
Spring 2015

Nexus Redux

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Recommended Citation

Gupta, Anjum (2015) "Nexus Redux," *Indiana Law Journal*: Vol. 90 : Iss. 2 , Article 1.

Available at: <https://www.repository.law.indiana.edu/ilj/vol90/iss2/1>

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Nexus Redux

ANJUM GUPTA*

Pursuant to its obligations under international law, the U.S. government has agreed to provide protection to individuals who fear persecution in their home countries for reasons of race, religion, nationality, membership in a particular social group, or political opinion. This protection in the United States takes the form of asylum, and the asylum statute states that the United States will protect individuals from persecution that occurred or will occur “on account of” one of those grounds. The Supreme Court has stated that in order to meet the “on account of” or “nexus” requirement, an asylum applicant must provide some evidence, whether direct or circumstantial, of persecutor motive. Congress later declared that a protected ground must be “one central reason” for the persecution. There is, however, no statutory, regulatory, or judicial authority setting forth the proper analytical framework for determining nexus in asylum cases.

In a previous article, I argued that in most cases, the “but-for” causation model from tort law would suffice as a method of establishing causation in asylum cases. I acknowledged, however, that this model may not provide the proper framework for all cases, particularly cases involving mixed or multiple motives for the persecution.

This Article sets forth a burden-shifting framework for such cases that is inspired by the frameworks for assessing causation in U.S. antidiscrimination law and, to a lesser extent, tort law. The Article draws from the literature and jurisprudence surrounding intent in U.S. asylum law and antidiscrimination law, as well as from mixed motives jurisprudence.

The framework proposed in this Article, used in conjunction with the but-for test proposed in the previous article, provides a rule for determining causation in asylum cases that would lead to more consistent, fair results and would bring the United States more in line with its international obligations.

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INTRODUCTION

If antidiscrimination law is in its infancy as compared with the law of torts, asylum law is embryonic. While the analytical framework for determining causation in torts is fairly well established and causation standards in antidiscrimination law have been set but continue to evolve, a precise rule for establishing or determining causation in asylum law has yet to be announced. This lack of guidance has led to widespread confusion and inconsistency in the determination of nexus in asylum cases, particularly in cases involving mixed or multiple motives. This Article, in conjunction with a prior article entitled *The New Nexus*,¹ proposes a framework for assessing causation in all asylum cases. While *The New Nexus* proposed an analytical framework for determining causation in most cases based on the but-for rule in tort law, this Article proposes a burden-shifting framework to be used in a subset of cases involving mixed or multiple motives. This framework is inspired by causation frameworks used in discrimination and tort cases but is tailored to the realities of asylum adjudication and the goals of refugee law. The Article considers the critiques of the antidiscrimination frameworks in the scholarly literature and jurisprudence and sets forth a proposal that can be consistently applied and easily implemented.

Part I provides the background necessary for a full understanding of the proposal set forth in this Article. It begins by discussing the relevant international and domestic law related to refugee protection. It then focuses specifically on the nexus requirement in international refugee law and U.S. asylum law and makes the argument that the lack of a procedural standard for determining nexus has led to inconsistent and unfair results in adjudication. This Part also includes a discussion of recent developments relating to the determination of nexus in asylum claims based on domestic violence. Part II examines the literature and jurisprudence related to the difficulties proving motive in asylum law. It then discusses the literature on motive in antidiscrimination law, drawing parallels to asylum law and making the case that the frameworks employed in discrimination cases may provide some guidance as to how to assess nexus in asylum cases. Part III discusses the past and current states of the law regarding mixed or multiple motives in asylum cases. It makes the argument that prior to enactment of the REAL ID Act,² the Immigration Agency and courts had very little guidance with respect to the proper analysis to be conducted in mixed motives cases, and as a result, rulings were inconsistent. After the REAL ID Act's

1. Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377 (2014).

2. REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)).

pronouncement that a protected status must be at least “one central reason” for the persecution, however, courts struggled with the meaning of the term “central,” and still had no guidance as to the proper analytical framework for such claims.³ Part IV of the Article sets forth the various frameworks for assessing causation in antidiscrimination law and tort law, which are then used as inspiration for the proposal set forth in Part V. Part V also anticipates and addresses the possible critiques of the proposal.

I. BACKGROUND

This Part begins by setting forth the relevant international and domestic law of asylum necessary to understand the nexus framework proposed in this Article. This Part also describes the evolution of the nexus requirement in U.S. asylum law. Finally, this Part includes a section describing recent developments related to the determination of nexus in asylum claims based on domestic violence.

A. International Refugee Law and U.S. Asylum Law

On July 28, 1951, the United Nations approved the Convention Relating to the Status of Refugees (the “Convention”), which obligates signatory states to offer protection to individuals fleeing their home countries due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”⁴ Although the United States was not a signatory to the Convention, it was a signatory to the 1967 Protocol Relating to the Status of Refugees (the “Protocol”),⁵ which adopted by reference the provisions of the Convention.

In 1980, Congress enacted the Refugee Act (the “Act”).⁶ The Act defines a refugee as any person who is unwilling or unable to return to her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷ The United States provides two forms of relief for such individuals seeking protection in the States: asylum and withholding of removal.⁸ If an individual proves that she is a refugee under the statutory definition and is not otherwise statutorily barred from receiving protection, the Attorney General (acting through the Immigration Agency)⁹ may, at his discretion, grant her

3. See, e.g., *Shaikh v. Holder*, 702 F.3d 897, 901–03 (7th Cir. 2012); *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F.3d 124, 131 (3d Cir. 2009); *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009); *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009); *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

4. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

5. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

6. Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

7. 8 U.S.C.A. § 1101(a)(42) (West 2014).

