in peace. When she declined his sexual advances, he raped her, saying, “[Y]ou are my woman.” On another day, when she tried to speak out against his abuse, he kicked and hit her, telling her, “I’m giving you that so you understand that you are not supposed to answer back.” When she told him she wanted to leave him, he broke a bottle and tried to cut her face with the jagged pieces “so that no other man would look at her.” She protected her face, and he lacerated her wrist instead.

Not wanting to bring a child into such an abusive home, Mariana secretly began birth control pills, but when Emilio found them, he threw them away and raped her, telling her that they must have a child together. Twice, Mariana attempted to go to the police to seek protection and to ask them to reprimand Emilio. Both times, the police turned her away and informed Emilio that she had attempted to report his conduct. In response, he punched her, splitting her lip. When she replied that she would try again to report his behavior, he responded, “Then you’ll die.”

One day, when Emilio pointed a gun at Mariana’s neck while he raped her, Mariana realized she had no choice but to leave Honduras. She embarked on a perilous two-week journey to the United States by foot, bus, and train. Upon arrival, she sought asylum in the United States.

The immigration judge found Mariana ineligible for asylum. The judge found that Mariana was credible and that she experienced past persecution and had a well-founded fear

1. “Mariana” is a former client of the author. Her name and country of origin have been changed to protect her identity. Her affidavit and the immigration judge’s decision in her case are on file with the author.

of future persecution. The judge acknowledged that the abuse she suffered was “outrageous.” Nevertheless, the judge denied her claim for asylum based, in part, on a finding that the persecution did not occur on account of any protected ground; rather, it occurred because of a “personal dispute” between her and Emilio. The judge stated that Emilio did not abuse Mariana because of any characteristic she possessed; rather, he abused her because of his “desire to have a bloodline,” his “belief about what [having a child] would say about his masculinity,” his “abusive temperament,” his “fear of being reported to his superiors,” and his country’s “machista culture.” Mariana appealed the judge’s decision, and to this day, over four years later, her appeal remains pending.

* * *

As a party to the 1967 Protocol Relating to the Status of Refugees, the United States has committed to protecting individuals fleeing persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.² That protection takes the form of asylum, which bestows the right to reside legally in the United States.³ Yet, despite its commitment to providing this powerful form of protection, the agency tasked with adjudicating claims for asylum and related forms of relief⁴ has refused protection to applicants making certain types of claims. In particular, the agency has refused many claims from applicants who fear gender-based violence or other private harms.⁵

2. See Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267; see also 8 U.S.C. § 1101(a)(42)(A) (2012).

3. See 8 U.S.C. § 1158 (2012).

4. Asylum cases are adjudicated by both the Asylum Office, part of the Department of Homeland Security; and the Executive Office for Immigration Review (EOIR), part of the Department of Justice. The EOIR is composed of the immigration courts and the Board of Immigration Appeals. 8 C.F.R. § 208.2 (2004); see also U.S. Department of Justice, Executive Office for Immigration Review, Organization and Information Breakdown, available at <http://www.usdoj.gov/eoir/orginfo.htm> (last visited Oct. 11, 2013) (stating that the EOIR “was created on January 9, 1983, through an internal Department of Justice reorganization which combined the Board of Immigration Appeals with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security)”) (internal abbreviations omitted). Because only the EOIR typically issues published decisions, all references to the “agency” are to the EOIR.

5. See, e.g., *Demiraj v. Holder*, 631 F.3d 194, 199 (5th Cir. 2011), *vacated*

As gender is not one of the five protected grounds listed in the treaty or in the United States' definition of a refugee,⁶ applicants and their representatives are forced to couch gender-based claims as particular social group or political opinion claims. The agency has rejected many of these formulations as not cognizable under the asylum laws.⁷ Significant scholarly and judicial debate has focused on the proper formulation of the protected status in such claims.⁸

after resolution by the parties, No. 08-60991, 09-60585, 2012 WL 2051799, at *1 (5th Cir. May 31, 2012) (denying a claim based on membership in a family); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 943 (11th Cir. 2010) (noting that the Board denied the claim for asylum based on homosexuality); *In re A-T-*, 24 I. & N. Dec. 296, 302 (B.I.A. 2007) (denying a claim for asylum based on fear of forced marriage and female genital mutilation); *In re R-A-*, 22 I. & N. Dec. 906, 927 (B.I.A. 2001) (denying asylum to a woman fleeing domestic violence); *In re Chang*, 20 I. & N. Dec. 38, 39–40 (B.I.A. 1989) (denying asylum to a man fleeing China's one-child policy and the threat of sterilization).

6. 8 U.S.C. § 1101(a)(42)(A) (2012).

7. See, e.g., *Cece v. Holder*, 11-1989, 2013 WL 4083282, at *2 (7th Cir. 2013) (stating that the Board rejected the argument that young Albanian women targeted for trafficking constituted a particular social group under the Act); *Kante v. Holder*, 634 F.3d 321, 324 (6th Cir. 2011) (stating that the Board found that the social group "females subject to sexual assault" was not a cognizable particular social group); *In re R-A-*, 22 I. & N. Dec. at 917 (refusing to grant asylum based on the finding that the identified particular social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," was not cognizable).

8. See, e.g., *Fatin v. INS.*, 12 F.3d 1233, 1241 (3d Cir. 1993) (rejecting a claim based on the social group of "Iranian women who refuse to conform to the government's gender-specific laws and social norms"); *Cece*, 2013 WL 4083282, at *11 (rejecting the Board's conclusion that young Albanian women targeted for trafficking do not constitute a particular social group); *In re R-A-*, 22 I. & N. Dec. at 917 (holding that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is not a cognizable particular social group); Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997) (arguing that asylum law should be interpreted by the courts to protect victims of domestic violence); Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361 (2012) (advocating for United States asylum law to recognize gender as a protected ground); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003) (calling for a bifurcated nexus approach to analyzing gender-based claims); Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002) (arguing that the particular social group analysis should encompass gender based claims). *But see In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (holding that the proffered group, "young women of the Tchamba-Kunsuntu Tribe

Yet, the agency has often made another set of findings, which has gone largely ignored in the literature. When a claim is premised upon fear of a gender-based or private harm, the agency has often refused to find that the persecution took place (or will take place) on account of the protected ground proffered by the applicant; rather, the agency has stated that the persecution took place (or would take place in the future) on account of “personal” or “criminal” reasons.⁹ In the domestic violence context, for example, the agency has denied asylum, reasoning that the abuse occurred on account of the abuser’s desire to control the victim or simply because the abuser is a “despicable person,” rather than on account of the victim’s gender or membership in a particular social group.¹⁰ In contrast, in cases involving individuals fleeing a dictatorial regime, the agency has found that the persecution occurred on account of political opinion or ethnicity, without regard to whether the dictator was seeking power and control or was a “despicable person.”¹¹ Although the agency’s problematic

who have not had FGM, as practiced by that tribe, and who oppose the practice,” met the requirements for being a cognizable particular social group).

9. See *Ayala*, 605 F.3d at 949 (stating that the B.I.A. found that “criminal acts by rogue police officers are not persecution ‘on account of’ one of the protected grounds”); *Bhasin v. Gonzales*, 423 F.3d 977, 982 (9th Cir. 2005) (“[T]he Board concluded that Bhasin had failed to establish persecution on account of membership in her family social group because [she] ‘was victimized because the JKLK wanted to locate her son, and perhaps as a means of retribution against the son, but not on account of membership in a particular social group.’”); *In re R-A-*, 22 I. & N. Dec. at 926 (holding that the applicant was not abused on account of a protected ground; rather “other factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality,” were among the reasons her husband abused her).

10. See *In re R-A-*, 22 I. & N. Dec. at 927 (“In sum, we find that the respondent has been the victim of tragic and severe spouse abuse. We further find that her husband’s motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of [sic] psychological disorder, pure meanness, or no apparent reason at all.”); Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends*, 77 NO. 42 INTERPRETER RELEASES 1533, 1535 (2000) (stating that in *In re D-K-* (B.I.A. Jan. 20, 2000), the immigration judge “denied asylum, ruling that Ms. Kuna had not been persecuted on account of her membership in either group, or for any political reason, but solely because her husband was ‘a despicable person’”).

11. See, e.g., *Oryakhil v. Mukasey*, 528 F.3d 993, 1000 (7th Cir. 2008) (holding that the applicant had a well-founded fear of future persecution and was unable to relocate within Afghanistan because of the Taliban’s presence); *Karijomengolo v. Gonzales*, 173 F. App’x 34, 36–37 (2d Cir. 2006) (holding that the applicant was persecuted on account of an imputed political opinion by a former military dictator who had close ties to the military); *Gui v. INS*, 280 F.3d

determinations with respect to causation extend to other types of asylum cases as well, the determinations seem particularly detrimental to gender-based claims and claims based on other private harms. It is this causation problem that this Article addresses.

The current state of asylum law makes clear that a new nexus formulation—one that reflects the primary goal of asylum of offering surrogate protection to individuals whose home countries are unwilling or unable to provide such protection—is sorely needed. This Article argues that the analysis that should apply in most cases is the “but-for” analysis traditionally used in United States tort law and sometimes used in United States anti-discrimination cases. This formulation would ask whether, but for the applicant’s protected status, the persecution would have occurred. If not, nexus is established. Two important principles underlying the but-for causation standard make it appropriate for the refugee law context: (1) the fact that there are multiple causes, all of which are necessary to give rise to the harm at issue, does not negate a finding that any one of the necessary factors is a cause of the harm; and (2) the fact that the cause of the harm under one set of circumstances would not give rise to harm under a different set of circumstances does not negate a finding that it was a cause of the harm in the first case.

Part I of this Article sets forth the necessary background related to international refugee law, United States asylum law, and the evolution of the nexus requirement in United States law. Part II makes the argument for the need for a new nexus using nine types of asylum cases to illustrate the inconsistent and unsound application of the nexus requirement in refugee law today. The contexts are forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, gangs, and membership in a family.

1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and political beliefs). It is widely recognized that, for purposes of asylum eligibility, the persecution could happen at the hands of the government or forces the government is unwilling or unable to control. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (“[H]arm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”), *modified on other grounds*, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Accordingly, the lack of direct government involvement in domestic violence cases is not sufficient to explain the different approaches taken in these two contexts.

Part III briefly sets forth the relevant tort law and anti-discrimination law causation rules, which are used as a model for the proposal set forth in the Article. Part IV argues for a new nexus in refugee law, modeled on the but-for rule of United States tort and anti-discrimination law. It sets forth the policy reasons that support this new nexus approach, illustrates how the approach would be carried out, and describes the potential benefits of such an approach. Part V addresses possible criticisms of and alternatives to the approach.

I. BACKGROUND

Although United States asylum law derives from international refugee protection instruments, the analysis used to determine causation in asylum cases has evolved largely domestically. Part A of this section provides the relevant background of international and domestic refugee law, and Part B describes the evolution of the nexus requirement in United States law.

A. *International Refugee Law and United States Asylum Law*

The centerpiece of international refugee protection is the 1951 Convention Relating to the Status of Refugees, which calls for the protection of individuals who have a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹² The United States is a signatory to the 1967 Protocol Relating to the Status of Refugees (Protocol),¹³ which adopts by reference the provisions of the 1951 Convention (Convention). Pursuant to its obligations under the Convention and Protocol, the United States enacted the Refugee Act of 1980 (Act).¹⁴ The Act defines a refugee as any person who is

12. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137, available at <http://www.unhcr.org/3b66c2aa10.html> (last visited Oct. 13, 2013).

13. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, available at <http://www.unhcr.org/3b66c2aa10.html> (last visited Oct. 13, 2013).

14. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

outside her home country and who is unable to avail herself of the protections of that country because of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁵

Refugees who come to the United States may be eligible for a discretionary form of relief called “asylum” or a mandatory form of relief called “withholding of removal” (sometimes referred to as “restriction on removal”).¹⁶ The asylum statute provides not only that the United States government will refuse to send a refugee back to the country where she fears persecution but that the individual may remain in the United States and eventually obtain permanent residency and citizenship.¹⁷ The withholding statute provides only that the United States will not send the individual back to the country where she fears persecution; the United States will not grant her permanent residency or citizenship and could send her to a third country where she does not fear persecution.¹⁸

It is the applicant’s burden to prove that she was persecuted or has a well-founded fear of future persecution on account of one of the protected grounds.¹⁹ The Act and its implementing regulations do not clearly define “persecution,” but courts have interpreted the phrase to require a showing of something more than discrimination or harassment.²⁰ The persecution must occur at the hands of the government or forces the government is unwilling or unable to control.²¹ Furthermore, the applicant must show that she has a status that is protected by the Act, and she must show that the persecution occurred or will occur “on account of” that status.²²

15. 8 U.S.C. § 1101(a)(42)(A) (2012); Immigration and Nationality Act § 101(a)(42)(A).

16. 8 U.S.C. § 1158 (2012).

17. *Id.*

18. 8 C.F.R. § 1208.16 (2012).

19. 8 C.F.R. § 208.13(a) (2012); 8 C.F.R. § 208.16(b) (2012).

20. See *Borca v. INS*, 77 F.3d 210, 214 (7th Cir. 1996) (“The Immigration Act does not, however, provide a statutory definition for the term ‘persecution.’”); *Stanojkova v. Holder*, 645 F.3d 943, 947–48 (7th Cir. 2011) (amended Aug. 16, 2011) (noting that the Board of Immigration Appeals has not defined persecution and applying its own definition, “the use of significant physical force against a person’s body, or the infliction of comparable physical harm without direct application of force . . . or nonphysical harm of equal gravity . . .”).

21. *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

22. 8 U.S.C. § 1101 (a)(42)(A) (2012); Immigration and Nationality

Once an applicant has proven past persecution on account of one or more of the five protected grounds, she is entitled to a presumption of a well-founded fear of future persecution.²³ The Department of Homeland Security (DHS) may rebut that presumption only by making one of two showings: (1) that there has been a fundamental change in circumstances such that the individual no longer has a well-founded fear of future persecution; or (2) that the individual could reasonably relocate to a different part of the country and be safe from persecution.²⁴ Even if an applicant has not experienced persecution in the past, she may be eligible for asylum upon a showing of an independent well-founded fear of future persecution.²⁵

B. *The Nexus Requirement*

The causation requirement in refugee law is often referred to as the “nexus” requirement. Although the United States changed the Convention nexus language from “for reasons of” to “on account of,” the legislative history of the Act suggests that this change was insignificant to legislators at the time it was made.²⁶ In fact, according to the Senate, the United States’ refugee definition “basically conform[ed]” to the Convention definition.²⁷ And years later, the Supreme Court described the

Act § 101(a)(42)(A).

23. 8 C.F.R. § 208.13(b)(1) (2012).

24. 8 C.F.R. § 208.13(b)(1)(i)(A)–(B) (2012).

25. 8 C.F.R. § 208.13(b)(1) (2012).

26. Brigitte L. Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499, 526 (2007) (citing S. REP. NO. 96-256, at 4 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 144; H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. 160; Immigration and Nationality Act, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1965); S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.)). It appears that the United States suggested the “on account of” language during the drafting stages of the Convention, but the “for reasons of” language was adopted instead. See U.N. Ad Hoc Comm. on Refugees and Stateless Pers., Ad Hoc Comm. on Statelessness and Related Problems, U.S.: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (Jan. 18, 1950), available at <http://www.unhcr.org/refworld/docid/3ae68c164.html> (last visited Mar. 6, 2013).

27. Frantz, *supra* note 26, at 526 (citing S. REP. NO. 96-256, at 4 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 144; H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.), reprinted in 1980 U.S.C.C.A.N. 160). See also Immigration and Nationality Act, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1965); S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.)).

Act's refugee definition as "virtually identical" to the Convention definition.²⁸ But at least one scholar has observed, "There are slight but important differences between the terms on account of and for reasons of. 'On account of,' which is not the language of the Convention, implies an element of conscious, individualized direction which is often conspicuously absent in the practices of mass persecution."²⁹

The Convention gave no guidance as to how to interpret or implement the nexus requirement. Indeed, it appears the drafters of the Convention were relatively unconcerned with the substantive elements of the refugee definition.³⁰ To this day, there are no prescribed standards or tests for determining causation in asylum cases.³¹ What little guidance there is for United States adjudicators on the proper application of the nexus rule largely has evolved domestically.

One troubling source of guidance is the Supreme Court's 1992 decision, *INS v. Elias-Zacarias*.³² In that case, Elias-Zacarias applied for asylum because he feared persecution on account of political opinion.³³ Specifically, he stated that guerillas in his home country of Guatemala had tried to recruit him and his parents but they refused.³⁴ Elias-Zacarias stated that he did not want to join the guerillas for fear of retaliation

28. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987).

29. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 102 (3d ed. 2007).

30. Kristen Walker, *Defending the 1951 Convention Definition of Refugee*, 17 *GEO. IMMIGR. L.J.* 583, 592 (2003) (citing ALEX TAKKENBERG & CHRISTOPHER C. TAHBAZ, *THE COLLECTED TRAVAUX PREPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES* 240–43 (1990) (citing G.A. Res. 429(V), U.N. GAOR, at Annex, U.N. Doc. A/Res/429 (1950)); Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. GAOR, 22nd Mtg. at 6, U.N. Doc. A/Conf.2/SR.22 (1951) (speech by Mr. Robinson, Israel)).

31. See, e.g., DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 294 (2012) ("U.S. law on nexus is in a state of flux . . ."); Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 *MICH. J. INT'L L.* 265, 266 (2002) ("[T]here is little consensus as to the appropriate test to be applied in interpreting [the nexus] aspect of the definition, and that there is pervasive confusion surrounding causation in the refugee context."); Carly Marcs, *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 *AM. U. INT'L L. REV.* 31, 66 (2009) ("The 'nexus' requirement is the least understood element of the refugee definition. International jurisprudence is either silent on the issue or adopts a particular understanding of the requirement with little explanation.").

32. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

33. *Id.* at 479.

34. *Id.*

from the government.³⁵ The Supreme Court held that Elias-Zacarias had not established a cognizable political opinion under the Act.³⁶ It further held that, for purposes of asylum, it was the applicant's political opinion, and not the persecutor's, that mattered.³⁷

With regard to nexus, the Court stated, "Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial."³⁸ The Court's decision has drawn significant criticism from the scholarly community for placing the focus on the persecutor's motives, which are often difficult, if not impossible, for the applicant to prove.³⁹ The nexus analysis proposed in this Article would shift the focus from the particular motives of the persecutor to the status of the applicant.

Courts also have minimal guidance on determining nexus with respect to cases involving mixed or multiple motives for the persecution. In such cases, courts generally have required that the feared persecution be based "at least in part" on a protected ground.⁴⁰ In 2005, Congress passed the REAL ID Act, part of which aimed to clarify the analysis of mixed-motives claims.⁴¹ However, the only portion of the REAL ID Act that

35. *Id.* at 480.

36. *Id.* at 483.

37. *Id.*

38. *Id.* (emphasis added).

39. See, e.g., Musalo, *supra* note 8, at 786; Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT'L L. 223, 228 (2002); see also James C. Hathaway & Michelle Foster, *The Causal Connection ("Nexus") to a Convention Ground*, 15 INT'L J. REFUGEE L. 461, 463 (2003) (stating that courts that require nexus to be connected to persecutor intent "rarely explain the reason for adopting such an approach, or even acknowledge that they are choosing one interpretation from amongst other possibilities").

40. See, e.g., *In re T-M-B-*, 21 I. & N. Dec. 775, 777 (B.I.A. 1997) ("[A]n applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground."); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 513 (9th Cir. 1999); *Shoaf v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000); *Gafoor v. INS*, 231 F.3d 645, 652 (9th Cir. 2000); *Deloso v. Ashcroft*, 393 F.3d 858, 860-61 (9th Cir. 2005); *Sanchez Jimenez v. U.S. Atty. Gen.*, 492 F.3d 1223, 1232-33 (11th Cir. 2007).

41. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)).

pertains to nexus is the requirement that a Convention ground be “at least one central reason” for the persecution.⁴² Significantly, the Act does not provide guidance as to what constitutes a “central” reason, and it does not set forth any standards or tests for determining causation. Since passage of the Act, many courts and the Board of Immigration Appeals (Board) have stated that the REAL ID Act did not “radically alter” the standard the courts already had been using.⁴³ Implementation of the causation analysis argued for in this Article would obviate the need for the REAL ID Act’s “one central reason” clause.

II. CAUSATION IN CONTEXTS: CAUSE FOR CONCERN

The inconsistent application of the nexus rule has led to the rejection of many gender-based claims or claims based on other private forms of persecution, largely because courts tend to view the persecution in these cases as occurring for personal reasons rather than because of a Convention ground. Using nine asylum-law contexts as examples of the dysfunction and confusion that current causation analysis embodies, this Part sets forth the argument that a new nexus formulation is sorely needed.

It is important to note that significant attention has been paid (both by scholars and courts) to the proper formulation of the Convention ground in many of the contexts described below;⁴⁴ however, the proper formulation of the Convention

42. *Id.*; see also H.R. REP. NO. 109-72, at 163 (2005) (Conf. Rep.) (stating that “under this definition it clearly would not be sufficient if the protected characteristic was incidental or tangential to the persecutor’s motivation”). This passage from the Act’s legislative history reveals an emphasis on the motives of the persecutor.

43. *Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008).

44. See, e.g., Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 298–99 (2003) (arguing that reorienting the particular social group definition toward the state’s role in the persecution and defining the ground on which these victims are persecuted to be their membership in families would bring the refugee claims of domestic violence victims within the scope of existing refugee law); Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 262–65 (2008) (arguing that female genital mutilation should be viewed as social group persecution based on gender and culture); Susan Hazeldean, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. DAVIS L. REV. 373, 442 (2012) (arguing that bisexual or transgender young people should be able to apply for asylum under a particular social group theory

ground is only part of the problem. Even when courts have accepted applicants' proffered particular social groups⁴⁵ as cognizable under the Act, they have denied the same claims due to lack of nexus. Yet, relatively little scholarly attention has been paid to the nexus problem. This Part isolates and examines the courts' analysis of nexus in nine different contexts: forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, gangs, and membership in a family.

A. Forced Sterilization

Forced sterilization was one of the first contexts in which the Board confronted a nexus problem in asylum case. The asylum applicant in *Matter of Chang* testified that he was forced to flee China because he and his wife had two children and planned to have more in contravention of the "one-child

involving imputed homosexuality); Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 847 (2008) (arguing that "ex-gang member" would seem to be a straightforward social group"); Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453, 466–67 (2010) (assessing the possibility that victims of human trafficking would be able to assert gender as a particular social group); Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55, 96–98 (2011) (arguing that forced marriage is persecution based on membership in a particular social group). See, e.g., *Fatin v. INS.*, 12 F.3d 1233, 1241 (3d Cir. 1993) (rejecting a claim based on the social group of "Iranian women who refuse to conform to the government's gender-specific laws and social norms"); *In re R-A-*, 22 I. & N. Dec. 906, 917 (B.I.A. 2001) (holding that the applicant was not abused on account of a protected ground; rather "other factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality," were among the reasons her husband abused her).

45. The "particular social group" ground, in particular, has been the subject of much attention, given the Board's stringent and ever-increasing requirements for the ground. In *In re Acosta*, the Board stated a requirement that the proffered group share a characteristic that is "immutable," that is to say the group shares a fundamental, unchangeable characteristic. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). More recently, the Board has stated that for purposes of asylum eligibility, the proffered group must be sufficiently "particular," that is, the group's boundaries must not be too "indeterminate," "subjective," "inchoate," or "variable." *In re A-M-E-*, 24 I. & N. Dec. 69, 76 (B.I.A. 2007). Further, the Board has stated that the group must meet the "social visibility" test, which requires that society must consider individuals with the shared characteristic to be a group and that members of the group must be "recognizable" within society. *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006).

rule” in place in his province.⁴⁶ He claimed that, pursuant to the policy, government officials would force him to get sterilized if he were to return to China.⁴⁷ He further stated that his wife was ordered to submit to sterilization but was able to postpone the operation due to illness.⁴⁸

After he fled China and arrived in the United States, Chang applied for asylum, arguing that he had a well-founded fear of persecution (in the form of forced sterilization) on account of his membership in a particular social group.⁴⁹ He defined the social group as “persons who actually oppose the government policy of ‘one child per family.’”⁵⁰

The immigration judge denied Chang’s claim, and Chang appealed to the Board. The Board, noting that Chang’s appeal presented a “profound dilemma,”⁵¹ dismissed the appeal.⁵² Without determining whether forced sterilization constitutes persecution⁵³ or whether the particular social group defined by the applicant constitutes a cognizable particular social group under the Act, the Board reasoned that forced sterilization does not occur on account of any of the Convention grounds; rather, the sterilization policy “is solely tied to controlling population.”⁵⁴ Accordingly, it concluded that the nexus requirement had not been met.⁵⁵ Significantly, although this case was decided a few years before *Elias-Zacarias*, the Board appears to have considered the motivation of the Chinese government in coming to the conclusion that forced sterilization did not occur on account of a Convention ground.⁵⁶

In apparent discomfort with the outcome of its own

46. See *In re Chang*, 20 I. & N. Dec. 38, 39–40 (B.I.A. 1989).

47. See *id.* at 39.

48. See *id.*

49. See *id.* at 43.

50. *Id.*

51. *Id.* at 44.

52. See *id.* at 48.

53. The Board later acknowledged that forced sterilization constitutes persecution. See generally *In re Y-T-L*, 23 I. & N. Dec. 601, 607 (B.I.A. 2003) (“Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.”).

54. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989).

55. *Id.* at 47.

56. *Id.* at 43–44 (“We do not find that the ‘one couple, one child’ policy of the Chinese Government is on its face persecutive. China has adopted a policy whose stated objective is to discourage births”).

holding, the Board all but asked Congress to provide a legislative fix to the nexus problem, stating, “Whether these policies are such that the immigration laws should be amended to provide temporary or permanent relief from deportation to all individuals who face the possibility of forced sterilization as part of a country’s population control program is a matter for Congress to resolve legislatively.”⁵⁷ Congress might have taken this opportunity to clarify the nexus element generally, but instead, it chose to address the nexus issue in coercive population control cases specifically. In 1996, Congress amended the refugee definition to include the following language:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.⁵⁸

To this day, forced sterilization and forced abortion remain the only types of claims explicitly mentioned in the refugee definition. Accordingly, while the nexus problem has been fixed in those contexts, the problem still exists in many other contexts, as described in more detail below. A uniform approach such as the one proposed in this Article would obviate the need for piecemeal legislative fixes.

B. Female Genital Mutilation

In the context of female genital mutilation, the agency has found nexus to a Convention ground; however, the Board’s reasoning is at odds with its other nexus holdings and thus deserves some attention.

57. *Id.* at 47.

58. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, tit. VI § 601(a), 110 Stat. 3009, 3009-689 (1996) (codified at 8 U.S.C. § 1101(a)(42)(B) (2012)).

In 1996, the Board, for the first time in a precedential decision, considered the claim of a young woman who feared that she would be subjected to female genital mutilation if returned to her home country.⁵⁹ The applicant, Fauziya Kasinga, testified that when she was seventeen years old, her family in Togo had forced her into a polygamous marriage with a forty-five-year-old man.⁶⁰ She further testified that her family and her new husband planned to force her to undergo genital mutilation before the marriage was consummated.⁶¹ With the help of her sister, she fled Togo before they were able to carry out their plan.⁶²

The Board cited the applicant's testimony and documentary evidence demonstrating that the type of genital mutilation practiced by Kasinga's tribe in Togo "is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period."⁶³ The Board further noted the failure of the Togolese government to protect women from genital mutilation.⁶⁴

In an en banc, 12-1 decision, the Board granted Kasinga's claim for asylum.⁶⁵ It held that female genital mutilation amounts to persecution and that Kasinga had shown that she was a member of a particular social group, namely, "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice."⁶⁶ In further holding that genital mutilation is practiced "on account of" Kasinga's particular social group, the Board reasoned that "there is no legitimate reason for [female genital mutilation]."⁶⁷ It agreed with the parties that "[female genital mutilation] is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to [genital mutilation]."⁶⁸

59. See *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

60. See *id.* at 358.

61. See *id.*

62. See *id.* at 358–59.

63. *Id.* at 361.

64. *Id.* at 362.

65. See *id.* at 368. The immigration judge had previously denied Kasinga's claim for relief and she had appealed to the Board. See *id.* at 364.

66. *Id.* at 365. The Board refers to female genital mutilation as "FGM."

67. *Id.* at 366.

68. *Id.* at 367.

Given that the Board, in its seminal decision on particular social group, explicitly stated that gender could be the basis of a cognizable particular social group,⁶⁹ it is curious that the Board felt the need to define the social group in this case with such specificity. One possibility is that the Board assumed that the nexus requirement could be met only if all (or at least most) of the members of the defined group were targeted for persecution.⁷⁰ Accordingly, it could not define the social group by gender, because not all women in Togo fear genital mutilation. It therefore limited the social group by age and tribal affiliation.⁷¹

Moreover, the Board's reasoning with respect to nexus seems to be at odds with its nexus reasoning in subsequent cases, outlined below. In *Kasinga*, the Board seemed unconcerned with finding a direct link between the persecutor's motives and the Convention ground. Indeed, according to the attorney who litigated Kasinga's case, documentary evidence demonstrated that "[i]t was often midwives or elders who carried out the [genital mutilation] itself, which they believed was a positive act for the young woman and larger community,"⁷² and the government's reply brief stated that the elders or midwives "did not have an intent to punish for a Convention reason; to the contrary, 'presumably most of . . . [them] believe that they are simply performing an important cultural rite that bonds the individual to society.'"⁷³ Perhaps

69. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (stating that a cognizable particular social group is made up of "persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership."), *modified on other grounds, In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

70. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 986 (5th ed. 2009).

71. Indeed, in its haste to narrow the particular social group, it may have unnecessarily narrowed it in another respect. As noted by one Board member in her concurrence, "it is surplusage to define the social group in this case by including as an element the applicant's opposition to the practice of female genital mutilation." *In re Kasinga*, 21 I. & N. Dec. at 376 (Rosenberg, concurring). Girls in Kasinga's tribe were subjected to genital mutilation whether or not they opposed it, so it makes little sense to say that she would be forced to undergo genital mutilation "on account of" her opposition to it. Opposition to the practice is, of course, relevant; however, a woman's opposition to genital mutilation more properly goes to whether or not the conduct sinks to the level of persecution in her case than to nexus.

72. Musalo, *supra* note 8, at 799.

73. *Id.* at 800 (quoting Gov't's Brief in Response to Applicant's Appeal from

because neither party appeared to mount a nexus challenge in the case,⁷⁴ the Board's explicit discussion of nexus is relatively minimal. Nevertheless, the Board's decision as a whole came close to saying that the intent of the individual persecutor is not determinative⁷⁵ as long as the practice of female genital mutilation is conducted generally for reasons related to a Convention ground. Yet, in the cases set forth below, and in line with *Elias-Zacarias*, the Board focuses on the intent of the actual persecutors in determining whether the nexus clause has been met.

Equally interesting is the Board's pronouncement that since there is no "legitimate" reason for genital mutilation, it follows that the mutilation occurs on account of a Convention ground despite the existence of other, non-Convention related reasons for the mutilation.⁷⁶ In many of the contexts outlined below, including domestic violence, trafficking, and forced marriage, courts have found no nexus to a Convention ground because other, typically personal, reasons exist for the treatment.⁷⁷ Yet it cannot be said that there are "legitimate"

Decision of Immigration Judge at 16, *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (No. A73-476-695), available at <http://www.justice.gov/eoir/efoia/kasinga3.pdf>).

74. See *In re Kasinga*, 21 I. & N. Dec. at 367 (citation omitted) (stating that the government attorney agreed that genital mutilation "should be regarded as meeting the asylum standard even if done with 'subjectively benign intent'").

75. See *id.* at 365 (citations omitted) (stating that "many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution").

76. *Id.* at 366 (citations omitted) (recognizing female genital mutilation "has been used to control woman's sexuality," and is "a form of 'sexual oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation'").

77. See, e.g., *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006) ("[T]he [immigration judge (IJ)] found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'"), *vacated sub nom*; *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007); *Burbiene v. Holder*, 568 F.3d 251, 254 (1st Cir. 2009) ("The BIA endorsed the IJ's finding that [the applicants] feared criminal, not governmental, activity."); *In re A-T-*, 24 I. & N. Dec. 296, 302 (B.I.A. 2007) (denying relief based on a forced marriage claim and reasoning that "respondent has expressed only a generalized fear of disobeying her authoritarian father" for refusing to consent to a marriage with her first cousin); *In re R-A-*, 22 I. & N. Dec. 906, 926 (B.I.A. 2001) (holding that the applicant was not abused on account of a protected ground, rather "[o]ther factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality," were among the reasons her husband abused her).

reasons for domestic violence, trafficking, or forced marriage. The legitimacy test used by the Board in *Kasinga* thus seems outside the bounds of the nexus analysis employed by the Board and other courts in subsequent cases.

C. Domestic Violence

Arguably the most controversial decision in the area of asylum law has arisen in the context of claims based on domestic violence. While significant attention has been paid to the particular social group and political opinion dimensions of domestic violence claims,⁷⁸ the Board's conclusions regarding nexus have been largely ignored. Yet, as shown in this Part, they are equally important.

Perhaps indicative of the controversial and unresolved nature of domestic violence claims, the Board's seminal decision on these claims, *Matter of R-A*, has a dizzying procedural history spanning nearly fifteen years.⁷⁹ The result is that the question of whether women fleeing domestic violence can qualify for asylum protection in the United States has yet to be definitively answered. In brief, Rody Alvarado fled Guatemala in May 1995 and applied for asylum in the United States.⁸⁰ In September 1996, an immigration judge granted her asylum.⁸¹ The government appealed, and in June 1999, the Board, in an en banc, 10-5 decision, overturned the

78. See, e.g., Adams, *supra* note 44, at 299; Anker et al., *supra* note 8, at 741–43 (arguing that victims of domestic violence should be able to establish an asylum claim based on particular social group or political opinion); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 148 (2013) (advocating that “[t]he United States should adjudicate domestic violence asylum cases consistent with international norms, guidance from the United Nations Human Commissioner for Refugees, and a growing body of jurisprudence in United States Federal Courts of Appeals that readily recognize gender-defined social groups, and clearly establish that persecution by intimate partners is a basis for asylum”); Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 383 (2010) (arguing that the particular social group of “women who have fled severely abusive relationships” should be recognized for asylum eligibility).

79. See Documents and Information on Rody Alvarado's Claim for Asylum in the U.S., Current Update, CTR. FOR GEND. & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited July 4, 2013) (providing an outline of the Alvarado case).

80. See *In re R-A*, 22 I. & N. Dec. 906, 909 (B.I.A. 2001).

81. See *id.* at 906.

immigration judge's decision.⁸² Responding to widespread criticism of the decision, including by members of Congress, in January 2001, then-Attorney General Janet Reno vacated the decision and remanded it back to the Board. She instructed the Board to hold the decision pending the issuance of proposed regulations on the definitions of "nexus," "persecution," and "particular social group" and to reissue the decision once the regulations were implemented.⁸³ The regulations have yet to be issued.⁸⁴ In 2003, then-Attorney General John Ashcroft certified the case to himself and requested that the DHS and Alvarado's attorneys brief the case.⁸⁵ In its brief, DHS conceded that Alvarado was eligible for asylum.⁸⁶ Eighteen United States Senators, as well as domestic violence and immigrant rights advocates, also supported a grant of asylum.⁸⁷ In 2005, in lieu of rendering a decision on the case, even though the DHS had agreed to a grant of asylum, Ashcroft remanded the case to the Board and reinstructed the Board to issue a decision once the proposed regulations were published.⁸⁸ In 2008, then-Attorney General Michael B. Mukasey certified the case to himself and remanded the case to the Board, removing the condition that the proposed regulations become final before the Board could decide the case.⁸⁹ In December 2008, the Board

82. *See id.*

83. See Bookey, *supra* note 78, at 114. Pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2012), the Attorney General has the authority to certify cases to herself for decision.

84. *See id.*; *see also* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified as 8 C.F.R. pt. 208).

85. *In re R-A-*, 24 I. & N. Dec. 629, 630 n.1 (B.I.A. 2008).

86. Alvarado-Pena, 22 I. & N. Dec 906, No. A73-753-922, (Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief), *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

87. Letter from U.S. Senators to Att'y Gen. Ashcroft (June 16, 2004), *available at* http://cgrs.uchastings.edu/documents/advocacy/senate_6-04.pdf (supporting Rody Alvarado). *See generally* Documents and Information on Rody Alvarado's Claim for Asylum in the U.S., Current Update, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited July 4, 2013) (providing links to the letters sent in support of Alvarado's case).

88. Att'y Gen. Ashcroft's Remand to B.I.A. (Jan. 19, 2005), *available at* http://cgrs.uchastings.edu/documents/legal/ag_ra_order_1-05.pdf.

89. *See Attorney General Lifts Stay, Remands Matter of R-A-*, 85 Interpreter Releases 2621 (Oct. 6, 2008); CTR. FOR GENDER & REFUGEE STUDIES, *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.: Current Update*, <http://cgrs.uchastings.edu/campaigns/alvarado.php> (last visited Jul. 4, 2013).

granted a jointly-filed motion to remand the case to the immigration court.⁹⁰ At the immigration court level, the government agreed to a grant of asylum.⁹¹ So, on December 10, 2009, the immigration judge granted Alvarado asylum.⁹² The summary and non-precedential decision stated, almost in full, “Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum].”⁹³

Despite the eventual grant of asylum to Alvarado in a summary decision, there is still no precedential decision on point, and the asylum cases of other domestic violence victims remain in abeyance pending further guidance.⁹⁴ Accordingly, although the Board’s 1999 decision has been vacated, it remains the most comprehensive source of insight into the Board’s reasoning with respect to asylum claims based on domestic violence and thus merits some attention.⁹⁵ The facts and reasoning recounted below come from that decision.

Alvarado fled to the United States from Guatemala to seek protection from the severe abuse she suffered at the hands of her husband over the course of several years.⁹⁶ Among other things, Alvarado’s husband dislocated her jaw bone; kicked her violently in her spine when she was four months pregnant; raped her daily; beat her before and during the rapes; passed on to her a sexually transmitted disease; kicked her in her genitalia, causing her to bleed for many days; forcibly sodomized her; struck her in the back of her head, causing her to lose consciousness; whipped her with an electrical cord; threatened her with a machete; pistol-whipped her; and broke windows and mirrors with her head.⁹⁷ As he was abusing her, he often made comments such as: “You’re my woman, you do

90. *Id.*

91. Natalie Rodriguez, *Give Us Your Weary But Not Your Battered: The Department of Homeland Security, Politics and Asylum for Victims of Domestic Violence*, 18 SW. J. INT’L L. 317, 333 (2011).

92. *See* CTR. FOR GENDER & REFUGEE STUDIES, *supra* note 89.

93. *Id.*

94. *See* Bookey, *supra* note 78, at 146 (stating that there are “several domestic violence asylum cases that, as of the date of writing, have been fully briefed and are pending before the Board awaiting decision”).

95. *See* Alvarado-Pena, *supra* note 86.

96. *See id.* at 908–10.

97. *See id.* at 908–09.

what I say,” and “I can do it if I want to.”⁹⁸ When Alvarado attempted suicide, he told her, “If you want to die, go ahead. But from here, you are not going to leave.”⁹⁹ Alvarado testified that she believed her husband would abuse any woman who was his wife and that he saw her “as something that belonged to him and he could do anything he wanted” with her.¹⁰⁰ She said he told her that, because he was a former military official, the police in Guatemala would not help her.¹⁰¹

Alvarado applied for asylum, arguing that she had been persecuted and feared persecution on account of a political opinion that her husband necessarily imputed to her, namely that “women should not be controlled and dominated by men,”¹⁰² and on account of her membership in a particular social group, namely “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”¹⁰³

Though the Board found her husband’s conduct “deplorable,”¹⁰⁴ it denied Alvarado’s claim in its 1999 decision, reasoning with respect to the political opinion claim that she had not shown a nexus between the abuse and the imputed political opinion.¹⁰⁵ It stated,

Even accepting the premise that [her husband] might have believed that [Alvarado] disagreed with his views of women, it does not necessarily follow that he harmed [her] because of those beliefs, rather than because of his own personal or psychological makeup coupled with his troubled perception of her actions at times.¹⁰⁶

The Board acknowledged that the abuse inflicted by Alvarado’s husband “may well reflect his own view of women”; however, that did not necessarily mean that “he had any understanding of [Alvarado’s] perspective or that he even cared what [her]

98. *See id.*

99. *See id.* at 909.

100. *Id.*

101. *Id.*

102. *Id.* at 916.

103. *Id.* at 917.

104. *Id.* at 910.

105. *See id.* at 917.

106. *Id.* at 916.

perspective may have been.”¹⁰⁷ It further reasoned that the fact that Alvarado’s husband had not targeted other women in Guatemala who disagree with his views on male domination was evidence that his actions were not taken “on account of” any imputed political opinion.¹⁰⁸

With respect to the particular social group claim, the Board first determined that the proffered social group was not a cognizable social group for purposes of asylum law.¹⁰⁹ It reasoned that the social group seemed to have been defined solely for purposes of the asylum case.¹¹⁰ The Board further held that, even assuming Alvarado had shown she was a member of a cognizable social group, she had failed to show that the abuse occurred on account of her membership in that group.¹¹¹ Citing the Supreme Court’s decision in *Elias-Zacarias*, the Board stated that it understood “the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm.”¹¹² The Board then concluded that Alvarado had failed to show that her husband was motivated to abuse her based on her political opinion or social group:

In the case now before us, it simply has not been shown that political opinion or social group membership can reasonably be understood as the motivation behind the spouse abuse. Other factors, ranging from jealousy to growing frustration with his own life to simple unchecked violence tied to the inherent meanness of his personality, are among the explanations or motivations that may reasonably be inferred on this record for the actions of the respondent’s husband. For example, when the respondent resisted her husband’s demands for sexual relations, he would accuse her of seeing other men. Notably, he did not accuse her of harboring opinions hostile to his own or of being part of an

107. *Id.* at 915.

108. *See id.* at 917 (stating that “there has been no showing that the respondent’s husband targeted any other women in Guatemala, even though we may reasonably presume that they, too, did not all share his view of male domination”).

109. *See id.* at 917–18.

110. *Id.* at 918.

111. *Id.* at 926.

112. *Id.* at 923.

abhorrent group.¹¹³

The Board also held that it was clear that Alvarado's husband was not targeting her "on account of" her membership in the proffered social group because he had not targeted other women in the same social group.¹¹⁴ It concluded that he targeted her "because she was his wife, not because she was a member of some broader collection of women, however defined, whom he believed warranted the infliction of harm."¹¹⁵ Significantly, in contrast to its prior decision in the *Kasinga* case (but without reference to the *Kasinga* decision), the Board explicitly stated that the lack of legitimate motives for domestic violence was an insufficient basis from which to infer that the abuse occurred on account of a Convention ground.¹¹⁶ As it did in the forced sterilization context in *Chang*, the Board ended its decision by noting that, if it so desired, Congress could amend the asylum laws to explicitly cover claims such as Alvarado's.¹¹⁷

Five members of the Board dissented, reasoning, *inter alia*, that the majority had erred in failing to consider the broader context in which the abuse occurs.¹¹⁸ Specifically, the Board had failed to recognize the proper relationship between the failure of the state to adequately protect women from domestic violence (or to punish perpetrators of domestic violence) and the abuser's motivations.¹¹⁹ The dissent argued:

[T]he level of impunity with which a persecutor acts is relevant to an "on account of" determination. Like the persecutor who targets the Jewish shopkeeper because he

113. *Id.* at 926.

114. *See id.* at 921 (stating that the immigration judge's nexus finding was too broad because Alvarado's husband "did not target all (or indeed any other) Guatemalan women intimate with abusive Guatemalan men").

115. *Id.*

116. *See id.* at 927 ("[W]e find the lack of legitimate motives, an unconscionable level of harm, the escalation of the harm over time, and even the very incomprehensibility of the abuse to be an inadequate basis from which to infer a statutorily qualifying motive.").

117. *Id.* at 928 ("The issue of whether our asylum laws (or some other legislative provision) should be amended to include additional protection for abused women, such as this respondent, is a matter to be addressed by Congress.").

118. *In re R-A-*, 22 I. & N. Dec. 906, 929 (B.I.A. 1999).

119. *See id.* at 937-39.

knows he can act with impunity owing to his victim's religion, the respondent's husband knows he can commit his atrocities with impunity because of the respondent's gender and their relationship. . . . [H]e knew that, as a woman subject to his subordination, the respondent would receive no protection from the authorities if she resisted his abuse and persecution.¹²⁰

Relying on the *Kasinga* decision, the dissent further argued that, just as genital mutilation is performed as a means of controlling women's sexuality, domestic violence is "a form of violence rooted in the economic, social, and cultural subordination of women."¹²¹ Indeed, the dissent reasoned that it was clear that Alvarado's husband was motivated "to dominate and subdue her, precisely because of her gender, as he inflicted his harm directly on her vagina, sought to abort her pregnancy, and raped her."¹²²

In the immediate aftermath of its 1999 decision in *Matter of R-A-*, the Board decided other cases based on the same reasoning.¹²³ In one case, the Board affirmed an immigration judge's holding that a victim of severe domestic violence had not been persecuted on account of any protected ground, but merely because the abuser was a "despicable person."¹²⁴ Yet, the agency and courts routinely have granted asylum to political dissidents fleeing dictatorial regimes, without any regard to whether the dictator was seeking power and control or whether he was a "despicable person."¹²⁵

As these decisions make clear, even if an applicant seeking asylum based on domestic violence were able to proffer a cognizable social group, the nexus requirement as it is

120. *Id.* at 939.

121. *Id.*

122. *Id.* at 938.

123. See Musalo & Knight, *supra* note 10, at 1535–36.

124. *Id.* (citing *Matter of D-K-* (L.J., Elizabeth, N.J. Dec. 8, 1998) (page number not available)).

125. See, e.g., *Gui v. INS*, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and being targeted by the government for his political beliefs). Indeed, many cases involving political dissidents escaping dictatorial regimes likely do not end up in the Courts of Appeals or even at the Board, because they are granted in the first instance. *Karijomenggolo v. Gonzales*, 173 F. App'x 34, 36–37 (2d Cir. 2006) (holding that the applicant was persecuted on account of an imputed political opinion by a former military dictator who had close ties to the military).

currently analyzed would still serve as a substantial, if not insurmountable, hurdle to obtaining relief.

D. Trafficking

According to the United Nations High Commissioner for Refugees, human trafficking includes forced labor, slavery, or practices similar to slavery.¹²⁶ The United States government similarly recognizes that human trafficking is a “tragically widespread form of modern-day slavery.”¹²⁷ Sex trafficking “primarily affects women and children who are forced into prostitution and other forms of sexual exploitation.”¹²⁸ For many victims of trafficking or individuals who fear trafficking, asylum may provide the best (or only) source of protection.¹²⁹

However, the nexus requirement has proven to be a barrier for individuals seeking protection from trafficking.¹³⁰ In many cases, courts have held that the nexus requirement has not been met, because the reasons for the trafficking were either personal or economic in nature. For example, in one case, a fifteen-year-old Albanian girl was approached by a local trafficker, who asked her if she would marry him.¹³¹ When she

126. U.N. High Comm’r for Refugees, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked ¶ 3, HCR/GIP/06/07 (Apr. 7, 2006), available at <http://www.unhcr.org/refworld/docid/443679fa4.html>.

127. U.S. DEP’T OF JUSTICE ARCHIVE, HUMAN TRAFFICKING, available at http://www.justice.gov/archive/olp/human_trafficking.htm (last visited Mar. 5, 2013).

128. U.N. High Comm’r for Refugees, *supra* note 126, ¶ 3.

129. See Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention’s “Nexus” Requirement*, 16 MICH. J. GENDER & L. 453, 462–63 (2010). It is important to note that the T visa, a form of relief granted to victims of trafficking, does not offer protection in all cases. The T visa requires a showing that the applicant is or was a victim of “severe human trafficking” and is present in the United States because of the trafficking. 8 U.S.C. § 1101(a)(15)(T), added by § 107(e), Division A (Trafficking Victims Protection Act of 2000), of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA 2000), Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000). Accordingly, an individual who fled her home country due to a fear that she would be trafficked if she stayed, but who was never actually trafficked, would not be eligible for a T visa.

130. See *id.* at 476–77; see also Steven Knight, *Asylum from Trafficking: A Failure of Protection*, 07 IMMIGR. BRIEFINGS 1 (July 2007).

131. *In re Anon.*, A# redacted (New York, N.Y., Immigration Ct., Feb. 4, 2004), at 19–20 (CGRS Case #1034).

refused, he kidnapped, beat, and raped her.¹³² While he held her in captivity, she overheard him making plans to traffic her.¹³³ She escaped and sought asylum in the United States;¹³⁴ however, the immigration judge and Board determined, among other things, that she had not shown the required nexus to a protected ground.¹³⁵ The immigration judge referred to her trafficker as a “spurned suitor” and stated that his reasons for wanting to traffic her were “personal.”¹³⁶ In other cases, immigration judges and the Board have denied asylum, reasoning that the traffickers were motivated by criminal or economic enrichment rather than a convention ground.¹³⁷

It is well-documented that the majority of victims of trafficking are female, and a large percentage are also minors.¹³⁸ By focusing on the traffickers’ personal motivations instead of the status of the victims, these decisions ignore the gender and age dimensions of human trafficking.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See, e.g.,* *Burbiene v. Holder*, 568 F.3d 251, 254 (1st Cir. 2009) (affirming the agency’s denial of an asylum claim based on fear of trafficking because trafficking is a “criminal, not governmental, activity”); *In re P-H, A#* redacted (Houston, Tex., Immigration Ct., Mar. 4, 2004) at 2 (CGRS Case #3695) (denying applicant’s asylum claim based on fear of trafficking on nexus grounds because her fear was based on “the outstanding debt she continues to have stemming from the illegal smuggling into United States, and as a result of international criminal conduct”).

138. *See, e.g.,* Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(4) (“Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.”); U.N. Office on Drugs and Crimes, *Who Are The Victims And Culprits Of Human Trafficking?*, available at http://www.unodc.org/unodc/en/human-trafficking/faqs.html#Who_are_the_victims_and_culprits_of_human_trafficking (stating that “a disproportionate number of women are involved in human trafficking both as victims and as culprits”) (last visited Dec. 8, 2013); Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 638 (2009) (“Approximately 800,000 people are trafficked across national borders each year; the majority of these victims are female and approximately half are minors.”).

E. Forced Marriage

Concerns about the application of the nexus test in the trafficking context apply with equal force in the context of asylum claims based on forced marriage.

In *Gao v. Gonzales*, the Second Circuit Court of Appeals considered the case of a young woman seeking asylum in the United States to escape a forced marriage in China, her home country.¹³⁹ When Gao was nineteen years old, her parents sold her to a man named Chen Zhi, promising him that she would marry him when she turned twenty-one.¹⁴⁰ After Zhi became abusive, Gao decided she did not want to marry him.¹⁴¹ Zhi told Gao that if she did not marry him, his uncle, a powerful government official, would arrest her.¹⁴² Gao tried to move to another part of China, but Zhi found her.¹⁴³ He also harassed and threatened her family.¹⁴⁴ Gao fled to the United States, and Zhi continued to harass her family.¹⁴⁵ She applied for asylum in the United States.¹⁴⁶

The immigration judge and Board held that Gao had not shown that she was targeted on account of one of the Convention grounds.¹⁴⁷ Instead, the agency determined that the persecution occurred on account of “a dispute between two families,” reasoning that Gao’s parents had violated the oral marriage contract, “and that is what caused the anger by the boyfriend in this situation”¹⁴⁸

On appeal, the government conceded, and the Second Circuit Court of Appeals held, that forced marriage rises to the level of persecution.¹⁴⁹ The court further held that Gao had shown that she was a member of a particular social group, namely, “women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and

139. *Gao v. Gonzalez*, 440 F.3d 62, 64 (2d Cir. 2006).

140. *Id.*

141. *See id.*

142. *Id.*

143. *See id.*

144. *See id.*

145. *Id.* at 64–65.

146. *See id.* at 65.

147. *See id.*

148. *Id.* at 70.

149. *Id.* at 66.

enforceable.”¹⁵⁰ Finally, the court held that the evidence demonstrated that Gao “might well be persecuted in China—in the form of lifelong, involuntary marriage—‘on account of’ her membership in this group.”¹⁵¹ The court granted the petition for review.¹⁵²

In 2007, however, the Supreme Court vacated the Second Circuit decision, and the case was remanded to the Board to decide, in the first instance, whether the social group articulated by the Court was a cognizable one and, if so, whether Gao was persecuted on account of her membership in that group.¹⁵³

While the Board has not rendered a precedential decision answering the precise questions raised in *Gao*, the Board in another recent case framed a forced marriage claim as a claim based on “arranged marriage.”¹⁵⁴ It held that arranged marriage does not constitute per se persecution.¹⁵⁵ It further “questioned the viability of” the applicant’s proffered social group, “young female members of the Bambara tribe who oppose arranged marriage,” and held that, even accepting the applicant’s membership in such a group, “she has failed to demonstrate a clear probability that she would be persecuted on that basis. Rather the respondent has expressed only a generalized fear of disobeying her authoritarian father.”¹⁵⁶

As in the trafficking context, it is well known that forced marriage overwhelmingly affects females and minors.¹⁵⁷ The

150. *Id.* at 70.

151. *Id.*

152. *Id.* at 72.

153. *See* *Keisler v. Hong Yin Gao*, 552 U.S. 801, 801 (2007) (remanding to the Second Circuit in light of its recent decision in *Gonzales v. Thomas*); *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2006) (holding that the agency must decide, in the first instance, whether the proffered social group is cognizable under the Act).

154. *See In re A-T-*, 24 I. & N. Dec. 296, 302 (B.I.A. 2007).

155. *See id.*

156. *See id.* at 303.

157. *See, e.g.*, U.N. Human Rights, Office of the High Comm’r for Human Rights, *Not a Single Girl Should Be Forced to Marry* (Oct. 12, 2012), available at <http://www.ohchr.org/EN/NewsEvents/Pages/IntDayGirlChild.aspx> (“Although boys and men can also be the victims of forced marriages, the overwhelming majority of those in servile marriages are girls and women.”); Sauti Yetu, *Forced Early Marriage*, CENTER FOR AFR. WOMEN, available at <http://www.sautiyetu.org/issues-early-forced-marriage> (“Globally, it is estimated that approximately one-third of girls living in the developing world (excluding China) are married before age 18.”); UNICEF, *Early Marriage: A Harmful Traditional Practice* (2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf (explaining and depicting through graphs that early marriage, marriage before

agency's reduction of forced marriage claims to mere familial disputes fails to take into account adequately the obvious role that gender, age, and culture play in the likelihood of forced marriage.

F. Religion

In the context of religion, a nexus problem has given rise to one of the most controversial asylum decisions to date. In *Li v. Gonzales*,¹⁵⁸ the Fifth Circuit Court of Appeals considered the appeal of an individual who claimed that he experienced and feared religious persecution in China.¹⁵⁹

Xiaodong Li testified that he was born into a Christian family, but the Chinese Communist Party suppressed religious activities, and his parents prohibited him from attending church when he was growing up.¹⁶⁰ In 1989, he joined a government church, but when his school administrators learned of his participation in the church, they threatened to discharge him from school.¹⁶¹ He ended his affiliation with the government church and began attending an underground church made up of six or seven individuals who met at Li's home on Sundays.¹⁶² In 1995, after police found religious materials in Li's home, they arrested him and took him to a police station.¹⁶³ There, they beat him, kicked him, hit him in the head, and pulled his hair, forcing him to kneel.¹⁶⁴ They interrogated him and pushed him to admit that he was involved with an illegal church.¹⁶⁵ When Li refused, they shocked him with an electric wand.¹⁶⁶ After two hours of this

eighteen, is especially common in Niger, Chad, Mali and Bangladesh and other poor mainly rural countries); Comm. on the Elimination of Discrimination Against Women, *General Recommendation 21*, 16 (2) (1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (The Committee on the Elimination of Discrimination against Women considers eighteen to be the minimum age of marriage and thus early marriage is considered forced marriage.).

158. 420 F.3d 500 (5th Cir. 2005).

159. *See id.* at 504.

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 504–05.

166. *See id.* at 505.

treatment, Li signed a written confession.¹⁶⁷ He was detained in abusive conditions for five days, after which he was released on bail.¹⁶⁸ Li was told that a hearing would be set in six months, but he fled to the United States before the hearing was conducted.¹⁶⁹

The Board denied Li's application for withholding of removal,¹⁷⁰ and the Fifth Circuit Court of Appeals affirmed.¹⁷¹ The court reasoned that the government of China was not motivated to punish Li by his religion; rather, it punished him on account of his violation of the law against unregistered churches.¹⁷² Distinguishing between religious activity and religion, the court reasoned, "it is axiomatic that Li was punished because of religious activities, nonetheless, it does not necessarily follow that Li was punished because of his religion."¹⁷³ Significantly, though it implied that it saw the police's treatment of Li as legitimate prosecution (as opposed to persecution),¹⁷⁴ the court failed to consider the severity of the treatment Li suffered at the hands of the police, a step that is critical to the prosecution-versus-persecution analysis.¹⁷⁵

The court's decision set off a firestorm of criticism from religious organizations and human rights groups.¹⁷⁶ The

167. *See id.* at 504.

168. *Id.* at 506.

169. *Id.* at 505.

170. Li was not eligible for asylum because he failed to file his application within the one-year deadline. *See id.* at 505.

171. *Id.* at 511.

172. *See id.* at 510–11.

173. *Id.* at 510.

174. *Id.* It is well established that legitimate prosecution does not constitute persecution for asylum purposes. *See* *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004); *Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1153 (6th Cir. 2010).

175. *See, e.g.*, U.N. High Comm'r on Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ¶ 57 (Geneva 1979, rev. 1992), available at <http://www.unhcr.org/3d58e13b4.html> (stating that an individual "guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the [refugee] definition"); *Li v. Holder*, 559 F.3d 1096, 1109 (9th Cir. 2009) (stating that "disproportionately severe punishment" is an exception to the general rule that prosecution does not qualify as persecution) (citing *Fisher v. INS*, 79 F.3d 995, 962 (9th Cir. 1996)); *Vumi v. Gonzales*, 502 F.3d 150, 157–59 (2d Cir. 2007) ((stating that interrogation and punishment "disproportionate to the crime which would indicate persecution on nexus grounds rather than prosecution or legitimate law-enforcement interrogation") (citing *In re S-P*, 21 I & N Dec. 486 (B.I.A. 1996)).