8. See 8 U.S.C.A. § 1158 (West 2014).

9. 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

asylum.¹⁰ If an individual is granted asylum, she may remain in the United States, as well as petition for her spouse and qualifying children to be granted derivative asylee status and thereby join her in the United States.¹¹ She will also be able to apply for permanent residence and eventually citizenship.¹² Withholding of removal, on the other hand, is a mandatory (albeit less desirable) form of relief.¹³ It does not provide a path to permanent residence or citizenship, and an individual granted withholding of removal may not petition for her family members.¹⁴ In addition, a grant of withholding of removal means only that the U.S. government will not return the individual to the country where she fears persecution; the U.S. government can, however, send the person to a third country.¹⁵

The burden of proving that an applicant is a refugee pursuant to the Act rests on the applicant. To obtain asylum, an individual must show that she suffered past persecution or has a well-founded fear of future persecution on account of one of the protected grounds.¹⁶ The term “persecution” is not clearly defined in the Act or implementing regulations, but courts have interpreted the phrase to require a showing of something more than mere discrimination or harassment.¹⁷ The persecution must occur at the hands of the government or forces the government is unwilling or unable to control.¹⁸ 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.¹⁹

If an applicant demonstrates past persecution, she is entitled to a presumption that she has a well-founded fear of future persecution.²⁰ The Department of Homeland

Department of Justice. The EOIR is composed of immigration judges and the Board of Immigration Appeals (BIA or “Board”). 8 C.F.R. § 208.2 (2014); *see also* U.S. Dep’t of Justice, Exec. Office for Immigration Review, *About the Office*, JUSTICE.GOV (Feb. 2014), <http://www.justice.gov/eoir/orginfo.htm> (stating that the EOIR “was created on January 9, 1983, through an internal Department of Justice (DOJ) 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)”). Because only the EOIR typically issues published decisions, all references to the “Agency” are to the EOIR.

10. *See* 8 U.S.C. § 1158(b)(1)(A).

11. *See* 8 U.S.C. § 1158(b)(3).

12. *See* 8 U.S.C.A. § 1159 (West 2014).

13. *See* 8 C.F.R. § 208.16 (2014).

14. *See* 8 U.S.C.A. § 1231 (West 2014).

15. *See* 8 U.S.C.A. § 1231(b).

16. *See* 8 U.S.C. § 1158(b)(1)(B)(i).

17. *See* *Stanojkova v. Holder*, 645 F.3d 943, 947–48 (7th Cir. 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” (emphasis in original)); *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.’”).

18. *See In re Acosta*, 19 I. & N. Dec. 211, 231–32 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (1987).

19. 8 U.S.C.A. § 1101(a)(42)(A) (West 2014).

20. *See* 8 C.F.R. § 208.13(b)(1) (2014).

Security (DHS) can rebut that presumption by showing that there has been a fundamental change in circumstances such that she no longer has a well-founded fear of future persecution, or that she could avoid persecution by relocating to a different part of her home country.²¹ If the DHS successfully rebuts the presumption of a well-founded fear of future persecution, an applicant may still be eligible for asylum if she can show “compelling reasons for being unwilling or unable to return” to her home country due to the “severity of the past persecution,” or that she would suffer “other serious harm upon removal” to the home country.²² If an applicant cannot establish that she experienced persecution in the past, she may still be eligible for asylum if she can show an independent well-founded fear of future persecution.²³ In such cases, it is the applicant’s burden of proving that she could not reasonably relocate to another part of her home country to avoid persecution.²⁴ An applicant need not show that she would be singled out individually for persecution; instead, she may meet her burden by demonstrating that there is a “pattern or practice” of persecution against persons similarly situated to the applicant in her home country.²⁵

The standards for withholding of removal claims are similar to those for asylum claims.²⁶ One major difference is that an applicant for withholding of removal must show that her life or freedom would be threatened in the future.²⁷ While an applicant who shows past persecution is entitled to a presumption that her freedom would be threatened in the future, the applicant may not be granted withholding of removal based on the severity of the past persecution or the possibility of other serious harm if the DHS successfully rebuts that presumption. Another major difference lies in the burden of proof. An applicant for withholding of removal must show that it is more likely than not that her life or freedom would be threatened on account of one of the protected grounds.²⁸ While there is no definitive standard for the burden of proof in asylum claims set forth in the statute or regulations, the U.S. Supreme Court has interpreted the term “well-founded fear” to require a less stringent burden, hinting that even a one in ten chance of persecution might suffice.²⁹

B. The Nexus Requirement

In order to make out a claim for asylum, an applicant must demonstrate not only that she is a member of a protected group and that she experienced (or fears) harm

21. *Id.*

22. 8 C.F.R. § 208.13(b)(1)(iii).

23. *See* 8 C.F.R. § 208.13(b)(2).

24. 8 C.F.R. § 208.13(b)(3)(i).

25. 8 C.F.R. § 208.13(b)(2)(iii).

26. *See* 8 C.F.R. § 208.16 (2014).

27. 8 C.F.R. § 208.16(b)(2).

28. 8 C.F.R. § 208.16(b)(1)(iii).

29. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40, 449–50 (1987) (“The High Commissioner’s analysis of the United Nations’ standard is consistent with our own examination of the origins of the Protocol’s definition There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.”).

that rises to the level of persecution, but that the persecution occurred (or would occur) “on account of” her protected status. This requirement is often referred to as the “nexus” requirement. Although the U.S. government changed the Convention language from “for reasons of” to “on account of” when drafting the statute, there is no evidence suggesting that this change was deliberate or significant at the time it was made.³⁰ Thus, there is no insight into the legislature’s reasoning for this decision.

There is scant international guidance as to the proper standards to be applied when determining whether an applicant has established nexus;³¹ the guidance that does exist has evolved largely domestically. For example, the U.S. Supreme Court, reasoning that the statute “makes motive critical,” has held that applicants must provide some evidence of persecutor motive, whether direct or circumstantial.³² This requirement to prove persecutor intent is discussed in greater detail in Part II.

With respect to cases involving mixed or multiple motives, the vast majority of circuit courts to confront the issue before the year 2005 recognized that the protected ground need not be the sole reason for the persecution in order for nexus to have been established; rather, a protected ground needed to be at least one reason, or part of the reason, for the persecution.³³ In 2005, however, Congress

30. See H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.); S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.); Immigration and Nationality Act, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (codified as amended at 8 U.S.C. § 1151 (1965)); Brigette 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 & nn.175–76 (2007) (explaining the original legislative purpose of the asylum system). 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 Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)* (E/AC.32.2), E/AC.32/L.4 (Jan. 18 1950), available at <http://www.refworld.org/docid/3ae68c164.html>; see also *Cardoza-Fonseca*, 480 U.S. at 437 (1987) (describing the Act’s refugee definition as “virtually identical” to the Convention definition).