176. *See* Jonathan Robert Nelson, *Shaking The Pillars: An Asylum Applicant Shakes Loose Some Unusual Relief*, 83 NO. 1 INTERPRETER RELEASES 1, 3 n.11

groups filed amicus briefs in support of a motion for rehearing en banc, and “influential political players went behind the scenes in Washington to question how the government could have advocated for a position that seemed so hostile to religious freedom.”¹⁷⁷ In an unprecedented move, the United States Commission on International Religious Freedom wrote a letter to the Attorney General stating that it had “never before taken a position on a case involving an individual asylum claimant,” but it felt compelled to voice its concern given “the potential adverse impact which the decision in *Li* . . . may have on both asylum adjudications and on United States’ efforts to promote international religious freedom.”¹⁷⁸

In response, the government withdrew its appeal to the Board.¹⁷⁹ The Board vacated its decision in the case and reinstated the immigration judge’s order granting Li withholding of removal.¹⁸⁰ The Fifth Circuit Court of Appeals then vacated its decision for mootness.¹⁸¹

In another case based on religion, the applicant was an

(Jan. 3, 2006) (*Amici* writing briefs in support of Li included the following religious and immigration organizations: “the Christian Legal Society; the National Association of Evangelicals, the Ethics and Religious Liberty Commission of the Southern Baptist Convention; the Hebrew Immigrant Aid Society; the Presbyterian Church (U.S.A.); the U.S. Conference of Catholic Bishops; Jubilee Campaign USA; Episcopal Migration Ministries; China Aid Association; Saddleback Church; Church World Service; Lutheran Immigration & Refugee Service; Refugio del Rio Grande; Amnesty International USA; American Immigration Lawyers Association; Minnesota Advocates for Human Rights; Human Rights First; Asian American Justice Center; the Capital Area Immigrants’ Rights Coalition; the Center for Gender and Refugee Studies; World Organization for Human Rights USA.”).

177. *Id.* at 3. *See, e.g.*, Brief of Amici Curiae Amnesty International USA, Minnesota Advocates for Human Rights, Human Rights First, Asian American Justice Center and Episcopal Migration Ministries in Support of the Petitioner’s Motion for Rehearing En Banc, *Li v. Gonzalez*, 420 F.3d 500 (5th Cir. 2005) (No. 03-60670), *available at* <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08211-asy-li-v-gonzales-brief.pdf>.

178. *See* Nelson, *supra* note 176, at 3 (quoting Letter dated September 13, 2005 from Michael Cromartie, Chair of USCIRF, to Assistant Attorney General Peter D. Keisler (copy attached to undated Response to Petition for Rehearing and Rehearing En Banc, served Oct. 24, 2005 in *Xiaodong Li v. Alberto Gonzales*, No. 03-60670, (5th Cir. Ct. App.))).

179. *See id.* at 3.

180. *Li v. Gonzales*, 429 F.3d 1153 (5th Cir. 2005).

181. *Id.*; *see also* Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 112 (2007).

Egyptian citizen who was born to a Muslim family.¹⁸² As a child, the applicant found himself attracted to the Christian faith, and as an adult, he married a Catholic woman. The applicant's extended family members were members of an extremist organization, recognized by the United States government as a terrorist organization. When they learned of his interfaith marriage, members of the organization began targeting the applicant and his wife. Among other things, they beat them, threatened to kill them if they did not divorce, destroyed their car, attempted to kidnap the wife, stabbed the applicant in the face, and attempted to kill their newborn daughter in the hospital. Twice, the applicant sought police protection. The first time, the officer turned him away, telling him that his wife was an "infidel" and that he would rather arrest the applicant than his persecutors. The second time, the applicant was taken to the police after he was stabbed, and the police did nothing. The applicant and his wife and daughter fled to the United States, and after they arrived in the United States, he converted to Catholicism.

The applicant applied for asylum based on both the past persecution he suffered as a result of his interfaith marriage as well as the future persecution he would suffer on account of his conversion. The immigration judge denied asylum, holding, in part, that the applicant had failed to demonstrate nexus because the past persecution did not occur on account of religion; rather, the persecution constituted "more of a family feud cutting along the lines of religious differences." The immigration judge did not address the future persecution claim. The Board dismissed the applicant's appeal, reasoning in part that the applicant had failed to show that the Egyptian government would not protect him from the persecution. The applicant appealed to the Fourth Circuit Court of Appeals. The Becket Fund for Religious Liberty filed an amicus brief in support of his claim. Before the government's response brief was due, the parties submitted a joint motion to remand, agreeing that the agency had erred in failing to consider the applicant's claim of fear of future persecution based on his conversion to Catholicism in the United States. The Fourth

182. The applicant is a client of the author. The applicant was represented by the author before the Immigration Judge, the Board, and the Fourth Circuit Court of Appeals. All application materials and court decisions (which were not published) are on file with the author.

Circuit Court of Appeals remanded, and the immigration judge granted asylum on that basis. The immigration judge's nexus holding with respect to the past persecution claim accordingly was never addressed by a higher court.

Although the agency's initial decision in this case and the *Li* decision eventually were vacated,¹⁸³ the cases serve as a demonstration of the confusion created by the lack of consistent standards regarding the nexus requirement. These cases further demonstrate the potential adverse impact this confusion can have on asylum adjudication, particularly in contexts that, unlike the religion context, do not spark corrective action by influential individuals and groups.¹⁸⁴

G. Homosexuality

Although claims involving persecution on account of homosexuality have generally been recognized as cognizable claims on the basis of particular social group,¹⁸⁵ the nexus requirement has posed a problem for some applicants, as persecution based on homosexuality has often been viewed by courts as having occurred for personal or criminal reasons.

Recently, in *Ayala v. U.S. Attorney General*, the Eleventh Circuit Court of Appeals considered the case of a gay man from Venezuela.¹⁸⁶ Ayala testified that, in addition to the harassment, discrimination, and rejection he faced from his family, neighbors, and coworkers due to his sexual orientation, he was physically and sexually assaulted by police officers when leaving a gay club one night.¹⁸⁷ He had participated in a vigil to commemorate International AIDS Day earlier that day.¹⁸⁸ As he left the club, the police officers threw him against

183. *Li*, 429 F.3d at 1153.

184. See Nelson, *supra* note 176, at 2 (“Unlike many asylum denials, the Fifth Circuit’s decision in *Li v. Gonzales* caused an uproar that extended beyond the insular community of professional human rights defenders.”) (emphasis added).

185. See, e.g., *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990). Interestingly, however, the Board in this case reasoned that “[t]he applicant’s testimony and evidence . . . do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual.” This reasoning implies that there might be a nexus problem in cases where the punishment occurred on account of the applicant’s activities, rather than his or her status. *Id.* at 822.

186. *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 943 (11th Cir. 2010).

187. *Id.* at 945.

188. *Id.*

a wall and pointed their weapons at him.¹⁸⁹ They asked him for his home address, and they took his identification and the money from his wallet.¹⁹⁰ When Ayala asked them why he was being detained, they told him “to shut up because [he] was queer and they could apply the vagrancy laws.”¹⁹¹ The officers then put Ayala in their car, placed a hood over his head, and drove around.¹⁹² Eventually, they removed the hood.¹⁹³ They forced Ayala to perform oral sex on one of the officers.¹⁹⁴ The police officers then dropped Ayala off at a dark marketplace, warning him that “‘if [he] presented any kind of denouncement or report they had [his] address,’ and [t]hey could incarcerate [him] or plant drugs in [his] house . . . all as a result of [his] being queer.”¹⁹⁵ In support of his application for asylum, Ayala presented articles and reports stating that homosexuals are subjected to discrimination in Venezuela.¹⁹⁶

Relying on its prior case law, the agency determined that Ayala was a member of a particular social group; however, it held that Ayala had not shown that the persecution he suffered was “on account of” that membership.¹⁹⁷ The immigration judge found that the conduct of the police officers amounted to a “criminal act[] perpetrated by individuals”¹⁹⁸ The Board, agreeing with the immigration judge, stated that “[s]uch criminal acts by rogue police officers are not persecution ‘on account of’ one of the protected grounds.”¹⁹⁹ Significantly, the Board and immigration judge did not explain why “criminal” acts carried out by “individuals” could not constitute persecution on account of a protected ground.²⁰⁰ Indeed, the majority of acts that rise to the level of persecution are likely criminal in nature, and there is no requirement that the treatment be carried out by large groups of people in order to constitute persecution under the Act.²⁰¹ It appears in this case

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.* at 946.

197. *Id.* at 947.

198. *Id.*

199. *Id.* at 949.

200. *Id.* at 947–49.

201. *See, e.g., In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *modified on*

that the agency viewed the actions of the police officers as occurring out of personal animus rather than on account of a protected ground. Because the agency had failed to “even mention[] the police officers’ slurs about Ayala’s homosexuality,”²⁰² the Court of Appeals remanded to the Board to reassess whether the police officers harmed Ayala, “at least in part, on account of his sexual orientation.”²⁰³

In *Boer-Sedano v. Gonzales*, the Ninth Circuit Court of Appeals considered the claim of a gay man from Mexico.²⁰⁴ Boer-Sedano was sexually assaulted by a high-ranking police officer on nine separate occasions.²⁰⁵ The assaults began when the officer arrested Boer-Sedano and his friend in a town square and detained them for twenty-four hours.²⁰⁶ He told them they were being held for being gay.²⁰⁷ During the sexual assaults, the officer told Boer-Sedano that he would tell others that Boer-Sedano was gay if he resisted.²⁰⁸ He physically and verbally abused him during the sexual assaults.²⁰⁹ He also told Boer-Sedano that he could kill him and that no one would ask about him because he was gay.²¹⁰ He stated that if he killed him, he would just be “cleaning up society.”²¹¹ The death threats were not only verbal; during one encounter, the officer

other grounds (“[H]arm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (noting that “persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim[,]” which in this case consisted of Kasinga’s aunt and husband, who wanted for her to be subjected to female genital mutilation).

202. *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 943 (11th Cir. 2010).

203. *Id.* at 950. Similarly, in *Bromfield v. Mukasey*, the agency held that Bromfield had not shown that he had a well-founded fear of persecution in Jamaica on account of his homosexuality, reasoning that homosexuals in Jamaica were only victims of “random acts of violence.” 543 F.3d 1071, 1076 (9th Cir. 2008). In overturning the agency’s decision, the Court of Appeals reasoned that “[w]hether particular conduct constitutes persecution or ‘random’ violence turns on the perpetrator’s motive. If the perpetrator is motivated by his victim’s protected status—including sexual orientation—he is engaging in persecution, not random violence.” *Id.* at 1076–77 (citations omitted).

204. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1085 (9th Cir. 2005).

205. *Id.* at 1086.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

took out his gun, loaded it with one bullet, and pointed it at Boer-Sedano's head.²¹² Boer-Sedano moved to a different part of Mexico and began working at an underground gay club.²¹³ When the bar was raided by the police, they asked him if he was gay, and he denied being gay in order to avoid arrest and the same treatment to which he had been subjected earlier.²¹⁴ He fled Mexico and sought asylum in the United States.²¹⁵

The immigration judge denied asylum, reasoning that the sexual assaults were a result of a "personal problem" Boer-Sedano had with the officer and not on account of a protected ground.²¹⁶ The Board affirmed without opinion.²¹⁷ The Court of Appeals remanded, stating: "The police officer initially arrested Boer-Sedano only *after* asking him if he was gay and only after seeing him with a friend, whom the officer concluded was his gay partner. Furthermore, the officer's words during the assaults make clear that he was motivated by Boer-Sedano's sexuality."²¹⁸ The court conducted no analysis as to whether Boer-Sedano's sexual orientation was a "central reason" for the persecution or whether there were other reasons for the persecution, likely because his application for asylum was filed before enactment of the REAL ID Act.²¹⁹ It is unclear how the court would have decided the case had it been governed by REAL ID.

Other cases involving claims based on homosexuality demonstrate the difficulty of proving the subjective intent of the persecutors. In *Karouni v. Gonzales*, the applicant, a gay man from Lebanon, stated in his asylum application that his cousin, Khalil, who was also gay, was shot in the anus by Hizballah.²²⁰ Though he survived the attack, he was later shot and killed in his apartment, apparently by Hizballah.²²¹ Karouni also detailed harassment and abuse that he suffered and that his friends or partners suffered in Lebanon.²²²

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1087.

216. *Id.*

217. *Id.*

218. *Id.* at 1089.

219. *Id.* at 1085 (indicating that the asylum hearing took place in 2001).

220. *Karouni v. Gonzales*, 399 F.3d 1163, 1167–68 (9th Cir. 2005).

221. *Id.* at 1168.

222. *Id.*

Regarding the nexus issue, the government argued before the Ninth Circuit that while homosexuals constitute a particular social group, the persecution Karouni fears would not be on account of his membership in that group, because the persecution “would not be on account of his *status* as a homosexual, but rather on account of him committing future homosexual *acts*.”²²³ The Court of Appeals dispensed with this argument, citing the Supreme Court’s decision in *Lawrence v. Texas*²²⁴ and stating that it did not agree with the government that the Immigration and Nationality Act requires Karouni “to relinquish such an ‘integral part of [his] human freedom.’”²²⁵

With respect to the incident involving Karouni’s cousin, Khalil, the immigration judge apparently found that Karouni had failed to demonstrate that his cousin was shot because he was gay.²²⁶ The Court of Appeals disagreed, reasoning that Hizballah’s shooting of the cousin in the anus was *res ipsa loquitor*²²⁷ evidence that he was shot because he was gay.²²⁸ The court reasoned:

We can conceive of no explanation why members of a society hostile to homosexuality would shoot Khalil in the anus other than that the perpetrators primitively and abhorrently believed that they were punishing Khalil for his perceived sins by mutilating, as Karouni characterized it, “the locus of Khalil’s homosexual sin.”²²⁹

The court concluded that the evidence demonstrated that Khalil “likely” was shot in the anus and then killed on account of his being gay.²³⁰ The court thus granted the petition for review.²³¹

Despite the fact that the Courts of Appeals have repeatedly

223. *Id.* at 1172.

224. *Lawrence v. Texas*, 539 U.S. 558 (2003).

225. *Karouni*, 399 F.3d at 1173 (quoting *Lawrence*, 539 U.S. at 577).

226. *Id.* at 1173.

227. BLACK’S LAW DICTIONARY (9th ed. 2009) at 1424 (Latin for “the thing speaks for itself”). The doctrine as used in tort law provides that, in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence that establishes a prima facie case. *Id.* at 1424–25.

228. *Karouni*, 399 F.3d at 1174.

229. *Id.*

230. *Id.*

231. *Id.* at 1179.

corrected the agency's disturbing nexus findings in the context of claims based on homosexuality, a new nexus framework is still needed to ensure that the agency does not continue to make such errors in reasoning in the first instance, particularly in light of the time it takes to appeal from an adverse immigration decision, the hardships faced by many immigrants during this waiting period, and the fact that many immigrants choose not to appeal or drop their appeals as a result.²³²

H. Gangs

In recent years, the Board has denied several claims of applicants who fled gang violence in their home countries.²³³ Many of these applicants are young men who have resisted recruitment efforts of local gangs and have been targeted by the gangs as a result.²³⁴ They argue that they have been persecuted or fear persecution on account of their particular social group, usually defined as young men from the applicant's home country who have been recruited by gangs and who have resisted such recruitment.²³⁵ Based on the Board's relatively

232. See, e.g., David C. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 793 (2011) ("Aliens in removal proceedings face greater and greater delays in the adjudication of their claims for relief; the average time for a case in removal proceedings is 526 days."); ARNOLD & PORTER LLP FOR THE AM. BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES pt. 3, at 11–12 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (noting that by the year 2000 adjudications "took an average of 1,100 days . . . from the time an asylum appeal was filed until the BIA's decision issued").

233. See, e.g., *Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010); *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011); *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012).

234. See, e.g., *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009); *Mendez-Barrera*, 602 F.3d at 27; *Lizama v. Holder*, 629 F.3d 440, 443 (4th Cir. 2011).

235. See, e.g., *In re E-A-G-*, 24 I. & N. Dec. 591, 593 (B.I.A. 2008) (using the social group formulations "young persons who are perceived to be affiliated with gangs (as perceived by the government and/or the general public)," and "persons resistant to gang membership (refusing to join when recruited)"); *Ramos-Lopez*, 563 F.3d at 856 ("[Y]oung Honduran men who have been recruited by the MS-13, but who refuse to join."); *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1228–29 (10th Cir. 2011) *as corrected on denial of reh'g en banc sub nom.* *Rivera-Barrientos*

new “social visibility” and “particularity” requirements for particular social groups, the Board and courts have rejected the proffered social groups.²³⁶ But in at least two recent cases, the Board rejected the claims on nexus grounds.

In *Larios v. Holder*, the applicant claimed that he feared persecution by gang members in Guatemala because they attempted to recruit him, and he refused.²³⁷ The immigration judge denied asylum, reasoning that, “[I]f Larios was indeed targeted by gangs, the motivation would not be on account of his membership in a particular social group but would rather be an attempt to increase the gang’s numbers.”²³⁸ The Board and First Circuit Court of Appeals affirmed.²³⁹

In *Matter of S-E-G-*, three siblings (a girl and two boys) applied for asylum, claiming that they feared persecution on account of their social group, “Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth”²⁴⁰ The two boys had resisted recruitment by the MS-13 gang, and in response, the gang members harassed and beat the brothers and threatened them with death for refusing to join the gang.²⁴¹ The gang members also threatened to rape their sister.²⁴² The Board rejected the

v. *Holder*, 666 F.3d 641, 647 (10th Cir. 2012) (“Women in El Salvador between the ages of 12 and 25 who resisted gang recruitment.”) (footnote omitted); *Orellana-Monson v. Holder*, 685 F.3d 511, 516 (5th Cir. 2012) (“Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to a principled opposition to gangs.”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 741 (9th Cir. 2008) (“[A] young man in El Salvador resisting gang violence unstoppable by the police”); *Zelaya v. Holder*, 668 F.3d 159, 162 (4th Cir. 2012) (“[Y]oung Honduran males who (1) refuse to join the Mara Salvatrucha 13 gang (MS-13), (2) have notified the authorities of MS-13’s harassment tactics, and (3) have an identifiable tormentor within MS-13.”).

236. See, e.g., *In re E-A-G-*, 24 I. & N. Dec. at 596 (holding that both gang-related particular social groups did not meet the social visibility and particularity tests); *Ramos-Lopez*, 563 F.3d at 862; *Rivera Barrientos*, 658 F.3d at 1234 (holding that the proposed social group did not meet the social visibility requirement); *Orellana-Monson*, 685 F.3d at 522 (affirming the B.I.A.’s holding that the articulated particular social group did not meet the social visibility and particularity test); *Santos-Lemus*, 542 F.3d at 741 (finding that the proffered social group of “a young man in El Salvador resisting gang violence unstoppable by the police” did not have sufficient social visibility and particularity).

237. *Larios v. Holder*, 608 F.3d 105, 108 (1st Cir. 2010).

238. *Id.* at 109.

239. *Id.* at 107, 110.

240. *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

241. *Id.* at 580.

242. *Id.*

siblings' proffered social group.²⁴³ As to the nexus issue, the Board stated that the applicants had "not submitted evidence that persuades us that gangs commit violent acts for reasons other than gaining more influence and power, and recruiting young males to fill their ranks."²⁴⁴ Again, the Board failed to distinguish political dissident cases in which the agency had granted relief without an inquiry into what other motives the persecutor might have had.²⁴⁵ Certainly, dictators are also motivated by a desire for increased "influence and power," yet the Board and courts have nevertheless found nexus to a Convention ground when they target members of a particular ethnic group or persons who hold an opposing political view.²⁴⁶

The Board's recent spate of denials of claims based on gang violence has garnered significant scholarly attention; however, for the most part, this attention has been focused on the proper formulation of the particular social group ground.²⁴⁷ Yet, a

243. *Id.* at 583–84.

244. *Id.* at 588.

245. *See, e.g.*, *Oryakhil v. Mukasey*, 528 F.3d 993, 1000 (7th Cir. 2008) (holding that the applicant had a well-founded fear of future persecution and was unable to relocate within Afghanistan because of the Taliban's presence); *Karijomenggolo v. Gonzales*, 173 F. App'x 34, 36–37 (2d Cir. 2006) (holding that the applicant was persecuted on account of an imputed political opinion by a former military dictator who had close ties to the military); *Gui v. INS*, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and political beliefs).

246. The Board has used similar nexus-related reasoning to deny claims based on resistance to recruitment by guerilla or rebel groups. *See, e.g.*, *In re Vigil*, 19 I. & N. Dec. 572, 577 (B.I.A. 1988) ("The purpose of [the guerillas'] recruitment . . . is to further the guerrillas' objective of overthrowing the Salvadoran Government; the intent of the recruitment is not the persecution of young Salvadoran males on account of one of the five grounds listed in the Act."); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 510 (9th Cir. 1999) (Wiggins, J., concurring) (agreeing with the Board that the applicant "failed to establish that the guerrillas threatened him or beat him on account of one of the enumerated grounds, rather than to coerce him to join their ranks") (internal quotation marks omitted); *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003) ("A reasonable fact finder could decide from this record that the guerillas were simply trying to fill their ranks and were not concerned with Dominguez's political beliefs."); *Bartolo-Diego v. Gonzales*, 490 F.3d 1024, 1027–28 (8th Cir. 2007) (affirming the agency's finding that "the guerillas did not identify the [petitioner] or seek to recruit him because of any political opinion. . . . To the contrary, by [petitioner's] testimony, it appears to be clear that [he] was simply targeted as a young man who might be sympathetic to the guerilla cause.") (quotation marks and citations omitted).

247. *See, e.g.*, Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 830 (2008) (setting forth various particular social groups for gang-related claims and arguing that they are cognizable); James Racine, *Youth Resistant to Gang Recruitment as a Particular*

cognizable social group, in itself, would be insufficient to save such claims. A new nexus formulation is also needed.

I. Membership in a Family

It is well recognized by both the agency and courts that membership in one's family (or association with a family member) can constitute membership in a particular social group for asylum purposes.²⁴⁸ Nevertheless, nexus has sometimes posed a problem for claims based on membership in a family.

In *Bhasin v. Gonzales*, the applicant, Usha Bhasin, applied for asylum based on past persecution and a fear of future persecution on account of her membership in her family.²⁴⁹ Bhasin was a native and citizen of India whose son served as an inspector in the Border Security Force (BSF) on the border between Pakistan and India.²⁵⁰ Within a few years, her son became "famous" for arresting militants crossing the border from Pakistan, and he became a target of those militant organizations.²⁵¹ One night, four armed men from one such organization, the Jammu and Kashmir Liberation Front (JKLF), came to Bhasin's home looking for her son.²⁵² When she told them he was not home, they abducted her and held her for four days.²⁵³ During that time, they tied her to a tree and beat her severely, pulled out her hair, hit her with the butt of a

Social Group in Larios v. Holder, 31 B.C. THIRD WORLD L.J. 457, 458 (2011); Linda Kelly Hill, *The Gangs of Asylum*, 46 GA. L. REV. 639, 644–45 (2012) (discussing the Board's implementation of the "social visibility" and "particularity" requirements, and their effects on gang violence-based claims).

248. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (recognizing petitioner's family as a "particular social group"); *In re C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."); *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007) (stating that "membership in a nuclear family" may support a social-group claim); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008) ("Our prior opinions make it clear that we consider family to be a cognizable social group within the meaning of the immigration law."); *In re Maria Del Rosario Ortega De Lezama*, No. A087 940 459, 2013 WL 3899677, at *1 (B.I.A. June 20, 2013) ("Of course, a family may constitute a particular social group.")

249. 423 F.3d 977, 982 (9th Cir. 2005).

250. *Id.* at 981.

251. *Id.*

252. *Id.*

253. *Id.*

gun, beat her until she lost consciousness, tied her to a cot, and interrogated her about the whereabouts of her son.²⁵⁴ They told her that they wanted to “eliminate each member of [Bhasin’s] family.”²⁵⁵ While she was gone, her youngest son disappeared; he is still missing, and Bhasin stated that she believed the JKLF abducted and killed him.²⁵⁶ Bhasin moved within India to Delhi.²⁵⁷

The persecution continued. While in Delhi, Bhasin learned from BSF officials that her older son, the BSF inspector, had been missing for a week, and that it was believed that he and other BSF agents had been captured or killed, likely by the JKLF.²⁵⁸ A few months after she moved to Delhi, two men knocked on her door.²⁵⁹ When she asked who they were, they told her they would kill her and that they had abducted both of her sons.²⁶⁰ She hid, and they fired shots in the air, leaving behind a note that “repeated that they had taken the sons, that one by one they would eliminate Bhasin’s family, and that they would spare no one.”²⁶¹ Bhasin fled to the United States and applied for asylum.²⁶²

The immigration judge denied Bhasin’s claim, holding that, while she had established a well-founded fear of persecution, she had not met her burden of showing that the persecution occurred or would occur “on account of” one of the protected grounds.²⁶³ Rather, the immigration judge found that the JKLF’s actions stemmed “from retribution.”²⁶⁴ The judge explicitly rejected her claim that she was persecuted on account of her membership in her family.²⁶⁵ The Board affirmed, reasoning that Bhasin “was victimized because the JKLF wanted to locate her son, and perhaps as a means of retribution against the son, but not on account of membership in a particular social group.”²⁶⁶ Bhasin filed a motion to reopen with

254. *Id.* at 981, 985.

255. *Id.* at 981.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 982.

264. *Id.*

265. *Id.*

266. *Id.*

the Board, including new evidence that her daughters and son-in-law had received death threats, had disappeared, and were still missing.²⁶⁷ The Board denied the motion to reopen, ruling that the new evidence was “self serving.”²⁶⁸

The Ninth Circuit Court of Appeals granted Bhasin’s petition for review, holding that the evidence she presented established that she was persecuted on account of her membership in a particular social group.²⁶⁹ Though the court disagreed with the Board’s conclusion that the persecution occurred as a means of retribution,²⁷⁰ its reasons for doing so are less than clear. The court seemed persuaded by the evidence Bhasin presented with her motion to reopen indicating that other family members had also been targeted.²⁷¹ Yet, the JKLF might have targeted other family members as a means of retribution. The court did not explicitly address why this new evidence proved that Bhasin had been persecuted on account of her membership in a particular social group.

In another case, *Demiraj v. Holder*, an applicant faced similar nexus-related hurdles.²⁷² Rudina Demiraj and her son, Rediol, applied for asylum based on a fear of persecution on account of their association with Rudina’s husband (and Rediol’s father), Edmond Demiraj.²⁷³ Edmond had been identified by the United States government as a material witness in its prosecution of Bell Bedini, an Albanian in the United States who was wanted for human smuggling.²⁷⁴ Before Edmond could testify, however, Bedini fled to Albania.²⁷⁵ When Edmond was deported to Albania, Bedini kidnapped, beat, and shot him because of his cooperation with the United States government.²⁷⁶ Bedini also kidnapped two of Edmond’s nieces.²⁷⁷ Rudina and Rediol applied for asylum, fearing that

267. *Id.* at 982–83.

268. *Id.* at 983.

269. *Id.* at 985.

270. *Id.* at 986.

271. *See id.*

272. *See* 631 F.3d 194, 199 (5th Cir. 2011), *vacated*, No. 08-60991, 09-60585, 2012 WL 2051799, at *1 (5th Cir. 2012).

273. *Id.* at 196.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 197.

they too would be targeted for persecution based on their membership in Edmond's family.²⁷⁸

The immigration judge denied their claims, and the Board dismissed their appeal.²⁷⁹ Though the Board agreed with the applicants that the "Demiraj family" constituted a particular social group under the Act,²⁸⁰ it found that the applicants had failed to show that the feared persecution would occur on account of that social group.²⁸¹ It reasoned that the persecutors "were seeking revenge against [Mr. Demiraj] for his testimony, and [sought] to harm [him] by attacking" his family members.²⁸² It further stated, "We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus"²⁸³ The Fifth Circuit Court of Appeals affirmed, reasoning that Rudina and Rediol would not be persecuted for their membership in the Demiraj family "*as such*."²⁸⁴ Instead, the court noted, they would be persecuted "because hurting them would hurt Mr. Demiraj."²⁸⁵

These cases based on fear of persecution on account of membership in a family clearly demonstrate the need for a new nexus standard. By pointing to other non-Convention related reasons for the persecution, courts have skirted the clear reality that were it not for their association with their family members, the applicants would not have been targeted for persecution in the first place.

III. BUT-FOR CAUSATION: A MODEL

As these examples make clear, a unifying approach to determining causation in asylum law is necessary. This Article posits that adjudicators should use the but-for causation analysis commonly employed in tort law, and sometimes applied in anti-discrimination law, as a method for determining

278. *Id.*

279. *Id.*

280. *Id.* at 198.

281. *Id.* at 199.

282. *Id.*

283. *Id.*

284. *Id.* (emphasis in original).

285. *Id.* After Rudina and Rediol appealed to the Supreme Court, the parties came to a resolution out of court, and Rudina and Rediol were granted asylum. *See id.* at 199. The Fifth Circuit's opinion accordingly was vacated. *Id.*

causation in asylum cases. The causation analysis in tort law has evolved over centuries to deal with a multitude of situations. While the but-for analysis is used in the vast majority of cases in tort law, some important exceptions and qualifiers have emerged to address problems that sometimes arise when the but-for test is strictly applied. One of the major qualifiers—the doctrine of proximate cause—would apply, at least by analogy, in refugee law. In addition, many of the principles and goals underlying the causation analysis in torts apply equally in the refugee law context. This Part sets forth the relevant law of causation in torts, with those areas of the law most relevant to refugee law emphasized. The Part then discusses one of the major exceptions to but-for causation in tort law, proximate cause. Finally, the Part describes the use of but-for causation in United States anti-discrimination law.

A. *But-For Causation in Tort Law*

To succeed on a tort claim for negligence, a plaintiff must prove not only negligent breach on the part of the defendant, but also causation.²⁸⁶ The test most often used to determine causation in the tort context is the “but-for” test, which asks whether, but for the defendant’s negligence, the plaintiff would have been harmed.²⁸⁷ If it is more likely than not that the plaintiff would not have been harmed, causation is established.²⁸⁸ In other words, if the defendant’s negligence was a necessary element in causing plaintiff’s harm, then the negligence is a “cause in fact” of the harm.²⁸⁹

This test for causation implicitly recognizes some principles applicable to the refugee law context, as described in further detail below. First, there is always more than one cause for any given event, and the fact that there are multiple

286. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2546 (2013); *Morris v. De La Torre*, 113 P.3d 1182, 1184 (Cal. 2005) (“[A] plaintiff must demonstrate that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of his or her injuries.”); David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1686 (2007).

287. See Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985).

288. See *id.*

289. See *id.*

necessary factors that give rise to an event does not negate that each factor is a cause of the event.²⁹⁰ For example, X negligently rolls a trashcan into the street. Y is driving a car, and though he otherwise would have had plenty of time to stop to avoid hitting the trashcan, he negligently checks his text messages at the moment the trash can rolls into the street. A collision ensues, and passenger Z is injured. But for X's rolling the trashcan into the street, the collision would not have occurred, and but for Y checking his text messages, the collision would not have occurred. Both X's conduct and Y's conduct are factual causes of Z's injury.

Second, the but-for test implicitly recognizes that the fact that a negligent act gives rise to harm under one set of circumstances but does not give rise to harm under another set of circumstances does not negate a finding that the negligent act was a cause of the harm in the first set of circumstances.²⁹¹ So, continuing the above hypothetical scenario, suppose that the next day, X again negligently rolls a trashcan into the street. This time, the driver of a different car sees the trash can in time and swerves around it. The fact that the identical negligent act by X did not cause the same harm in the second scenario does not mean that X's negligent act in the first scenario did not cause Z's injury.

The but-for test is employed in the majority of cases as a routine matter, but some cases have led to exceptions to this general rule of causation.²⁹² One such exception is the "proximate cause" exception.

B. Proximate Cause

The concept of proximate cause (sometimes referred to as "legal cause" or "scope of liability") is actually a rule of liability

290. See RESTATEMENT (THIRD) OF TORTS § 26 cmt. b (2010) ("With recognition that there are multiple factual causes of an event, a factual cause can also be described as a necessary condition for the outcome.") (internal reference omitted).

291. See *id.* § 26.

292. See, e.g., *id.* at cmt. j (describing the evolution of the "substantial factor test" used "to permit the factfinder to decide that factual cause existed when there were multiple sufficient causes—each of two separate causal chains sufficient to bring about the plaintiff's harm, thereby rendering neither a but-for cause"); *id.* at cmt. n (describing the use of "lost opportunity" or "lost chance" doctrine in medical harm cases).

rather than causation.²⁹³ The rule generally dictates that even when a plaintiff has proven that the defendant acted negligently and that the defendant's actions were an actual cause of her injuries, the defendant will not be held liable if his actions were so remote or attenuated from the injuries that liability cannot be justified.²⁹⁴ For example, suppose a doctor negligently diagnoses a woman with infertility. Based on the diagnosis, the woman ceases taking oral contraception. As a result, she becomes pregnant and gives birth to a child. Decades later, that child, now an adult, negligently installs an air conditioning unit in his apartment window, and that unit falls out of the window onto the street, striking and killing a passerby. In this scenario, the doctor was negligent and the doctor's negligence was an actual cause of the death, because but for the doctor's negligence, the child would never have been born, and he never would have killed the passerby. Nevertheless, in this situation, courts would decline to hold the doctor liable for the death of the passerby, because the doctor's negligence was too attenuated from that death.

The proximate cause analysis has evolved over time. The Second Restatement of Torts framed the proximate cause analysis as backward-looking, stating that a defendant will not be held liable for harm if "looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."²⁹⁵ Conversely, the Third Restatement of Torts asks whether the harm was "foreseeable" to the defendant.²⁹⁶ Specifically, it asks whether the defendant should have foreseen the kind of harm that in fact resulted from the defendant's conduct and whether the plaintiff was within the class of persons upon whom such harm might foreseeably befall.²⁹⁷ If the harm was not foreseeable, then the defendant's conduct was not a proximate or legal cause of the harm, and the defendant should not be

293. Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *Dobbs' Law of Torts* § 198 (2d ed. 2013).

294. *See, e.g.*, *Goldberg v. Fla. Power & Light Co.*, 899 So.2d 1105, 1116 (Fla. 2005) ("The law does not impose liability for freak injuries that were utterly unpredictable in light of common human experience.") (quoting *McCain v. Fla. Power Corp.*, 593 So.2d 500, 503 (Fla. 1992)).

295. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

296. RESTATEMENT (THIRD) OF TORTS § 29 cmt. j (2010).

297. *Id.*

held liable.²⁹⁸

C. *But-For Causation in Anti-Discrimination Law*

In United States anti-discrimination law, there are three frameworks for determining causation in disparate treatment cases: (1) the *McDonnell Douglas* framework; (2) the *Price Waterhouse* framework; and (3) the framework set forth in the Civil Rights Act of 1991.²⁹⁹

Under the *McDonnell Douglas* framework, a plaintiff alleging discrimination (for example, that he was not hired for a job due to his race) must first establish a prima facie case of discrimination.³⁰⁰ He may do so by showing: (i) he belongs to a racial minority; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) he was rejected despite his qualifications; and (iv) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.³⁰¹ Once a plaintiff has established a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."³⁰² Finally, the plaintiff must prove that the defendant's articulated reasons were merely pretext.³⁰³

In *Price Waterhouse v. Hopkins*, the Supreme Court announced a second framework for showing causation in discrimination cases.³⁰⁴ Under this approach, the plaintiff must first prove that the protected status was a "substantial factor" in bringing about the challenged employment action.³⁰⁵ The

298. *Id.*

299. Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 643 (2008).

300. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

301. *Id.*

302. *Id.*

303. *Id.* at 804.

304. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989) (per opinion of Justice Brennan with three Justices concurring and two Justice concurring in the judgment), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2 (adding a new subsection (m), stating "[e]xcept as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice[]").

305. *Id.* at 258.

burden then shifts to the defendant to show that the “same decision” would have been made absent the protected trait, and if the defendant makes such a showing, the defendant avoids liability.³⁰⁶

Finally, in the Civil Rights Act of 1991, Congress set forth a third framework. Under the Act, a plaintiff must first prove that the protected trait played a “motivating part” in bringing about the adverse employment action. The burden then shifts to the defendant to show that the “same decision” would have been made absent the protected characteristic.³⁰⁷ However, even if the defendant successfully shows that the same action would have been taken absent consideration of the protected characteristic, liability attaches; a successful defense merely reduces the damages available to the plaintiff.³⁰⁸

It is well recognized that but-for causation plays a role in all three of these analyses. The *McDonnell Douglas* framework places the burden on the plaintiff to prove but-for causation.³⁰⁹ Under *Price Waterhouse*, the plaintiff can meet the initial burden by showing that the protected characteristic was merely a substantial or motivating factor in bringing about the adverse action, and the burden then shifts to the defendant to prove a lack of but-for causation.³¹⁰ Similarly, under the Civil

306. *Id.*

307. See Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-5(g)(2)(B) (West 2013).

308. *Id.*

309. Katz, *supra* note 299, at 653 (“Courts that require litigants to use the *McDonnell Douglas* framework probably intend to require ‘but for’ causation for all purposes (liability, as well as damages), and to place the full burden of proving ‘but for’ causation on the plaintiff.”).

310. See *Price Waterhouse*, 490 U.S. at 278 (O’Connor, J., concurring) (“Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made ‘because of’ the plaintiff’s protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations.”); *id.* at 281 (Kennedy, J., dissenting) (“Much of the plurality’s rhetoric is spent denouncing a ‘but-for’ standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today’s decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof.”); Katz, *supra* note 299, at 653 (“By proving ‘motivating factor’ causation, the plaintiff can shift the burden to the defendant on the issue of ‘but for’ causation (to prove a lack of ‘but for’ causation). But if the defendant prevails on this issue—that is, if there is only ‘motivating factor’ causation—then there is no liability.”); see also William R. Corbett, *Unmasking A Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62

Rights Act of 1991 standard, the plaintiff must show only that the protected trait was a “motivating factor.” The burden then shifts to the defendant to show lack of but-for causation.³¹¹ Despite the existence of the frameworks involving a lower standard of proof for plaintiffs, it is clear that establishing but-for causation remains a sufficient method for proving causation in anti-discrimination law.³¹²

This Article proposes a rule for causation—modeled on the but-for rule used in tort law and anti-discrimination law—to be used in most refugee law cases. As in tort and anti-discrimination law, under this proposed rule, establishing but-for causation would be a *sufficient* method of proving causation. A subsequent article will set forth a more nuanced approach for some cases involving mixed or multiple motives where the but-for approach may fail. That approach similarly will be derived primarily from the causation rules of anti-discrimination law and tort law.

IV. A PROPOSED RULE FOR CAUSATION IN REFUGEE LAW

This Article proposes that in most refugee law cases, the but-for causation formulation often used in tort law and sometimes used in United States anti-discrimination law should be used to determine whether the nexus requirement has been met. Specifically, instead of asking the tort law

AM. U. L. REV. 447, 471 (2013) (“First, the plaintiff was required to prove—as the prima facie case—that the relevant protected characteristic was a motivating factor in the adverse employment decision. If the plaintiff successfully proved the first step, the burden of persuasion then shifted to the defendant to prove that it would have taken the same action in the absence of a discriminatory motive” (“the same-decision defense”).

311. See Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-5(f)(2)(B) (West 2013); Katz, *supra* note 299, at 653 (“The plaintiff has the burden of proving ‘motivating factor’ causation. At the ‘motivating factor’ level, two things happen: liability attaches and the burden of proof shifts to the defendant on the issue of ‘but for’ causation (to prove a lack of ‘but for’ causation).”); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 503 (2006) (“Under the 1991 Act, for example, the plaintiff must demonstrate that the forbidden criterion . . . was a ‘motivating factor’ in the employer’s decision. If the plaintiff does so, the employer has the opportunity (or obligation) to prove . . . a lack of ‘but for’ causation.”).