31. See, e.g., 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 (July 16, 1951) (speech by Mr. Robinson, Israel); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 334 (2014) (“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 . . . 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 (2008) (“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. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

33. See, e.g., *Mustafa v. Holder*, 707 F.3d 743, 751 (7th Cir. 2013) (“Under the mixed-motives doctrine applied by this circuit prior to the enactment of the REAL ID Act, which applies in this case, an applicant may qualify for asylum if his persecutors had more than one motive for their conduct so long as the applicant demonstrates by either direct or circumstantial evidence that his persecutors were ‘motivated, at least in part, by one of the enumerated grounds.’” (footnote omitted)); *Menghesha v. Gonzales*, 450 F.3d 142, 148 (4th

enacted the REAL ID Act, which required that the protected ground be “at least one central reason” for the persecution.³⁴ The Act gave no guidance as to the proper interpretation of the word “central,” and circuit courts, the Agency, and scholars have struggled with the term ever since.³⁵

Apart from the Supreme Court’s pronouncement that applicants must provide evidence of persecutor motive and the REAL ID Act’s requirement that the applicant show that a protected ground was at least one “central” reason for the persecution,

Cir. 2006) (“Under the INA’s ‘mixed-motive’ standard, an asylum applicant need only show that the alleged persecutor is motivated *in part* to persecute him on account of a protected trait. Recognizing that persecutors often have multiple motives for punishing an asylum applicant, the INA requires only that an applicant prove that one of those motives is prohibited under the INA.” (emphasis in original) (footnote omitted)); *Mohideen v. Gonzales*, 416 F.3d 567, 570 (7th Cir. 2005) (“We agree with our sister circuits that the statute’s reference to persecution ‘on account of’ one of the specified grounds does not mean persecution *solely* on account of one of those grounds.” (emphasis in original)); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (“A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds.”); *Osario v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) (“The plain meaning of the phrase ‘persecution on account of the victim’s political opinion,’ does not mean persecution *solely* on account of the victim’s political opinion.” (emphasis in original)).

34. REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)); *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” (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (Dec. 7, 2000))).

35. *See* *Shaikh v. Holder*, 702 F.3d 897, 901–03 (7th Cir. 2012) (simultaneously embracing the Ninth Circuit’s analysis of “one central reason” as well as the Third Circuit’s rejection of the term “subordinate”); *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F.3d 124, 131 (3d Cir. 2009) (concurring with the BIA’s interpretation but holding that when “the term ‘subordinate’ is removed, the BIA’s interpretation constitutes a reasonable, valid construction of § 208’s ‘one central reason’ standard”); *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009) (analyzing the statutory interpretation to hold that “a motive is a ‘central reason’ if the persecutor would not have harmed the applicant if such motive did not exist”); *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009) (joining the BIA, Fourth, First, and Ninth Circuits in the interpretation of “one central reason”); *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007) (holding that, after consulting the dictionary for the suitable meaning of the word “central” and applying “common sense” to statutory interpretation, “one central ground” needs to be more than “incidental, tangential, superficial, or subordinate to another reason for harm”); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 118 (2006) (explaining that “the REAL ID Act does not define ‘centrality,’ but it appears to have adopted the term ‘central’ from proposed INS regulations issued in December 2000 in which centrality was a major theme. In those regulations, the INS proposed that ‘[i]n cases involving a persecutor with mixed motivations, the applicant must establish that the applicant’s protected characteristic is central to the persecutor’s motivation to act against the applicant’” (alteration in original) (citing Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598 (Dec. 7, 2000))); James Feroli, *Burden of Proof, and Corroboration Under the REAL ID Act*, 09-06 IMMIGR. BRIEFINGS 1 (2009) (demonstrating that REAL ID did not drastically alter the previous standard and that the Act was implemented to encourage the circuits to apply the same standards, particularly relating to mixed motive cases).

courts and the Agency have provided no guidance as to procedural standards to apply when evaluating whether nexus has been established. In a previous article, I argued that this lack of a uniform standard has led to inconsistent application of the rule, largely to the detriment of applicants fleeing gender-based persecution or other private harms.³⁶ I made this argument by examining in depth the treatment of nexus in nine contexts—forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, gangs, and membership in a family.

In the forced sterilization context, for example, the Agency initially held that applicants who feared sterilization or forced abortion due to China's "one-child" policy could not establish nexus to a protected ground because the policy was due to the government's desire to control the population and not on account of any Convention ground.³⁷ The nexus holding was so problematic that Congress amended the refugee definition specifically to resolve this issue in forced sterilization or forced abortion cases.³⁸ The Agency has found nexus to a protected ground in female genital mutilation cases but, as I argued, its reasoning with respect to nexus appears to be out of line with its nexus reasoning in other gender-based cases.³⁹ In cases based on fear of domestic violence, trafficking, and forced marriage, the Agency refused to find nexus, reasoning that the persecution occurred (or would occur) on account of personal or criminal reasons, rather than on a protected ground.⁴⁰ In the domestic violence context, for example, the Agency has held that the abuse occurred or would occur because of jealousy, frustration, the "inherent meanness"⁴¹ of the abuser's personality, or simply because the abuser was a "despicable person,"⁴² rather than on account of the victim's gender, political opinion, or social group. But, as I pointed out elsewhere, the Agency routinely grants claims alleging fear of persecution from a dictator without stopping to ask whether the persecution occurred because the dictator was a "despicable person."⁴³ Similarly, in cases based on fear of trafficking

36. Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 457 (2014).

37. See *In re Chang*, 20 I. & N. Dec. 38, 39–40, 45 (B.I.A. 1989) (denying asylum to a man fleeing China's one-child policy and the threat of sterilization because the one-child policy "is solely tied to controlling population, rather than . . . a guise for acting against people for reasons protected by the Act"); see also Gupta, *supra* note 36, at 390–92.

38. 8 U.S.C.A. § 1101(a)(42)(B) (West 2014). The statute added the following language to the refugee definition:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, 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.

Id.; see also Gupta, *supra* note 36, at 392.

39. Gupta, *supra* note 36, at 394.

40. See *id.* at 395.

41. *Id.* at 447 (citation omitted).

42. See *In re R-A-*, 22 I. & N. Dec. 906, 926 (B.I.A. 2001).

43. See, e.g., *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

or forced marriage, the Agency has found that the persecution was actually tied to economic enrichment or other criminal or personal aims, rather than to gender or social group.⁴⁴

In religion cases, the Agency and courts of appeals have found lack of nexus, reasoning that there is a distinction between religion (a Convention ground) and religious activity (a nonprotected ground).⁴⁵ Similarly, in some cases based on fear of persecution on account of homosexuality, the Agency has denied asylum, finding that the persecution occurred because of “personal problems” between the victim and the persecutor as opposed to a Convention ground.⁴⁶ It has done so despite having held, decades earlier, that homosexuality constitutes membership in a particular social group for asylum purposes.⁴⁷ With respect to claims based on fear of persecution from gangs (typically in retaliation for refusal to join a gang), the Agency and courts of appeals have routinely denied asylum, finding that persecution did not occur on account of social group membership; rather, it occurred due to the gangs’ desire to increase their numbers or to gain more influence and power.⁴⁸ As I argued,

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 being targeted by the government for his political beliefs); *see also* Gupta, *supra* note 36, at 402.

44. *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”); *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (determining that because the persecution occurred on account of “a dispute between two families,” the Immigration Court denied asylum and the Agency affirmed); *In re Anon.*, A# redacted (New York, N.Y., Immigration Ct., Feb. 4, 2004), at 19–20 (CGRS Case #1034) (referring to her trafficker as a “spurned lover,” the Immigration Court denied asylum); *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”); *see also* Gupta, *supra* note 36, at 403–07.

45. *See, e.g.*, *Li v. Gonzales*, 420 F.3d 500, 510 (5th Cir. 2005) (affirming the denial of asylum to a man who was persecuted on account of his affiliation with an illegal church, reasoning, “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”), *review dismissed and opinion vacated*, 429 F.3d 1153 (5th Cir. 2005); *see also* Gupta, *supra* note 36, at 407–08.

46. *See, e.g.*, *Ayala v. U.S. Attorney Gen.*, 605 F.3d 941, 947 (11th Cir. 2010) (holding that because the sexual assault the applicant was a victim of was a “criminal act[] perpetrated by individuals,” the immigration judge denied asylum (alteration in original)); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087 (9th Cir. 2005) (“The IJ concluded that the sex acts that Boer-Sedano was forced to perform by the police officer were simply ‘a personal problem’ he had with this officer.”); *see also* Gupta, *supra* note 36, at 411–14.

47. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); *see also* Gupta, *supra* note 36, at 411–13.

48. *See, e.g.*, *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1228, 1235 (10th Cir. 2011) (rejecting the applicant’s asylum claim on the basis that she was attacked by gang members not for her political opinion or particular social group, but because she refused to join the gang); *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (“[T]he IJ determined that if Larios was indeed targeted by gangs, the motivation would not be on account of his membership in a

this holding stands in stark contrast to the grants of asylum in dictatorship cases, where the Agency and courts have not stopped to ask whether the dictator was motivated for a desire for more influence and power.⁴⁹ Finally, in claims involving fear of persecution on account of membership in a family, the Agency has sometimes denied claims, finding that the persecution would occur not because of the applicant's relationship to their family member, but because of the persecutor's desire for revenge or retribution against the family member.⁵⁰ The Agency has made this finding despite the fact that it is well recognized that membership in a family constitutes membership in a particular social group for asylum purposes and despite the fact that the applicants in those cases had clearly demonstrated that they were members of families that were targeted for persecution.⁵¹

Based on these examples, I argued that a new standard for evaluating nexus in asylum claims is needed.⁵² I proposed that the standard that should be used in most asylum claims is the but-for standard of causation commonly used in U.S. tort law and antidiscrimination law.⁵³ That is, if an applicant can show that but for the protected characteristic, it is more likely than not that the persecution would not have occurred, nexus is established. I further stated that while meeting the but-for test for nexus is a *sufficient* way of establishing nexus, it may not be the *only* way.⁵⁴ I acknowledged that a more nuanced approach to evaluating nexus may be necessary in some cases where the but-for test fails. Such an approach would be particularly

particular social group but would rather be an attempt to increase the gang's numbers."); *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." (alteration in original) (citations omitted) (internal quotation marks omitted)); *In re E-A-G-*, 24 I. & N. Dec. 591, 596 (B.I.A. 2008) (denying asylum because neither of the applicant's gang-related particular social groups did not meet the social visibility and particularity tests); *see also* Gupta, *supra* note 36, at 416–19.

49. *See* Gupta, *supra* note 36, at 418.

50. *See, e.g.,* *Demiraj v. Holder*, 631 F.3d 194, 199 (5th Cir. 2011), *vacated*, No. 08-60991, 09-60585, 2012 WL 2051799 (5th Cir. May 31, 2012) (finding that the applicants were harmed as retribution and that "[t]he record here discloses a quintessentially personal motivation" despite the acknowledgement that the applicants were harmed because they were members of a particular family unit and therefore targeted); *Bhasin v. Gonzales*, 423 F.3d 977, 982 (9th Cir. 2005) (recalling that the Agency had concluded that the applicant was persecuted for retaliation purposes not on account of membership in a particular social group); *see also* Gupta, *supra* note 36, at 419–22.

51. *See, e.g.,* *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."); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (recognizing applicant'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."); *see also* Gupta, *supra* note 36, at 419–22. *But see* *Demiraj*, 631 F.3d at 199.

52. *See generally* Gupta, *supra* note 36.

53. *Id.* at 428; *see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 985–90 (5th ed. 2009).

54. Gupta, *supra* note 36, at 443.

useful in the context of mixed motives cases. This Article sets forth a proposal for evaluating nexus in such cases.

C. Nexus in Domestic Violence Cases, Revisited

Some important developments in the domestic violence context have taken place since the publication of *The New Nexus*. It is accordingly worth revisiting this area of the law. As described in more detail in that article, the Board first addressed whether domestic violence could form the basis of an asylum claim in 1999 in *In re R-A-*.⁵⁵ In that case, Rodi Alvarado, a woman from Guatemala, applied for asylum in the United States based on the extreme domestic violence she suffered at the hands of her husband.⁵⁶ She argued that she had been persecuted and feared future persecution on account of a political opinion that her husband necessarily imputed to her, specifically that “women should not be controlled and dominated by men,”⁵⁷ 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.”⁵⁸

Though the Board found her husband’s conduct “deplorable,”⁵⁹ it denied Alvarado’s claim, reasoning with respect to the political opinion claim that she had not shown a nexus between the abuse and the imputed political opinion.⁶⁰ It stated, “[e]ven 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.”⁶¹

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.⁶² It reasoned that the social group seemed to have been defined solely for purposes of the asylum claim.⁶³ 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.⁶⁴ 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.”⁶⁵ 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; instead, the Board found that “[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, are among the explanations or

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

56. *Id.* at 908–10.

57. *Id.* at 916.

58. *Id.* at 917.

59. *Id.* at 910.

60. *See id.* at 917.

61. *Id.* at 916.

62. *See id.* at 917–18.

63. *Id.* at 918.

64. *Id.* at 926.

65. *Id.* at 923.

motivations that may reasonably be inferred on this record for the actions of the respondent's husband."⁶⁶ 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.⁶⁷ 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."⁶⁸

In January 2001, then Attorney General Janet Reno vacated the decision and remanded it back to the Board, instructing 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.⁶⁹ The regulations have yet to be issued,⁷⁰ and until recently, the Board had not revisited in a precedential decision whether domestic violence could be the basis of an asylum claim.