312. Moreover, regarding claims brought under the Age Discrimination in Employment Act, the Supreme Court has held that in order to succeed on such a claim, a plaintiff must prove that age was a but-for cause of the adverse employment action. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

question of whether, but for the actions of the defendant, the plaintiff would have been harmed, the relevant question in asylum cases would be whether, but for the applicant's protected status, the persecution would have occurred or would occur in the future. If it is more likely than not that the persecution would not have occurred or would not occur in the future, nexus is established.³¹³

This Part begins by examining policy reasons that support the adoption of a new nexus approach. It then lists reasons why the new approach should be modeled on the tort law analysis of causation. It ends by describing the new approach, illustrating how the new analysis would apply in refugee law cases generally, and demonstrating the benefits of the new approach in specific contexts.

A. *Why a New Nexus?*

As set forth above, no clear standard or test for determining causation in refugee law currently exists other than the Supreme Court's general statement in *Elias-Zacarias* that some evidence, whether direct or circumstantial, of the persecutor's intent is required,³¹⁴ and the REAL ID Act's pronouncement that the protected ground must be "at least one central reason" for the persecution.³¹⁵ The lack of a uniform standard has resulted in the inconsistent application of the nexus rule to the disproportionate detriment of applicants fleeing gender-based persecution or other private harms. A unifying approach is clearly needed.

In addition, several policy considerations weigh in favor of adopting a new standard for nexus determinations in asylum

313. In order to make out a claim for withholding of removal, an applicant bears the burden of proving that she would more likely than not be persecuted on account of one of the protected grounds. 8 U.S.C. § 1231(b)(3) (2013); 8 C.F.R. § 1208.16(b)(2) (2013). In the asylum context, the Supreme Court has stated that the burden of proof is lower. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Though the Court did not set out the precise burden of proof, it hinted that even a one-in-ten chance of persecution might suffice. *Id.* at 431. Those burdens of proof go to the likelihood of the persecution occurring, not necessarily to nexus. Nevertheless, it is conceivable that, given the Supreme Court's pronouncement, a lower burden of proof with respect to nexus in asylum cases also would be appropriate.

314. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

315. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)).

cases. First, as recognized by the agency and scholars, the goal of refugee and asylum law is not to assign blame or to change the persecutory behavior; rather, it is to provide protection to those who face persecution because of a characteristic they cannot or should not be required to change and who are unable to receive such protection from their home countries.³¹⁶ Accordingly, focus on the actual intent of the persecutor is misplaced. The focus, instead, should be on the status or perceived status³¹⁷ of the applicant and whether that status is an actual cause of the persecution.³¹⁸ As scholars have noted, such an analysis is more in line with the aims of the Refugee Convention.³¹⁹ Accordingly, if an applicant can demonstrate

316. See, e.g., Department of Homeland Security's Position on Respondent's Eligibility for Relief at 906, *In re R- A-*, 22 I. & N. Dec. 906 (B.I.A. 1999) ("The DOJ Guidelines advise that claims to asylum should be analyzed against the background of the fundamental purpose of refugee law: to provide surrogate international protection where there is a fundamental breakdown in state protection.") (citing Phyllis Coven, *U.S. Dep't Of Justice, Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf); Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 INT'L J. REFUGEE L. 729, 734 (2005) ("An asylum grant does not punish the failed state, but protects the asylum seeker who, for whatever reason, could not turn to her home country for protection."); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1181 (1994) ("The overarching objective of the domestic and international refugee regime is protection of potential victims of persecution, not punishment of persecutors."); *The Refugee Convention, 1951*, THE UN REFUGEE AGENCY, at 6 (1995), available at <http://www.unhcr.org/4ca34be29.html> ("A remarkable feature of the Convention is the establishment of a system of international protection to persons who are in need of it. From the perspective of international law, the Convention accords the status of a refugee to a person who has lost the protection of their state of origin or nationality.").

317. The agency and courts have made clear that an applicant may be eligible for asylum based on imputed political opinion, that is, an opinion that the applicant does not hold, but that the persecutor believes the applicant to hold. See, e.g., *Elias-Zacarias*, 502 U.S. at 483; *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985); *Canas-Segovia v. INS*, 970 F.2d 599, 601-02 (9th Cir. 1992); *In re S-P-*, 21 I. & N. Dec. 486, 494 (B.I.A. 1996); *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). This new nexus approach would do nothing to alter the imputed political opinion doctrine. The approach would ask whether, but for the persecutor's belief that the applicant held a particular political opinion, the persecution would have occurred or would occur. If not, nexus is established.

318. See, e.g., Musalo, *supra* note 316, at 1181-82 ("In such a context, the inquiry should be on the effect of persecution on the victim and not on the intent of the persecutor.").

319. See, e.g., Mikhail Izrailev, *A New Normative Approach for the Grant of Asylum in Cases of Non-State Actor Persecution*, 19 CARDOZO J. INT'L & COMP. L. 171, 187 (2011) ("Requiring proof of the persecutor's motive ignores the

that she has a status that is protected by the Convention and that her status is the actual cause of the persecution she experienced or fears, regardless of whether the persecutor intended to target her because of that status, the nexus requirement should be adjudged to have been met.³²⁰

Moreover, nothing in the text of the Convention or the Act suggests that the intent of the persecutor should be controlling.³²¹ Certainly, if the intent of the persecutor to target a victim because of her protected status is clear, evidence of such intent would be evidence of actual causation.³²² But to require an applicant to prove the intent of the persecutor,

fundamental quality of non-refoulement and implicitly condemns asylum seekers to be returned to places where their lives or the lives of their families may still be at risk.”); Elizabeth A. James, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C. J. INT’L L. & COM. REG. 455, 500 (2008) (“With regard to the nexus requirement, courts have tended to draw on concepts rooted in ascertaining criminal or civil liability, where courts would instead do better to focus on the object and purpose of the Convention, which is concerned with providing international protection to persons at serious risk of harm.”) (internal quotation marks and citation omitted).

320. One of the bars to asylum eligibility provides a scenario where intent of the persecutor *should* be a major consideration. If an applicant is found to have assisted or engaged in the persecution of others, she is barred from receiving asylum. 8 C.F.R. § 208.13(c)(2)(i)(E) (2013). Whether the persecutor bar applies to an asylum applicant who assisted or engaged in the persecution of others by force or under threat of torture or death remains an open question. *Negusie v. Holder*, 555 U.S. 511 (2009) (remanding the case to the B.I.A. to decide in the first instance whether the persecutor bar still applies if the applicant shows he engaged in the persecution under force or duress). Because the effect of the application of the bar is to strip an individual of eligibility for relief (as opposed to providing protection to the victim of the alleged persecution), whether the applicant was actually motivated by a Convention ground (rather than by fear of torture or death) should be determinative in this context.

321. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 29, at 100–01 (“Nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status.”) (footnote omitted); Brief Amicus Curiae of the Office of the U.N. High Comm’r for Refugees in Support of Respondent at *15, *INS v. Elias Zacarias*, 502 U.S. 478 (1991) (No. 90-1342), available at <http://www.unhcr.org/refworld/docid/4b03d09c2.html> (citing Office of the U.N. High Comm’r for Refugees (Geneva), *Inter-Office Memorandum/Field Office Memorandum* (unnumbered) (Mar. 1, 1990) (“The definition [of refugee] does not require that there must be a specific showing that the authorities intend to persecute an individual on account of [one of the five factors] It is the result which matters.”)).

322. See GOODWIN-GILL & MCADAM, *supra* note 29, at 101 (“Of course, intent is relevant; indeed, evidence of persecutory intent may be conclusive as to the existence of well-founded fear, but its absence is not necessarily conclusive the other way.”).

either through direct or circumstantial evidence, is contrary to the spirit and purpose of the Refugee Convention. By extension, to use the intent of the persecutor as a proxy for the actual cause of the persecution hinders the goal of providing protection based on status.³²³

Further, intent of a third party is always challenging to prove, but is especially difficult to prove in the asylum context. The persecutor is not in the courtroom but instead is generally hundreds or thousands of miles away.³²⁴ It would be unreasonable, for example, to ask an asylum applicant to obtain an affidavit from her abuser delineating his reasons for the abuse.³²⁵ Asylum applicants fear their persecutors and in many cases have fled hastily and in secret and do not wish to alert their persecutors to their whereabouts.³²⁶ In some cases, applicants may not even know who their particular persecutors are.³²⁷ As stated by one scholar, “[t]he requirement that the applicant prove persecutor’s motivation places the burden upon the party who does not have access to the critical information.”³²⁸ A new nexus formulation that focuses on the status of the victim rather than the motivation of the persecutor could help alleviate these evidentiary burdens.

323. See *id.* at 102 (“The Convention definition offers a series of objective elements by which to describe the refugee. The *travaux préparatoires* suggest that the only relevant intent or motive would be that, not of the persecutor, but of the refugee or refugee claimant: one motivated by personal convenience, rather than fear, might be denied protection.”).

324. See Cook, *supra* note 39, at 238 (“[U]nlike many situations where motive is at issue, the persecutor is not present in the courtroom.”); Musalo, *supra* note 316, at 1193 (“The refugee does not have subpoena power over his or her persecutors, nor does the refugee have access to other instrumentalities available in normal civil or criminal proceedings in the United States.”); Helen P. Grant, *The Floodgates Are Not Going to Open, but Will the U.S. Border?*, 29 HOUS. J. INT’L L. 1, 22 (2006) (“It is not an easy task to prove what was in the mind of the persecutor.”).

325. See, e.g., *Gafoor v. INS*, 231 F.3d 645, 654 (9th Cir. 2000) (stating that persecutors are not “likely to submit declarations explaining exactly what motivated them to act”); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (“Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”).

326. See, e.g., *Gafoor*, 231 F.3d at 654 (“[I]ndividuals fleeing persecution do not usually have the time or ability to gather evidence of their persecutors’ motives.”).

327. See, e.g., *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1073 (9th Cir. 2004) (“We have cautioned that the difficulty of determining motive in situations of general civil unrest should not . . . diminish the protections of asylum for persons who have been punished because of their actual or imputed political views”) (internal quotation marks and citation omitted).

328. Musalo, *supra* note 316, at 1193.

As set forth above, the focus on intent of the persecutor has resulted in the disproportionate rejection of certain types of claims, particularly gender-based claims and claims based on other private harms. Because the Convention does not explicitly list gender as a protected ground, applicants and their representatives must frame gender-based claims using the particular social-group formulation. But adjudicators have been reticent to view the persecution in these cases as occurring on account of gender or the proffered social group rather than for “personal” or “economic” reasons, particularly in cases where the persecutor is a private individual.³²⁹ In gender-based cases where the agency has found causation, it has defined the particular social group in very narrow terms, possibly based on the incorrect notion that the persecutor must be targeting all of the members of the defined group in order for the causation requirement to have been met. As set forth in more detail below, a new nexus approach based on but-for causation would allow for more broadly defined social groups.

Despite the agency’s reluctance to grant certain types of claims based on the current law of nexus, there has been significant support, both internationally and domestically, for the proposition that victims of these types of persecution should be protected under refugee laws. In particular, international and domestic organizations and scholars have recognized the need for protecting individuals fleeing domestic violence,³³⁰ trafficking,³³¹ forced marriage,³³² and gang

329. See Musalo, *supra* note 8, at 786 (“The nexus requirement has posed a substantial barrier to gender claims because adjudicators have been slow to accept a causal connection between an applicant’s gender and the harm inflicted upon her. The difficulty is exacerbated where the persecutor is a non-State actor, and it is presumed that the motivation for the harm is ‘personal’ rather than related to gender.”).

330. See *id.* at 790–97 (stating that adjudicating bodies in other nations accept domestic violence as a valid basis for asylum); see also Bookey, *supra* note 78, at 148 (advocating that the United States “should adjudicate domestic violence asylum cases consistent with international norms, guidance from the United Nations Human Commissioner for Refugees, and a growing body of jurisprudence in United States Federal Courts of Appeals that readily recognize gender-defined social groups, and clearly establish that persecution by intimate partners is a basis for asylum.”); Adams, *supra* note 44 (arguing that a reorientation of the particular social group definition in domestic violence cases is needed in order to bring United States asylum claims of domestic violence victims within the scope of existing refugee law); Randall, *supra* note 8 (arguing through a comparative study of Canadian and international laws that victims of domestic violence should be protected as refugees); Cianciarulo & David, *supra* note 78, at 383 (arguing that

the particular social group of “women who have fled severely abusive relationships” should be recognized for asylum eligibility); Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709 (1997) (stating that there is a clear basis for victims of domestic violence to establish an asylum claim based on particular social group or political opinion).

331. See, e.g., 22 U.S.C. § 7101(b)(24) (2013) (“To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.”); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (preamble), U.N. Gen. Assembly, (Nov. 15, 2000), available at <http://www.unhcr.org/refworld/docid/4720706c0.html> (declaring that “effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach . . . to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”); U.N. High Comm’r for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, ¶ 15, U.N. Doc. HCR/GIP/06/07 (April 7, 2006), available at http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Trafficking.pdf (advocating for victims of human trafficking to receive the protection they need, including asylum); Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention’s “Nexus” Requirement*, 16 MICH. J. GENDER & L. 453, 466–67 (2010) (arguing that victims of human trafficking should be allowed to use gender as a particular social group to establish a nexus for asylum); Tyler Marie Christensen, *Trafficking for sexual exploitation: victim protection in international and domestic asylum law*, U.N. HIGH COMM’R FOR REFUGEES RESEARCH PAPER NO. 206, Apr. 2011 at 1, available at <http://www.unhcr.org/4d9c7c869.pdf> (advocating for victims of sex trafficking to be protected and be granted asylum under current international and domestic refugee laws); Steven Knight, *Asylum from Trafficking: A Failure of Protection*, 07 IMMIGR. BRIEFINGS, July 2007, at 1 (noting a troubling practice that victims of human trafficking who merit asylum have been denied because they cannot prove nexus); Kaori Saito, *International protection for trafficked persons and those who fear being trafficked*, U.N. HIGH COMM’R FOR REFUGEES RESEARCH PAPER NO. 149, Dec. 2007, at 1, available at <http://www.unhcr.org/476652742.html> (“There is no reason why a victim of trafficking . . . should not be granted refugee status where the state of origin is unable or unwilling to protect that person against such harm.”); U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, 38–40 (2012), available at <http://www.state.gov/documents/organization/192587.pdf> (providing country rankings based on whether countries meet the “minimum standards” for combating human trafficking; one of the metrics evaluates how well countries protect victims).

332. E.g., Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, 42 COLUM. HUM. RTS. L. REV. 55, 96–98 (2010) (arguing that forced marriage is persecution based on membership in a particular social group); Gen. Assembly, Human Rights Council, Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Gulnara Shahinian, 9, 12, U.N. Doc A/HRC/15/20* (June 18, 2010), <http://www>.

violence.³³³ In the forced sterilization context, Congress thought victims of forced sterilization or forced abortion to be so deserving of asylum protection that it amended the refugee definition to fix the nexus problem in those cases.³³⁴ Further, as set forth above, the public uproar over the Fifth Circuit Court of Appeals' decision in *Li* concerning religious persecution was enough to force the government to withdraw its appeal and the court to vacate its decision.³³⁵ And, in the homosexuality and family membership contexts, despite the agency's recognition of these grounds as valid bases for asylum, the Courts of Appeals have repeatedly been called upon to

ohchr.org/Documents/Issues/Slavery/SR/A.HRC.15.20_en.pdf (noting that “[f]orced marriage combines sexual exploitation with domestic servitude. The victims are forced to perform household chores in line with gendered stereotypes, while submitting to their husbands’ sexual demands” and that since the women are kept in the private sphere, they are often not granted asylum when they should be).

333. *E.g.*, U.N. HIGH COMM’R FOR REFUGEES, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, Division of International Protection 21 (March 2010), http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_%20Guidelines_Gang_Related_Asylum.pdf (stating that those who resist gang membership or flee gang violence may have claims based on political opinion or particular social group); WASHINGTON OFFICE ON LATIN AMERICA, CENTRAL AMERICAN GANG-RELATED ASYLUM 5 (May 2008), http://www.uscrrrefugees.org/2010Website/5Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_4_Reports/Washington_Office_on_Latin_Americas_WOLACentralAmericanGang.pdf (stating that “any non-gang involved individual who has been persecuted by gang violence” or “formerly gang-involved individuals” should be protected); Christy Fuijo & Giovanni Di Maggio, “*Refugee*” Status Should Protect Victims of Gang Violence, PHYSICIANS FOR HUMAN RIGHTS (May 11, 2011), available at <http://physiciansforhumanrights.org/blog/refugee-status-for-gang-violence-victims.html> (advocating for the refugee definition to encompass victims of gang violence); Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. MEM. L. REV. 827 (2008) (arguing that those fleeing gang violence and gang recruitment should be protected); James Racine, *Youth Resistant to Gang Recruitment as a Particular Social Group in Larios v. Holder*, 31 B.C. THIRD WORLD L.J. 457, 472 (2011) (“Youth resistant to gang recruitment deserve the protection from persecution that asylum offers.”); Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. INT’L L. 31, 32 (2012) (arguing “that the United States should view the migrants fleeing violence in Mexico and Central America as refugees”).

334. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, § 601(a) (codified at 8 U.S.C.A. § 1101(a)(42) (West 2013)).

335. See Nelson, *supra* note 176, at 2 (stating that “[u]nlike many asylum denials, the Fifth Circuit’s decision in *Li v. Gonzales* caused an uproar that extended beyond the insular community of professional human rights defenders,” and that the government subsequently withdrew its appeal and the Fifth Circuit Court of Appeals vacated its decision); *Li v. Gonzales*, 450 F.3d 500 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005).

correct agency error with respect to the nexus issue.³³⁶ Yet piecemeal congressional action, extreme public outrage, and corrective action by the Courts of Appeals in individual cases should not be necessary. Sound policy reasons support the implementation of a new nexus approach that, if properly applied, would open up eligibility for relief to victims of these and gender-based types of persecution.

B. Why This New Nexus?

The purposes of the Refugee Convention call for a focus on the status of the applicant, rather than on the motivations of the persecutor, when determining causation in asylum cases.³³⁷ Asking whether, but for the applicant's status, the persecution would have occurred properly places the focus on the applicant's status, rather than on the persecutor's motives.

Furthermore, the reasons for and benefits of the causation analysis in tort and anti-discrimination law apply equally in the refugee law context. As stated by one scholar, but-for causation recognizes the principle that a condition is a cause of an event if "it is, in some sense, necessary for the occurrence of the event. This view is shared by lawyers, philosophers, scientists, and the general public."³³⁸ Similarly, in refugee law, if an applicant's protected status is a necessary condition for the persecution, it should be regarded as a cause of the persecution, and thus, the persecution should be regarded as occurring "on account of" that status. Most importantly, but-for analysis in tort law recognizes that for any given event to occur, multiple conditions must be present, but the fact that

336. See *Karouni v. Gonzales*, 399 F.3d 1163, 1172–73 (9th Cir. 2005) (rejecting the agency's contention that the applicant was persecuted not on account of his *status* as a homosexual, but on account of homosexual *acts*); *Bromfield v. Mukasey*, 543 F.3d 1071, 1076–77 (9th Cir. 2008) (rejecting the immigration judge's conclusion that applicant did not fear persecution on account of homosexuality; rather, he feared "random" acts of violence); *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 950 (11th Cir. 2010) (rejecting the immigration judge's conclusion that Ayala "suffered as a result of the acts of rogue policemen and not the targeted efforts of those intent on abusing and persecuting a person with a different gender preference than their own") (internal quotation marks omitted); *Bhasin v. Gonzales*, 423 F.3d 977, 986 (9th Cir. 2005) (disagreeing with the Board's determination that the persecution occurred on account of retribution rather than on account of her family membership).