In August 2014, however, the Board issued *In re A-R-C-G*.⁷¹ In that case, which involved another Guatemalan woman who suffered "repugnant" abuse at the hands of her husband,⁷² the immigration judge determined that the applicant had not established that her husband had abused her on account of her status as a "married woman in Guatemala who was unable to leave the relationship."⁷³ Instead, he found that the abuse was a result of "criminal acts, not persecution."⁷⁴ He accordingly denied her asylum claim.⁷⁵

The Board reversed the immigration judge's decision, determining that "married women in Guatemala who are unable to leave their relationship" constitute a cognizable social group.⁷⁶ It noted, however, that the DHS conceded that "the mistreatment was, for at least one central reason, on account of [the applicant's] membership in a cognizable particular social group."⁷⁷ Accordingly, and although this was the very reason the immigration judge denied asylum, the Board declined to address the nexus issue in the decision.⁷⁸

66. *Id.* at 926.

67. *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").

68. *Id.*

69. *See* 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, 114 (2013). 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.

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

71. *In re A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014).

72. *Id.* at 389.

73. *Id.* at 389–90.

74. *Id.* at 390.

75. *Id.*

76. *Id.* at 392–95.

77. *Id.* at 395.

78. *Id.*

The Board's actions in *A-R-C-G-* highlight the need for a new nexus formulation. Although the Board addressed the particular social group issue, an issue that has garnered significant scholarly attention,⁷⁹ the Board did nothing to change the landscape of nexus determinations in domestic violence cases. Immigration judges are therefore free, even after *A-R-C-G-*, to determine that the abuse occurred not on account of the applicant's particular social group (cognizable though it may be), but on account of the abuser's "criminal" or "despicable" nature. Indeed, since the issuance of *A-R-C-G-*, the Board has continued to deny domestic violence asylum claims on this basis.⁸⁰ The nexus formulation set forth in this Article, in conjunction with the *The New Nexus*, would fix this problem.

II. A MATTER OF MOTIVE

This Article posits a causation analysis for asylum cases inspired by the analyses used in U.S. antidiscrimination law. Both asylum cases and discrimination cases involve some inquiry into motives (either of the persecutor or the discriminator). This Part accordingly begins with an examination of the judicial and scholarly literature on motive in both contexts.

A. Intent in U.S. Asylum Law

The United States's focus on persecutor intent in asylum claims arguably traces back to its decision to change the Convention language of "for reasons of" to "on account of" in its implementing statute.⁸¹ While the phrase "for reasons of" implies

79. 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 as their membership in families would bring the refugee claims of domestic violence victims within the scope of existing refugee law); Deborah Anker, Lauren Gilbert & Nancy Kelly, *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, 741–43 (1997) (arguing that victims of domestic violence should be able to establish an asylum claim based on particular social group or political opinion); Bookey, *supra* note 69, at 148 (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 U.S. 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).

80. See, e.g., *In re D-M-*, (B.I.A. Dec. 9, 2014) (unpublished memorandum decision) (assuming "the validity of the [applicant's] proposed particular social group in light of *Matter of A-R-C-G-*," but denying asylum based in part on the immigration judge's finding that "the actions against taken [sic] the [applicant] were not the result of her proposed social group but because her partner was abusive and criminally motivated to harm her").

81. 8 U.S.C. § 1101(a)(42) (2014).

that *any* reason related to a protected ground, regardless of the persecutor's motive, would be sufficient to establish nexus, "[o]n 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."⁸²

The language chosen by the drafters of the statute undoubtedly influenced the Supreme Court's decision in *INS v. Elias-Zacarias*.⁸³ In that case, Elias-Zacarias applied for asylum because he feared persecution on account of political opinion.⁸⁴ Specifically, he stated that guerillas in his home country of Guatemala had tried to recruit him and his parents, but he and his parents refused.⁸⁵ He stated that he did not want to join the guerillas for fear of retaliation from the government.⁸⁶ The Supreme Court held that Elias-Zacarias had not established a cognizable political opinion under the Act.⁸⁷ It further held that, for purposes of asylum, it was the applicant's political opinion (and not the persecutor's) that mattered.⁸⁸ 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."⁸⁹ Since then, the Agency has required asylum applicants to prove persecutor motive.⁹⁰

The Supreme Court's requirement that asylum applicants prove persecutor intent is problematic for several reasons. First, just as the Act's "on account of" language implies a focus on individualized intent absent from the Convention's "for reasons of" language, the Court's intent requirement seems inconsistent with the language of the Convention.⁹¹ More importantly, requiring the applicant to prove persecutor

82. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 102 (3d ed. 2007) (emphasis in original); see also Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1195 (1994) ("The 1967 Protocol expresses the causal connection between the feared harm and the victim's status or belief by the phrase 'for reasons of.' The phrase 'for reasons of' is sufficiently broad to permit a finding of causal relationship absent proof of the persecutor's motivation." (emphasis omitted) (footnote omitted)).

83. 502 U.S. 478 (1992).

84. See *id.* at 479.

85. *Id.*

86. *Id.* at 480.

87. See *id.* at 483.

88. See *id.*

89. *Id.* (emphasis added and omitted).

90. See, e.g., *In re W-G-R-*, 26 I. & N. Dec. 208, 223-24 (B.I.A. 2014) ("Whether that nexus exists depends on the views and motives of the persecutor."); *In re N-M-*, 25 I. & N. Dec. 526, 532 (B.I.A. 2011) ("A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error."); *In re R-A-*, 22 I. & N. Dec. 906, 923 (B.I.A. 1999) (examining the evidence of the persecutor's motives and finding it insufficient for a grant of asylum, reasoning, "[w]e understand the 'on account of' test to direct an inquiry into the motives of the entity actually inflicting the harm").

91. See, e.g., Musalo, *supra* note 82, at 1186-88 (explaining that the Supreme Court's treatment of intent in *Elias-Zacarias* was inconsistent with the U.N. Handbook and legislative history of the adoption of the 1967 Protocol); Bret I. Parker, *Immigration and Naturalization Service v. Elias-Zacarias: A Departure from the Past*, 15 FORDHAM INT'L L.J. 1275, 1304 (1992) (stating that the requirement that an applicant prove persecutor motive "contradicts the

intent is inconsistent with the purpose of the Convention—to provide surrogate protection from persecution to individuals whose own countries are unwilling or unable to do so.⁹² Unlike criminal proceedings or even some civil proceedings, the outcome of asylum proceedings is not the assignment of blame or punishment.⁹³ Accordingly, it makes no sense to require proof of the persecutor’s intent. The persecutor is not a party to the proceedings; indeed, in most cases, the persecutor will not even be aware that the applicant is seeking asylum in the United States.⁹⁴ The aim of asylum law is to provide protection to individuals who fear persecution on account of characteristics they cannot change or should not be required to change. The proper focus of the nexus analysis, then, should be on the applicant’s predicament rather than the persecutor’s state of mind.