337. See Protocol Relating to the Status of Refugees, *supra* note 2.

338. Wright, *supra* note 287, at 1735.

there are multiple necessary conditions does not mean that any one of them is not an actual cause of the event; to the contrary, they are all actual causes.³³⁹

Another scholar has described causation analysis in tort law as “a factual causation approach that is relatively simple, rigorous enough to yield trustworthy answers, and just sufficiently flexible to avoid egregious injustice.”³⁴⁰ It is “both simple enough for everyday application in lawyers’ offices and busy trial courts and at the same time comprehensive enough to solve the recurrent types of occasionally quite challenging causation difficulties.”³⁴¹ Moreover, “[i]n most cases, and in virtually all clear-cut cases, it will yield the ‘correct’ answer on the question of cause-in-fact.”³⁴² This causation analysis would bring these same benefits to the refugee law context. At both the immigration court and Board of Immigration Appeals levels, the immigration agency is overloaded with cases and strapped for time.³⁴³ In recent years, the large number of cases adjudicated by the agency has led to an influx of appeals at the circuit court level.³⁴⁴ And, the large number of cases poorly

339. RESTATEMENT (THIRD) OF TORTS § 26, cmt. c (2010) (“A useful model for understanding factual causation is to conceive of a set made up of each of the necessary conditions for the plaintiff’s harm. Absent any one of the elements of the set, the plaintiff’s harm would not have occurred. Thus, there will always be multiple (some say, infinite) factual causes of a harm . . .”).

340. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1800 (June 1997).

341. *Id.* at 1767. See also John D. Rue, *Returning to the Roots of the Bramble Bush: The “But for” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2686 (2003) (stating that “many scholars agree with Professor Robertson’s assertion” on this point).

342. Rue, *supra* note 341, at 2686 (footnote omitted).

343. *Immigration Litigation Reduction Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), available at <http://www.aila.org/content/default.aspx?docid=18996> (“The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket.”); Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, <http://articles.latimes.com/2003/jan/05/nation/na-immig5> (stating that in one day, “a member of the Board of Immigration Appeals [] signed more than 50 cases—a decision nearly every 10 minutes if he worked a nine-hour day without a break. . . . Altogether that day, the board issued nearly 400 decisions, ranging from complex asylum cases to simple jurisdictional matters.”).

344. Dep’t of Justice, BIA Restructuring and Streamlining Procedures: Fact Sheet (Mar. 9, 2006), available at <http://www.justice.gov/eoir/press/06/>

adjudicated by the agency has led to a significant number of remands from the circuit courts back to the agency.³⁴⁵ A clear and consistently applied causation approach would lead to greater efficiency in the adjudication of asylum claims and fewer remands from the circuit courts.

C. *The Proposed Rule*

This Article proposes that the but-for rule of causation from United States tort and anti-discrimination law be applied in most asylum cases. This Part aims to describe in further detail what application of tort law causation analysis would look like in the refugee law context. It begins with a general description of the proposed approach, including a discussion of how an analogy to the proximate-cause qualifier to traditional but-for causation would apply in the refugee law context. It then illustrates how the approach would function in practice, using some of the contexts highlighted in Part II.

1. The Rule Generally

Just as the plaintiff in a tort action must prove negligent breach on the part of the defendant, an applicant for asylum must establish inclusion in one of the five protected grounds.³⁴⁶

BIAStreamliningFactSheet030906.pdf (“The rate of new petitions—the number of BIA decisions appealed to the federal courts compared to the total number of BIA decisions—has increased from an historical 5 percent (before 2002) to a current level of approximately 30 percent.”); DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 40 (2003), *available at* http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df604f69523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/DorseyStudyABA_8mgPDF.pdf (“During late 2001 . . . BIA decisions were being appealed to the federal circuit courts at a rate of around 100 per month. . . . By the beginning of 2003, BIA decisions were being appealed to the federal circuit courts at a rate of over 800–900 per month. Every federal circuit is experiencing a surge in appeals from the BIA.”).

345. *Immigration Litigation Reduction Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5–7 (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), *available at* <http://www.aila.org/content/default.aspx?docid=18996> (“Adding resources at the Immigration Judge and BIA levels will also reduce the percentage of cases that are remanded by the courts of appeals for further work by the Immigration Judge or the BIA. Currently 20% of our [Second Circuit] cases are remanded; in the Seventh Circuit the percentage is 40%.”).

346. 8 U.S.C.A. § 1101(a)(42)(A) (West 2013) (“race, religion, nationality, membership in a particular social group, or political opinion”).

Each of those inquiries is separate from the causation inquiry. In tort law, a causal link between the defendant's negligence and the plaintiff's injury must be established;³⁴⁷ in refugee law, a causal link between the protected ground and the persecution must be established.³⁴⁸ This Article proposes that in most asylum cases, the but-for analysis typically used to determine causation in tort law should function as the test for determining whether nexus has been established. Specifically, nexus is established if the applicant can prove that but for her protected status, it is more likely than not that the persecution would not have occurred or would not occur in the future. For example, an applicant is a political dissident from a country where human rights abuses against dissidents are well documented. Before she fled, she was imprisoned and tortured, and while they tortured her, her persecutors repeatedly accused her of being "against the government." In this case, the applicant could use country conditions evidence showing that political dissidents are routinely persecuted in her home country, along with the statements made by her persecutors, to demonstrate that, but for her political opinions, she would not have been persecuted.

The Board's decision in *Matter of R-* provides an example of an instance in which the application of the but-for rule might have changed the outcome of a claim based on political opinion and ethnicity.³⁴⁹ In that case, the applicant, a citizen of India and a Sikh, had been sought out for recruitment by a group of Sikh militants.³⁵⁰ Although the applicant favored an independent Sikh state, he disagreed with the group that this goal should be realized through violence.³⁵¹ Accordingly, he rejected their efforts to recruit him.³⁵² When the police learned of his contact with the group, they arrested him as a suspected militant.³⁵³ They interrogated and physically abused him before releasing him.³⁵⁴ When he returned home, the Sikh militants beat him and threatened to kill him or a member of

347. See RESTATEMENT (THIRD) OF TORTS § 3 (2010).

348. See 8 U.S.C.A. § 1101(a)(42)(A).

349. *In re R-*, 20 I. & N. Dec. 621 (B.I.A. 1992).

350. *Id.* at 622.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

his family if he did not join them.³⁵⁵ Thereafter, both the police and members of the group continued to seek him out, and he fled the country, fearing for his life.³⁵⁶ The Board denied his claim for asylum, reasoning that he had not met the nexus requirement.³⁵⁷ Relying on the Supreme Court's holding in *Elias-Zacarias*—that in order to succeed on a claim based on political opinion, the persecution must have occurred on account of the applicant's, not the persecutor's, political opinion³⁵⁸—the Board held that nexus had not been established because the “purpose of the threats and mistreatment by the militants was to coerce [the applicant] into joining with them,” and there was “no indication that the militants cared at all about the reasons for his refusal to join.”³⁵⁹ Similarly, while the Board agreed that the applicant had been subjected to police brutality, it found that “the purpose of the mistreatment [by the police] was to extract information about Sikh militants, rather than to persecute the applicant ‘because’ of his political opinions or the mere fact that he was a Sikh.”³⁶⁰

However, had the but-for rule proposed in this Article been in force at the time the applicant applied for asylum, he might have been able to demonstrate that, but for his opinion that the militants were wrong to accomplish their ends through violent means, he would not have refused recruitment and, therefore, would not have been targeted by the militants. Similarly, he might have been able to show that but for his Sikh ethnicity, the police would not have suspected him of being a Sikh militant and would not have persecuted him on that basis.

It is worth noting that many of the types of evidence that applicants currently provide under the existing nexus formulation would also be helpful in proving but-for causation. For example, direct evidence of a persecutor's motive, as well as evidence regarding conditions for members of the protected status in the applicant's home country, would both be relevant to the but-for analysis. The major shift would be in the way in which courts analyze claims in light of the evidence. While direct or circumstantial evidence of persecutor intent would be

355. *Id.*

356. *Id.* at 622–23.

357. *Id.* at 623.

358. *Id.* (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992)).

359. *Id.* at 624.

360. *Id.* at 624–25.

helpful in establishing nexus using a but-for formulation, in many cases, it may not be *necessary*, as it currently is. In other words, the but-for formulation might allow a court to find causation even when the applicant is unable to provide direct or circumstantial evidence of the persecutor's motive.

Some qualifications from tort law apply equally in the refugee law context. First, just as in tort law, an asylum applicant need not show that but for her protected status, she would not have been harmed in any way by anyone; she merely would need to show that the actual persecution she experienced (or fears) by the actual persecutor she fears would not have occurred (or would not occur) absent the protected ground. For example, in tort law, if a patient lost a limb because of the negligent conduct of his doctor, he would not fail the but-for test simply because at some other point, the wind blew a sign post into his face, breaking his nose (which would have happened even absent the doctor's negligence). Similarly, if an asylum applicant fears imprisonment by her government because of her race (a Convention ground), and she fears beatings by a police officer because of a dispute over money (not a Convention ground), the but-for test does not fail simply because the applicant would be persecuted even absent the Convention ground. The fact that she would not be imprisoned but for her protected status is sufficient to demonstrate nexus.

Second, United States tort law takes into account the possibility of multiple sufficient causes. The rule is: "If multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."³⁶¹ The Restatement provides the following illustration: Suppose two campers set campfires and negligently fail to extinguish them. The campfires each cause a forest fire, and those fires merge and burn down a camping lodge, destroying it. The camping lodge would have been destroyed by either one of the fires alone. Nevertheless, each camper's negligence is considered a factual cause of the destruction of the lodge.³⁶² A similar principle would apply in refugee law. Suppose a dictator rules a country primarily composed of individuals from four ethnic groups: A, B, C, and D. The dictator, of ethnicity D,

361. See RESTATEMENT (THIRD) OF TORTS § 27 (2010).

362. See *id.* cmt. a, fig. 1.

persecutes members all three other ethnicities. An applicant from ethnicity A would still be able to satisfy the but-for test even though membership in ethnicity B or C would also be a sufficient cause for the persecution.

Third, under this proposal, the concept of proximate or legal cause in torts would play a role, albeit by analogy, in the refugee law context. Although proximate cause is used in torts to determine whether liability should be assigned (not to establish causation), the concept of proximate cause would apply to the causation element in refugee law under the formulation proposed in this Article. In tort law, even if a defendant was negligent, the plaintiff was harmed, and the but-for test is met, the defendant will not be held liable if her negligence was too remotely linked to the harm suffered by the plaintiff. Similarly, in refugee law, even if the applicant has a protected status, she is persecuted, and the but-for test for causation is technically met, a court could still find that the nexus has not been established if it determines that the protected status was too remotely linked to the persecution.

An English Court of Appeals case rejecting the but-for approach provides an example of a case where this proximate cause analysis would be necessary.³⁶³ Suppose an individual is on her way to church when she witnesses a crime. Thereafter, she is threatened with retribution by the perpetrators of the crime if she testifies against them. But for her religion, she would not have been going to church and therefore would not have been at the scene of the crime. She would not have witnessed the crime, and she would not have been threatened. She would have no fear of persecution.³⁶⁴ In a scenario such as this, the agency or a court might find the Convention ground (religion) too remotely linked to the persecution and therefore hold that nexus had not been established. Indeed, in a case such as this, where there is absolutely no evidence that the protected ground was related to the persecution (other than by putting the applicant in the wrong place at the wrong time), a finding that no nexus exists between the protected ground and the persecution would be appropriate.

The backward-looking test described in the Second

363. Hathaway & Foster, *supra* note 39, at 472 (citing *Velasco v. SSHD*, 2000 Lexis, EIN Database App. No. SLJ-1999, 7981-C (U.K.C.A., Apr. 2000)).

364. *See id.*

Restatement of Torts provides guidance with respect to the proper analysis to be conducted when determining whether the protected status and the persecution are too remotely linked.³⁶⁵ The test asks whether, “looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.”³⁶⁶ Similarly, in the refugee law context, if it seems “highly extraordinary” that the protected status should have led to the persecution, a court may rule that nexus has not been established. This test is more appropriate than the foreseeability test described in the Third Restatement of Torts because that test asks whether the harm was “foreseeable” to the defendant.³⁶⁷ If the harm was not foreseeable, then the defendant’s conduct was not a proximate or legal cause of the harm.³⁶⁸ In the asylum context, however, there is no defendant. The cause at issue is the applicant’s status, and it makes no sense to ask whether the persecution was “foreseeable” to the applicant’s protected status.

Asylum applications that raise real concerns about the remoteness of the persecution from the protected ground are likely few and far between, and they should not be cause for rejecting the but-for test outright. Just as in tort law, the concept of proximate cause provides a useful exception to the general but-for rule.

Finally, as in tort law and anti-discrimination law, establishing but-for causation should not be the *only* way to prove causation in an asylum case, but it should be a *sufficient* way of proving causation. That is to say, if an asylum applicant proves but-for causation, subject to the proximate cause exception outlined above, nexus is established. Some important exceptions and changes to the but-for rule have evolved in tort law and anti-discrimination law for special cases, and some exceptions may be applicable in the refugee law context as well. A more nuanced approach for such special cases in the refugee law context will be the subject of a future article.

365. RESTATEMENT (SECOND) OF TORTS § 435 (1965).

366. *Id.*

367. RESTATEMENT (THIRD) OF TORTS § 34 (2010).

368. *Id.*

2. The Rule in Context

In most situations, and in the contexts outlined in Part II, a straightforward application of the but-for test will be possible. For example, in the forced sterilization context, the Board initially held that the nexus requirement had not been met because the government of China forcibly sterilized individuals not on account of any political opinion or membership in any particular social group, but because of a uniform population-control policy.³⁶⁹ Applying the but-for analysis, however, would lead to a different result. But for the applicant's opinion that he should be allowed to have more than one child, he would not have to be forcibly sterilized. Or, but for the applicant's membership in a particular social group of individuals who oppose the one-child policy or individuals who choose to have more children than allowed by the one-child policy, he would not fear forced sterilization.³⁷⁰ The use of the but-for analysis of causation would have obviated the need for congressional intervention.

In the female genital mutilation context, the Board found nexus, but only after it defined the particular social group in an extremely limited manner.³⁷¹ It defined the group as "young women . . . of the Tchamba-Kunsuntu Tribe . . . who have not been subjected to [female genital mutilation], as practiced by that tribe, and who oppose the practice . . ."³⁷² It is possible that the Board did so out of a belief that in order to prove causation, an applicant must be able to show that all (or most) of the members of the defined group would be targeted for persecution. But tort law teaches us that this reasoning is flawed. Just as causation in a negligence action would not be negated simply because the same negligent act on the part of the defendant did not always lead to harm, causation in an asylum case should not be negated merely because not everyone with the shared protected status is targeted by the persecutor. So, the Board might have defined the particular social group more broadly—for example as "women" or "young

369. *In re Chang*, 20 I. & N. Dec. 38, 38 (B.I.A. 1989).

370. Of course, the agency would also have to find that these are cognizable social groups under the Refugee Act, but that analysis is separate from the nexus determination.

371. *In re Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

372. *Id.*

women”—and causation could still be established because but for her gender, the applicant would not have been subjected to genital mutilation.

This potential broadening of the particular social group is important, especially in the female genital mutilation context. Recently, the Board ruled that women who have already undergone the genital mutilation were not eligible for relief because any presumption of well-founded fear of persecution that arose from a showing of past persecution had been rebutted by a fundamental change in their personal circumstances—their having undergone genital mutilation.³⁷³ The Board reasoned that since the genital mutilation had already been inflicted and would not be inflicted again, the applicant had no well-founded fear of future persecution.³⁷⁴ But the Second Circuit Court of Appeals, and then the Attorney General, disagreed with the Board’s reasoning, stating, *inter alia*, that once the applicant had demonstrated past persecution in the form of genital mutilation, she was entitled to a presumption that she would face persecution in the future—including forms of persecution other than genital mutilation—on account of her particular social group, and that it was the government’s burden to rebut this presumption.³⁷⁵ Women who come from tribes that practice genital mutilation are often subjected to other forms of persecution,³⁷⁶ but the government would have a much easier time proving that the applicant will not be further persecuted on account of her membership in the particular social group if that group is very narrowly defined. If the particular social group were broadly defined (based on gender, for example), the government might have a difficult time proving that the past infliction of genital mutilation negates a well founded fear of *other* types of persecution (such as rape or domestic violence), because those types of persecution occur on account of gender. On the other hand, if the particular social group is defined as narrowly as the Board defined it in *Kasinga*, the government will have a

373. *In re A-T-*, 24 I. & N. Dec. 296, 301 (B.I.A. 2007).

374. *Id.* at 300.

375. *See Bah v. Mukasey*, 529 F.3d 99, 114–15 (2d Cir. 2008); *In re A-T-*, 24 I. & N. Dec. 617, 621–23 (AG 2008).

376. *Bah*, 529 F.3d at 116 (finding that Guinean and/or Fulani women are routinely subjected to various forms of persecution and harm beyond genital mutilation).

much easier time showing that because the applicant has already been subjected to genital mutilation, she no longer has a well-founded fear of persecution because it is unlikely she would be subjected to *other* types of persecution on account of her membership in the group of “young women of the tribe who have not been subjected to female genital mutilation and who oppose the practice.”

Application of the but-for test for causation in the female genital mutilation context would also give teeth to a principle that the Board comes close to recognizing in another part of the *Kasinga* decision: that the victim’s status or predicament rather than the intent of the persecutor should be the focus of the analysis.³⁷⁷

In the context of domestic violence, this proposed nexus rule has the potential to make an even bigger impact. There is tremendous domestic and international support—by scholars, organizations, and courts—for the idea that applicants fleeing domestic violence should be eligible for asylum protection. Even the DHS agrees that at least some victims of domestic violence are eligible for asylum protection.³⁷⁸ Nevertheless, domestic violence cases in the United States have been stalled for years due to disagreement over how to interpret the nexus, particular social group, and political opinion elements of these claims. Employing the but-for causation analysis in refugee law would, at the very least, solve the nexus issue in domestic violence cases.

Under the proposed rule, a domestic violence victim would have to show that but for the applicant’s political opinion or membership in a particular social group (perhaps defined, in part, by gender), the abuse would not have occurred. For example, if the proffered political opinion is that women should not be controlled and dominated by men or their partners, an applicant might be able to establish nexus by showing that the

377. *Kasinga*, 21 I. & N. Dec. at 365 (“[M]any of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”).

378. See, e.g., Department of Homeland Security’s Position on Respondent’s Eligibility for Relief, *In re R-A*, A-73-753-922 (B.I.A. Feb. 19, 2004), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf; Department of Homeland Security’s Supplemental Brief, *In re L-R*, A# redacted (B.I.A. Apr. 13, 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

abuse occurred only when she challenged her abuser's authority or asserted her rights in the household (either verbally or implicitly by her actions). In that case, a court could find that but for her political opinion, the abuse would not have occurred. Even if the abuser *began* abusing her for some other reason, if an applicant can show that but for the expression of her political opinion, *some* of the abuse would not have occurred (and that abuse in itself rises to the level of persecution), then nexus will have been established.

The proposed rule would also make the particular social group analysis more clear. In *Matter of R-A-*, the applicant defined her social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."³⁷⁹ DHS has offered similar social group formulations,³⁸⁰ and others have argued for broader social group formulations. Even if the agency were to accept these social groups as cognizable under the Act, however, such claims would still fail under the current nexus formulation. The Board has found in the domestic violence context that the abuse occurred not on account of the victim's membership in any particular social group but because of jealousy, frustration, or meanness on the part of the abuser,³⁸¹ or simply because he is a "despicable person."³⁸² Under the but-for rule, however, the applicant would be able to show that the abuse would not have occurred but for her gender or membership in more narrow particular social groups. The but-for causation model recognizes that there may be many causes for abuse, each of which is necessary for the abuse

379. *In re R-A-*, 22 I. & N. Dec. at 911.

380. *See, e.g.*, Dep't of Homeland Security's Position on Respondent's Eligibility for Relief at 25, 27, R-A- (B.I.A. Feb. 19, 2004), *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (stating that "a group defined as 'married women in Guatemala who are unable to leave the relationship' would qualify as a particular social group under the Board factors" and that Alvarado's articulation of her social group met the particular social group requirements based on the facts she presented about her situation in Guatemala); Department of Homeland Security's Supplemental Brief at 14–15, L-R-, A# redacted (B.I.A. Apr. 13, 2009), *available at* <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> (stating that "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their position within a domestic relationship" would be cognizable social groups under the Act).