Moreover, as scholars and courts have recognized, intent of another party is difficult to prove in any type of case, but it is particularly difficult to prove in asylum cases.⁹⁵ The events leading to a claim for asylum have often taken place thousands of miles away and sometimes during periods of extreme social or civil strife.⁹⁶

statutory language that requires only that the applicant prove a ‘well-founded’ fear”).

92. See, e.g., *Horvath v. Sec’y of State for the Home Dep’t*, [2000] UKHL 37 (H.L.) (“The general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.”); 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 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.”).

93. See Brief Amicus Curiae of the Office of the United Nations High Comm’r for Refugees in Support of Respondent at 16, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (No. 90-1342) (“[R]efugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof.”).

94. See Ulrike Davy, *Refugees from Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK TRANSNAT’L L. REV. 53, 107–08 (1995) (“[Persecutors] often try to hide their ‘real’ intentions, and even if they do not, they rarely provide their victims with formal statements in writing. Under these circumstances, direct evidence of the actual intent is hard to obtain, either because it is simply beyond the reach of the victims or because any direct inquiry puts other people at risk.”).

95. See *In Re S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996) (“Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases.”); Musalo, *supra* note 82, at 1186–88, 1193 (“Proof of intent, or state of mind, is difficult under any circumstances. In the case of refugees, it is exceedingly difficult.”).

96. See U.N. High Comm’r for Refugees, *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees—Some Basic Questions* (June 15, 1992), <http://www.unhcr.org/3ae68cca0.html>. (“[UNHRC’s] position on this matter is that refugees are refugees when they flee, or remain outside, a country for reasons pertinent to the 1951 Convention refugee definition, whether these arise in a civil war, in international armed conflict, or otherwise. There is nothing in the definition itself which would exclude its application to persons caught up in civil war who meet the definition.”); Musalo, *supra* note 82, at 1193 (“Generally, the refugee is thousands of miles away from the place where the relevant events took place. The refugee does not have subpoena power over his or her

Applicants fleeing persecution are unlikely to have the time or state of mind to gather evidence of their persecutor's motives before fleeing their home countries.⁹⁷ In some cases, such as those in which low-level soldiers who are unknown to the applicant are carrying out orders, the applicant may not even be able to identify the actual persecutor or persecutors.⁹⁸ The persecutor, to the extent one can be identified, is not a party to the asylum claim and is typically not in the country, much less in the courtroom.⁹⁹ The persecutor cannot be called as a witness and is unlikely to supply an affidavit in support of the applicant's case.¹⁰⁰ In many cases, there are no witnesses to the persecution (other than the applicant), but even if there were witnesses, often those individuals are still in the applicant's home country and unreachable due to instability in the country or safety concerns.¹⁰¹ Persecutors do not always inform their

persecutors, nor does the refugee have access to other instrumentalities available in normal civil or criminal proceedings in the United States." (footnote omitted)).

97. See *Gafoor v. INS*, 231 F.3d 645, 654 (9th Cir. 2000) ("[I]ndividuals fleeing persecution do not usually have the time or ability to gather evidence of their persecutors' motives."); *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) ("In determining whether the alien has met his burden of proof, we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution."); U.N. High Comm'r for Refugees, Note on Burden and Standard of Proof in Refugee Claims 3 (Dec. 16, 1998), <http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf> ("[I]t should be recognised that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.")

98. See *Eduard v. Ashcroft*, 379 F.3d 182, 186 (5th Cir. 2004) (finding that, although the applicant did not know his persecutors, there was sufficient evidence to show that Christians are persecuted by Muslims in Indonesia); *Agbuya v. INS*, 241 F.3d 1224, 1227 (9th Cir. 2001) (discussing how the applicant was blindfolded throughout the duration of the torture inflicted on her by men who identified themselves as members of an armed communist guerilla group).

99. See, e.g., *Foster*, *supra* note 31, at 288 (2002) ("[T]he Federal Court of Canada has warned that adjudicators should not 'base [their] determination as to whether or not a claimant has established a nexus to the Convention on the subjective belief of the alleged persecutors themselves, especially since these alleged persecutors are obviously not present at the hearing . . . and cannot testify as to their own subjective state of mind . . .'" (alteration in original) (quoting *Shahiraj v. Canada* (Minister of Citizenship and Immigration), [2001] 3 F.C. 453, para. 19 (Can. Ont.))).

100. See, e.g., *Gafoor*, 231 F.3d at 654 (noting that persecutors are unlikely "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."); *Cianciarulo*, *supra* note 35, at 122–23 ("Obviously, most asylum seekers will not come to court equipped with notarized affidavits from their persecutors stating, 'I, Joe Persecutor, beat and tortured your client on three occasions between December 1999 and August 2003 on account of her political opinion against our oppressive but beloved dictator. Her political opinion was foremost in my mind when this occurred.'").

101. See, e.g., *Omondi v. Holder*, 674 F.3d 793, 799–800 (8th Cir. 2012) (affirming the lower courts determination that despite the applicant's credible testimony, his application lacked a credible witness since the affidavit sent by the sole witness, aside from the persecutors, was insufficiently detailed to support the applicant's assertion that police officers

victims of the reasons for the persecution and, in some cases, may try to hide their reasons, making proving them even more difficult.¹⁰²

Finally, focus on the actual or “real” intent of the persecutor will sometimes lead to absurd results. In the domestic violence context, for example, adjudicators have often found that the “real” motivation of the abuser was to establish power and control over the victim¹⁰³ or that the abuser was actually motivated by jealousy or anger rather than gender.¹⁰⁴ But it is no coincidence that the vast majority of domestic violence victims are women,¹⁰⁵ and focus on the abuser’s “real” intentions ignores the important role that gender plays in domestic violence cases. Or, as one scholar noted:

[T]he cruel experiments people had to suffer in Nazi concentration camps . . . might be described as harm inflicted in order to promote medical science. . . . Yet, these purposes do not reflect the whole picture of history. It was not by coincidence that Jews, Gypsies or homosexuals had to suffer for the “progress” of medical science. They had to suffer because, according to certain racial or social “theories”, they were deemed inferior and unworthy.¹⁰⁶

starved, abused, and raped him); *Lin v. Holder*, 565 F.3d 971, 977 (6th Cir. 2009) (finding that the applicant failed to obtain affidavits that substantiated that he practiced Fulan Gong in China and that he failed to prove that these affidavits were unavailable.); *Izrailev*, *supra* note 92.