381. *In re R-A-*, 22 I. & N. Dec. at 926.

382. Musalo & Knight, *supra* note 10, at 1535–36.

to occur, but the existence of multiple necessary factors does not negate the fact that any one of those factors is an actual cause of the abuse. Indeed, the agency appears to have implicitly acknowledged as much in other cases. For example, in cases involving dictators persecuting political dissidents, the agency has not stopped to question whether the persecution occurred on account of the fact that the dictator was “mean” or a “despicable person”; rather, it has simply found that the persecution occurred on account of political opinion.³⁸³ Application of the but-for rule would bring the adjudication of gender-based claims in line with the adjudication of other types of claims.

The but-for analysis also disposes of the flawed reasoning that, because the abuser is not targeting *all* members of the particular social group, the nexus requirement has not been met. In *Matter of R-A-*, the Board reasoned that the applicant could not establish nexus because Alvarado’s husband “did not target all (or indeed any other) Guatemalan women intimate with abusive Guatemalan men.”³⁸⁴ The but-for test would not require an applicant to show that the protected status gives rise to persecution in every context, and this principle makes sense from a policy perspective. As an illustration, imagine a tribe X in which female genital mutilation is routinely inflicted upon young girls who have not yet been mutilated. Under *Kasinga*, an applicant could make out a claim based on persecution on account of a particular social group: “[Y]oung women from X tribe who have not yet been subjected to mutilation.” It is widely recognized that genital mutilation is often performed by village elders, often older women.³⁸⁵

383. See, e.g., *Gui v. INS*, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the petitioner was eligible for asylum based on his political dissidence and being targeted by the government for his political beliefs); *Karijomengolo v. Gonzales*, 173 F. App’x 34, 36–37 (2d Cir. 2006) (holding that the petitioner was persecuted on account of an imputed political opinion by a former military dictator who had close ties to the military).

384. *In re R-A-*, 22 I. & N. Dec. at 921.

385. *Balogun v. Ashcroft*, 374 F.3d 492, 496 (7th Cir. 2004) (explaining that the petitioner testified that genital mutilation is a traditional practice in her village performed by village elders); *Kane v. Holder*, 581 F.3d 231, 239 (5th Cir. 2009) (“Kane himself testified that Fulani tribal elders would likely enforce the practice against his daughters only because they believe that their culture compels them to do so and not as a way to persecute Kane for any particular belief or characteristic that he exhibits.”); *Kone v. Holder*, 596 F.3d 141, 144 (2d Cir. 2010) (explaining that three older women in her village subjected her to genital

Suppose that X tribe is divided into nine neighborhoods, and neighborhoods one through six each have an assigned village elder responsible for performing the genital mutilation on the girls born in that neighborhood, even if the girl later moves to a different neighborhood. Suppose further that neighborhoods seven through nine have abandoned the practice of genital mutilation, so that girls born in that neighborhood do not have a fear of mutilation. In this example, each persecutor (in this case, the village elder) is not concerned with persecuting *all* girls in the offered particular social group; rather, each elder is concerned only with the girls born in her neighborhood. Moreover, not all of the members of the social group have a fear of persecution in the form of genital mutilation, as three of the neighborhoods no longer practice the ritual. Under the Board's reasoning in *Matter of R-A-*, a girl from neighborhood six who fled to the United States before the genital mutilation was forced upon her would not be able to establish nexus, even though she clearly has a fear of future persecution and even though that persecution would clearly occur because of her social group membership. Whether the persecutor targets every member of the particular social group or whether every member of the social group is in danger of persecution is irrelevant to the nexus formulation. The but-for analysis recognizes this principle.³⁸⁶

Finally, use of the but-for test in domestic violence claims properly shifts the evidentiary focus from the intent of the abuser to the status of the victim. A victim of domestic violence may not be able to provide evidence, whether direct or

mutilation and then treated her profuse bleeding with herbal potions); Carrie Acus Love, *Unrepeatable Harms: Female Genital Mutilation and Involuntary Sterilization in U.S. Asylum Law*, 40 COLUM. HUM. RTS. L. REV. 173, 181 (2008) ("Practitioners who perform genital mutilation ceremonies vary across countries. However, the cutting is most often performed by 'traditional practitioners,' who are often unskilled, older women in the community or male barbers without medical training. These practitioners generally work in unsanitary conditions and without anesthesia or other methods of minimizing pain.").

386. The proposed regulations on Asylum and Withholding Definitions appear to recognize this principle. Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) ("[I]n a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race.").

circumstantial, that her gender or political opinion motivated the abuser to harm her. However, she may be able to provide evidence that the vast majority of victims of domestic violence in her home country are women. An adjudicator could find, on that basis, that but for her gender, it is more likely than not that the abuse would not have occurred. In this way, application of the but-for test in domestic violence claims also takes into account the role that the government of the applicant's home country plays in failing to protect women from domestic violence.

A straightforward application of the but-for test is also possible in the remainder of the contexts discussed above. For example, in claims based on forced marriage or trafficking, the nexus requirement would be satisfied if the applicant can show that, but for her gender (or gender-based social group), she would not fear forced marriage or trafficking. Nexus to a protected ground would be established even if, as the Board has found, the persecutors were also motivated by personal or economic grounds. This analysis would account for the well-documented gendered dimensions of forced marriage and trafficking in a way that the Board's decisions outlined above have failed to do.

Similarly, the Fifth Circuit Court of Appeals' decision in *Li* would not have caused so much consternation if a but-for analysis had been used.³⁸⁷ But for *Li*'s religion, he would not have organized an underground church and would not have been targeted for that reason. That the persecutors had other reasons for targeting his group would do nothing to alter the nexus finding. The but-for test might also have altered the nexus holding in the other religion claim described in Part II above. The applicant could demonstrate that but for his interfaith marriage, the persecution would not have occurred, and the immigration judge would have been precluded from finding that the persecution amounted to a mere "family feud."

The cases described above involving applications for asylum based on homosexuality might also have been decided differently by the agency using a but-for analysis. The agency found no nexus because it determined that persecution suffered

387. See Nelson, *supra* note 176, at 2 ("Unlike many asylum denials, the Fifth Circuit's decision in *Li v. Gonzales* caused an uproar that extended beyond the insular community of professional human rights defenders.").

by the applicants at the hands of the police occurred for “personal” or “criminal” reasons.³⁸⁸ Using a but-for analysis, however, it is clear that the persecution the applicants experienced and feared would not have occurred but for their homosexuality; thus, it was an actual cause of the persecution.

In the gang context, the fact that gangs often target individuals in order to increase their ranks would not negate a nexus finding, as long as the applicant could show that, but for his membership in a cognizable social group (defined, perhaps, by qualities such as gender and age), he would not have been targeted (or would not fear targeting) by the gang.

Finally, claims based on membership in a family would also benefit from the proposed nexus analysis. In the cases described above, the agency and courts, while acknowledging that families constitute particular social groups, found lack of nexus based on the reasoning that the persecutors were instead motivated by personal reasons, typically retribution against the person to whom the applicants were related. Using the but-for analysis, it would be clear that, but for their membership in the family, the applicants would not have been persecuted or would not fear persecution. Family membership claims show clearly how the but-for analysis would shift the focus from the motives of the persecutor to the status of the victim. The persecutor might, in fact, be motivated to harm the applicant by a desire for revenge against the applicant’s relative; nevertheless, the applicant ultimately is being persecuted because of a characteristic she is powerless to change: her family membership. As the dissenting judge in *Demiraj* persuasively argued, the agency and the court majority characterized Rudina and Rediol’s claims as “involving merely personal revenge, but there is no evidence that Bedini has any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals—rather, his only interest in them is because of their membership in the family of Mr. Demiraj.”³⁸⁹

388. See *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 949 (11th Cir. 2010) (The applicant feared persecution on account of homosexuality, and the Board agreed with the immigration judge that “[s]uch criminal acts by rogue police officers are not persecution ‘on account of’ one of the protected grounds.”); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087 (9th Cir. 2005) (stating that the immigration judge found that the violence the applicant experienced occurred because of a “personal problem” he had with a police officer, not because of homosexuality).

389. *Demiraj v. Holder*, 631 F.3d 194, 202 (5th Cir. 2011) (Dennis, J., dissenting).

Therefore, the but-for analysis in family claims brings the adjudication of those claims more in line with the aims of the Refugee Convention: to protect individuals who are targeted for characteristics they cannot change or should not be required to change.

V. CRITIQUES AND ALTERNATIVES

While there is relatively little scholarship examining the nexus prong in refugee law, some scholars have questioned the viability and appropriateness of a but-for causation approach. This section attempts to address those criticisms as well as some alternative approaches to causation in asylum law.

A. *Critiques of the Proposed Approach*

Professor James C. Hathaway and the Michigan Guidelines on the Nexus to a Protected Ground provide one major critique of the use of but-for analysis in refugee law. The Guidelines state:

Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.³⁹⁰

But the fact that tort law is aimed at assigning liability does not, in itself, mean that its standards for causation cannot apply to areas of the law that do not assign liability. The approach that this Article proposes merely uses that standard as a model, and sound policy reasons support importing aspects of this model to refugee law.³⁹¹

390. James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT'L L. 207, 215–17 (2002).

391. The use of domestic United States law to address an international law problem might be similarly criticized. And a similar response applies: the fact that but-for causation is used in domestic law does not automatically mean that it

Moreover, the fact that tort law is aimed at assigning liability does not undermine the argument that applying the but-for causation analysis to refugee law claims fulfills the protection goal of refugee law because the analysis functions differently in refugee law. In tort law, the required causal link is between the negligent actions of the defendant and the harm suffered by the plaintiff. Thus, the question is whether, but for the defendant's negligent conduct, the plaintiff would have been harmed. In refugee law, the causal link that is required is between the applicant's status and the persecution. Thus, the relevant question is *not* whether, but for the persecutor's conduct, the applicant would have been harmed; rather, it is whether, but for the applicant's status, the persecution would have occurred.

Professors Hathaway and Michelle Foster provide further criticism of the use of but-for analysis in refugee law. First, they point out that the but-for analysis has been criticized even in the tort context for "its inability adequately to accommodate situations involving multiple causes . . ." ³⁹² But exceptions to the but-for rule have evolved in tort law for precisely this reason. Anti-discrimination law also has evolved to address cases involving mixed motives, or multiple causes. A subsequent article will set forth a more nuanced approach to

would not be useful in an international law context. Moreover, the Board and Courts have applied domestic law principles to international refugee law concepts in other contexts. For example, the United Nations Convention Against Torture, as implemented in the United States, prohibits the United States from removing an individual to a country where he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). The Board looked to United States civil rights law in interpreting the "acting in an official capacity" phrase to mean "acting under color of law," and the Courts of Appeals have adopted that interpretation. *See, e.g., Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009) ("While our circuit has yet to adopt the agency's interpretation of 'in an official capacity' as the equivalent of 'under color of law' as used in the civil-rights context as reasonable, we do so now."); *Ahmed v. Mukasey*, 300 F. App'x 324, 327–28 (5th Cir. 2008) ("To prove entitlement to . . . [the] CAT, the applicant must demonstrate that . . . it is more likely than not he would be tortured by, or with the acquiescence of, government officials acting under color of law."); *Bankole v. INS*, 126 F. App'x 503, 504 (2d Cir. 2005) (referring to "color of law" under CAT analysis); *Ali v. Reno*, 237 F.3d 591, 597 (6th Cir. 2001) (noting that "the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in United States law, it applies to torture inflicted under color of law") (internal quotations omitted).

392. Hathaway & Foster, *supra* note 39, at 471.

causation in refugee law to address these special cases.

Professors Hathaway and Foster further criticize the “speculative and hypothetical nature” of the but-for analysis.³⁹³ They state that this problem “may well be exacerbated in refugee law given the hypothetical nature of the refugee inquiry (in looking to assess chances of future persecution in a foreign country, often assessed across linguistic and cultural divides).”³⁹⁴ While it is true that, as in tort law, the but-for analysis calls for some speculation on the part of the adjudicator as to what would have happened (or what would happen) but for the applicant’s protected status, this inquiry is no more speculative than the inquiry into the persecutor’s motives demanded by the current state of the law. The latter inquiry is particularly speculative given that the persecutor is most often in a foreign country, and the court operates across those same “linguistic and cultural divides.” They also criticize the but-for test for being overly inclusive in that it “could lead to an artificial chain of reasoning that would connect factors to an applicant’s well-founded fear of being persecuted that are only remotely (and even accidentally) related to the true reasons for fearing serious harm.”³⁹⁵ It is for this reason that this Article proposes employing an analogy to the proximate cause analysis in torts.

It is also worth pointing out that applying the but-for analysis in refugee law would not open any floodgates. Applicants would still have to show, at a minimum, that they have a protected status, that they experienced or fear treatment that rises to the level of persecution, that the persecution occurred at the hands of the government or forces the government is unwilling or unable to control, and that they are not subject to any bars to asylum or withholding of removal eligibility. Moreover, their cases would have to withstand a possible rebuttal by DHS premised on a change in circumstances or their ability to relocate elsewhere within the home country. The but-for analysis would do nothing to change these requirements.³⁹⁶

393. *Id.*

394. *Id.*

395. *Id.* at 472.

396. See David L. Neal, *Women As A Social Group: Recognizing Sex-Based Persecution As Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 243 (1988) (“Numerically, legitimate asylum applicants do not at present pose a threat to

B. *Alternative Approaches*

Two alternative approaches to determining causation in refugee law are worth mentioning. First, Professors Hathaway and Foster suggest a “contributing cause” standard, derived from anti-discrimination law.³⁹⁷ Under this approach, the protected status need not be a dominant or sole cause of the persecution; the test asks only whether the status is “a contributing factor to the risk of being persecuted.”³⁹⁸ This approach has some appeal in theory. The trouble, at least in the United States, is that courts already recognize that persecution can be based only “in part” on a protected ground and still constitute persecution on account of a protected status.³⁹⁹ Nevertheless, in contexts such as domestic violence, trafficking, and forced marriage, the agency has declined to find a nexus between the victim’s gender or particular social group and the persecution. In these types of cases, in contrast to cases involving political opinion or ethnicity-based persecution, the persecutors do not often explicitly mention the protected ground, and the courts therefore have been unwilling to see the ground as a motivating factor. Indeed, even in rare cases where the abuser or persecutor has made explicit comments about the victim’s gender, courts have been unwilling to see gender as a motivating factor, holding instead that the abuser was motivated by other personal reasons.⁴⁰⁰ If

domestic resources and immigration allowances.”); Jenny-Brooke Condon, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 255 (2002) (“The burden of presenting sufficient evidence of a persecutor’s motive and the requirement that a country be unable or unwilling to protect an applicant from persecution, remain substantial hurdles for any asylum applicant.”); see also Meghan Casey, *Refugee Women As Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States*, 10 SEATTLE J. SOC. JUST. 981, 1047 (2012) (“[T]he excuse that recognition of gender-based asylum claims will ‘open the floodgates’ to deny asylum claims is contrary to the principles of refugee law.”).

397. Foster, *supra* note 31, at 338; see also Hathaway & Foster, *supra* note 39, at 466.

398. Foster, *supra* note 31, at 338.

399. *E.g.*, *In re T-M-B*, 21 I. & N. Dec. 775, 777 (B.I.A. 1997); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc), *superseded in part by statute*, Real ID Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *Sebastian-Sebastian v. INS*, 195 F.3d 504, 513 (9th Cir. 1999); *Shoafara v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000); *Gafoor v. INS*, 231 F.3d 645, 652 (9th Cir. 2000); *Deloso v. Ashcroft*, 393 F.3d 858, 860–61 (9th Cir. 2005); *Sanchez Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1232–33 (11th Cir. 2007).

400. See, *e.g.*, *In re R-A-*, 22 I. & N. Dec. 906, 908, 925 (B.I.A. 2001) (stating

the agency has not found that gender or membership in a particular social group even partially caused the persecution, it is unlikely to find that this status was a contributing factor to the risk of being persecuted.⁴⁰¹ Yet, an applicant might be able to show that but for her gender or her membership in a particular social group, it is more likely than not that she would not have been abused or persecuted. Thus, and somewhat counterintuitively, for some applicants the but-for test might make for a less burdensome test than the contributing cause test. Moreover, the but-for formulation provides an approach that can be applied in a straightforward manner and that leaves no doubt about the causal link between protected status and the persecution. In any event, the but-for test advocated in this Article is merely one sufficient way of establishing causation. A subsequent article will set forth a more nuanced approach, encompassing the contributing factor test advocated by Hathaway and Foster, for cases in which the but-for test fails, such as cases involving mixed or multiple motives.

Another potential approach worth noting is the bifurcated approach described by Professor Karen Musalo.⁴⁰² Under this approach, an applicant would not have to show that a persecutor targeted her on account of a protected ground; rather, she could show that she suffered or fears serious harm (for any reason) *and* that the state failed or would fail to protect her from that harm on account of her protected status.⁴⁰³ This approach has been adopted in other countries, but although the United States came close to adopting this approach in *Kasinga*, it has not done so.⁴⁰⁴ Instead, the United States has required a link between the persecution and the protected ground. The United States courts' hesitation to

that during the abuse, the applicant's abuser sometimes said, "You're my woman, you do what I say," and nevertheless holding that the protected ground did not lead, even in part, to the abuse).

401. *See id.* at 925 ("We . . . do not find it reasonable to believe that an actual or imputed political opinion or social group membership led even in part to the respondent's abuse.")

402. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 786 (2003).

403. *Id.* at 789. ("Pursuant to this formula [Persecution = Serious Harm + Failure of State Protection], the required nexus is established if *either* of the constituent elements of persecution are causally related to a Convention reason.")

404. *Id.* at 778-79.

consider the reasons for lack of state protection in the nexus analysis⁴⁰⁵ may make the approach proposed in this Article more viable in the United States.

Another advantage to the proposed approach is that it can be applied uniformly to all types of cases—whether the persecutor is a private individual or a state actor. Moreover, it is widely recognized that the failure of the state to protect a class of individuals often goes to motivation. For example, in the domestic violence context, the level of impunity with which an abuser knows he can act will often inform his decision about whether or not to abuse.⁴⁰⁶ Thus, the but-for test implicitly factors in lack of state action: but for the applicant's gender, the state would protect her, and the abuse would not occur. Accordingly, the approach proposed in this Article also encompasses Professor Musalo's proposed bifurcated approach.

CONCLUSION

The lack of a uniform standard or test for determining causation in asylum cases has led to inconsistent and poorly reasoned decisions, in large part to the detriment of applicants seeking relief from gender-based persecution or other private harms. The but-for causation standard from tort law, along with its qualifications and exceptions for rare cases, provides a consistent and simple approach that will apply easily in most asylum cases and is supported by sound policy. The proposed approach would shift the focus of the nexus analysis away from the motivation of the persecutor to the status of the victim. This new nexus analysis is more in line with the ultimate goal of refugee law: to provide surrogate protection to individuals who face persecution because of characteristics they cannot or

405. See, e.g., *In re R-A-*, 22 I. & N. Dec. at 922 (“[G]overnmental inaction is not a reliable indicator of the motivations behind the actions of private parties.”).

406. See *id.* at 939 (Guendelsberger, Board Member, dissenting) (“The respondent’s husband was not a simple criminal, acting outside societal norms; rather, he knew that, as a woman subject to his subordination, the respondent would receive no protection from the authorities if she resisted his abuse and persecution.”); *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1178 (9th Cir. 2001), *opinion vacated on reh’g en banc*, 270 F.3d 794 (9th Cir. 2001), *opinion vacated and matter remanded*, 273 F.3d 1220 (9th Cir. 2001) (finding that Aguirre-Cervantes was severely abused by her father because she was an immediate member of his family and that it was legal in Mexico “for husbands to use ‘correction’ discipline to handle wives and children.”).

should not be required to change and who are unable to receive such protection from their home countries.