102. *See, e.g.*, *Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997) (“The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. The BIA majority’s requirement that an alien prove that her persecutor’s subjective intent was punitive is unwarranted.”).

103. *See, e.g.*, 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, 141 (2013) (quoting an unpublished decision by an immigration judge stating, “[i]t appears that the abuse suffered by Respondent, although tragic, was the result of [her abuser’s] efforts to exert power and control over her, not her membership in any particular social group” (alteration in original)).

104. *See In re R-A-*, 22 I. & N. Dec. 906, 926 (B.I.A. 1999) (“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.”).

105. *See* SHANNON CATALANO, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 239203, INTIMATE PARTNER VIOLENCE, 1993–2010, at 3 (2012), available at <http://www.bjs.gov/content/pub/pdf/ipv9310.pdf> (finding that about 4 in 5 victims of domestic violence were women from 1994 to 2010); Cianciarulo & David, *supra* note 79, 343 (explaining that domestic violence is not random but a calculated pattern for an intimate partner to exert power and control); Gupta, *supra* note 36, at 445–47 (advocating for a reframing of the nexus requirement to a but-for standard, which would allow for a broader analysis of gender-based claims). *See generally* Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Persecution Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361 (2012) (arguing that gender persecution should be a basis for asylum under the particular social group category).

106. Davy, *supra* note 94, at 108–09.

Overreliance on evidence of the persecutor's "real" motives can thus distract from the victim's status as a reason for the persecution in favor of reasons unrelated to protected grounds, even when the protected status was an actual cause of the persecution.

For these reasons, emphasis on the motivations of persecutors is misplaced; the real focus should be on the status of the victim. The but-for test set forth in *The New Nexus* and the approach proposed in this Article would ease the applicant's burden to prove the persecutor's precise motivations and would refocus the nexus determination on the status of the applicant.

B. Intent in U.S. Antidiscrimination Law

There are obvious similarities between asylum law and antidiscrimination law. Both involve protected statuses or characteristics defined by law, both involve harms to the applicant or plaintiff, and both involve an assessment of whether the protected characteristic or status gave rise to the harm. It is useful, then, to look to the relevant U.S. antidiscrimination law for guidance as to how the nexus requirement in U.S. asylum law might be formulated.

As in asylum law, scholars and courts have criticized attempts to require evidence of actual intent¹⁰⁷ in antidiscrimination cases. They have noted, for example, that it is difficult to prove motive in discrimination cases. Although defendants, unlike persecutors, are party to the litigation, their motives are similarly difficult to prove because they are unlikely to admit to discriminatory motive or to leave a trail of evidence pointing to motive.¹⁰⁸ Moreover, plaintiffs in discrimination actions may

107. Scholars have noted the difference between "intent" and "motive," and contend that the word "motive" is more appropriate in this context. See, e.g., Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 500 (2001) ("In describing disparate treatment claims, the Court uses the terms discriminatory intent and discriminatory motive interchangeably, as will we. In fact, however, motive is the more accurate term, as it focuses on the reason for an act or why an act is occurring, not on whether the employer intends to perform the act." (footnote omitted)). But the courts and much of the literature use the terms interchangeably, and I have done so as well.

108. See *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987) ("Proof of [intentional discrimination in employment] is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible."); see also Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1203 (1982) ("Evidence of illicit intent may be extremely difficult to obtain . . . Plaintiffs' chances of proving illicit intent will, therefore, turn to a great degree on judicial rulings as to what kind of evidence of such intent plaintiffs are required to produce at various stages of the trial process, and with what kind of assistance from the employer."); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1177 (1995) ("Disparate treatment plaintiffs face a thorny problem. In short, courts have construed section 703 of Title VII, like 42 U.S.C. sections 1981 and 1983, to require proof of intent to discriminate in disparate treatment cases. But, as numerous courts have acknowledged, proving such intent is particularly difficult in employment-related disputes.").

face obstacles due to evidentiary exclusions.¹⁰⁹

Antidiscrimination law scholars have made additional arguments that are also applicable to the asylum law context. Scholars have argued, for example, that while some Supreme Court discrimination decisions might be read to require a conscious decision to act on the basis of “inaccurate and stigmatizing stereotypes,”¹¹⁰ decisions on the whole should not be read to require any hostile animus, or intent to punish, on the part of the defendant.¹¹¹ In other words, it should not matter that an adverse employment decision was driven by an unprotected reason, such as a “benign business objective[],”¹¹² as long as the protected characteristic played a role in the decision.¹¹³ Scholars suggest that discriminatory motive should not be measured by animus, but instead should be understood “as a causation concept, one that asks whether the plaintiff’s race, sex, etc. caused the decision to occur.”¹¹⁴

109. *See Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 359 (5th Cir. 1995) (“The Eighth Circuit found that aspect noteworthy in both cases and expressed the opinion that ‘blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer’s account of its own motives.’” (quoting *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155 (8th Cir. 1990))); *Riordan*, 831 F.2d at 698 (“A plaintiff’s ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.”); Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination If She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159, 204–05 (1996) (arguing for the ability to access nationwide discovery in disparate treatment cases because of the difficulty of obtaining evidence of discrimination).

110. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

111. *See EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1283–84 (11th Cir. 2000) (“To prove the discriminatory intent necessary for a disparate treatment or pattern or practice claim, a plaintiff need not prove that a defendant harbored some special ‘animus’ or ‘malice’ towards the protected group to which she belongs.”); White & Krieger, *supra* note 107, at 497–98; *see also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288 (1997) (“Proving that a defendant acted with animus or an illicit motive will generally suffice to establish intent to discriminate, however, neither animus nor motive is *required* to prove intent.” (emphasis in original)).

112. White & Krieger, *supra* note 107, at 498; *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

113. *See Lewis v. City of Chi.*, 130 S. Ct. 2191, 2198 (2010) (“Unless and until the defendant pleads and proves a business-necessity defense, the plaintiff wins simply by showing the stated elements” of a Title VII disparate impact claim.); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009) (finding that the City’s promotion tactics were race based and did not meet the business necessity standard); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (rejecting the argument of a battery manufacturer that uses lead that discriminating against women because of their reproductive capacity was a business necessity); White & Krieger, *supra* note 107, at 498.

114. White & Krieger, *supra* note 107, at 498; *see also* Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court’s Rhetoric and Its Constitutive Effects on*

This argument has a parallel in asylum law. In one context, the Agency appeared to recognize that applicants need not prove animus on the part of the persecutor. In *In re Kasinga*, the Agency considered the case of a young woman who feared that she would be subjected to female genital mutilation if returned to her home country, Togo.¹¹⁵ The Board of Immigration Appeals granted asylum, reasoning, “[T]here is no legitimate reason for [female genital mutilation].”¹¹⁶ It “agree[d] 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 [female genital mutilation].”¹¹⁷ It accordingly found that the applicant had established a nexus between the feared persecution and a particular social group.¹¹⁸

Interestingly, in finding that nexus had been established, the Board seemed relatively 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 [female genital mutilation] itself, which they believed was a positive act for the young woman and larger community.”¹¹⁹ 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.’”¹²⁰ Nevertheless, the Board’s decision came close to saying that the intent of the individual persecutor is not determinative¹²¹ as long as the practice of female genital mutilation is generally conducted for reasons related to a Convention ground.

Employment Discrimination Law, 60 U. PITT. L. REV. 1, 15 (1998) (“The undeniable presence of discriminatory motives made this question one of pure causation: to resolve the case, the courts had to decide what it means to say that an employment decision is made ‘because of’ the employee’s status.”); Selmi, *supra* note 111, at 289 (“What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decision-making process, a question that targets causation, rather than subjective mental states.”); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 739 (1987) (“Motive is a causal concept. It comes into play when a concern exists that decisions were made ‘because of’ or ‘on the grounds of’ certain factors.”).

115. 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

116. *Id.* at 366.

117. *Id.* at 367.

118. *Id.* at 368 (“The applicant has a well-founded fear of persecution in the form of [female genital mutilation] if returned to Togo. The persecution she fears is on account of her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation] . . . and who oppose the practice.”).

119. Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 799 (2003).

120. *Id.* at 800 (alteration in original) (quoting Gov’t’s Brief in Response to Applicant’s Appeal from Decision of Immigration Judge at 16, *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (No. A73-476-695)).

121. See *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

However, the Board's reasoning with respect to nexus in *Kasinga* appears out of sync with its nexus holdings in other contexts.¹²² In most cases, relying on the *Elias-Zacarias* decision, the Board has required a showing of persecutor motive.¹²³ Consistent with its reasoning in *Kasinga* and with arguments made by antidiscrimination law scholars, the Agency should not require applicants to demonstrate animus on the part of the persecutors. Instead, as long as the Convention ground played a role in leading to the persecution, the nexus requirement should be found to have been met. The analysis proposed in this Article would bring nexus analysis in line with this principle.

Antidiscrimination law scholars also criticize the motive requirement for ignoring the important concept of unconscious discrimination. In describing its motivation analysis in *Price Waterhouse v. Hopkins*, the Supreme Court stated:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.¹²⁴

But, as scholars have noted, “This statement reflects an assumption that, when disparate treatment discrimination occurs, the discriminator is, at the moment a decision is made, consciously aware that he or she is discriminating.”¹²⁵ The argument is that when a protected status causes the adverse employment action to occur, in whole or in part, the defendant should be held liable even if the defendant had no awareness that he was taking the action based on the protected status.¹²⁶ Studies in social cognition have shown that individuals can, and often do,

‘malignant’ intent is not required for harm to constitute persecution.”).

122. See Gupta, *supra* note 36, at 394–96.

123. See, e.g., *In re W-G-R-*, 26 I. & N. Dec. 208, 223–24 (B.I.A. 2014) (“Whether that nexus exists depends on the views and motives of the persecutor.”); *In re N-M-*, 25 I. & N. Dec. 526, 532 (B.I.A. 2011) (“A persecutor’s actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by us for clear error.”); *In re R-A-*, 22 I. & N. Dec. 906, 923 (B.I.A. 1999) (examining the persecutor’s motives and finding them insufficient for a grant of asylum, reasoning, “[w]e understand the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm”).

124. 490 U.S. 228, 250 (1989).

125. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1030 (2006).

126. See Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts’ Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 271 (1994) (noting that “discrimination that affects upper-level women is often unintentional and unconscious”); Krieger, *supra* note 108, at 1164 (arguing that the Courts should adopt doctrine that consider subtle or unconscious discrimination); White & Krieger, *supra* note 107, at 509 (arguing that “[i]f a plaintiff’s race or sex caused an employment action to occur, then liability should be present, even if the decision maker was unaware that he was taking the prohibited factor into account”).

discriminate on the basis of gender or some other protected characteristic without the awareness that they are doing so.¹²⁷

This criticism of the motive requirement applies with equal force in the asylum law context. Cases involving women fleeing domestic violence provide a good example. Abusers asked for their reasons for the abuse, even if answering honestly, likely would not list gender among them. In fact, in its decisions refusing to find that abuse occurred on account of a protected ground, the Agency has listed reasons for domestic violence, including “jealousy,” “growing frustration with his own life,” and “simple unchecked violence tied to the inherent meanness of his personality.”¹²⁸ But this reasoning ignores the clear role that gender plays in domestic violence.¹²⁹

Despite their criticisms, these same scholars have not advocated for overruling Supreme Court precedent or for the adoption of a new regime for proving causation in discrimination cases. Nor have they argued for the admission of different types of

127. See Krieger & Fiske, *supra* note 125, at 1031–34; see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005) (demonstrating “that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities”).

128. *In re R-A-*, 22 I. & N. Dec. at 926; see, e.g., Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends*, 77 INTERPRETER RELEASES 1533, 1535 (2000) (stating that in *Matter of D-K-*, 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’” (citation omitted)).

129. See, e.g., CLAUDIA GARCÍA-MORENO, HENRICA A.F.M. JANSEN, MARY ELLSBERG, LORI HEISE & CHARLOTTE WATTS, WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN’S RESPONSES viii (2005), available at http://www.who.int/gender/violence/who_multicountry_study/en/ (surveying and analyzing data collected from ten countries and finding that “[v]iolence against women is both a consequence and a cause of gender inequality”); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, NCJ 183781, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 26 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> (finding that one out of five women in the United States experience domestic violence); U.N. Dev. Fund for Women, *Not a Minute More: Ending Violence Against Women* 6 (Gloria Jacobs ed., 2003), http://www.unrol.org/files/312_book_complete_eng.pdf (“Throughout the world, . . . one in three women will be raped, beaten, coerced into sex or otherwise abused in her lifetime.”); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 303, 305 (1994) (arguing that “[d]omestic violence is not gender-neutral” and that “domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women”); Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL’Y & L. 229, 231 (2009) (highlighting that gender plays an important role in domestic violence); Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT’L L.J. 487, 527 (2008) (advocating for a human rights approach which “offers a contextualized understanding of the relationship between intimate violence and gender subordination”).

evidence to prove causation. Instead, some have argued that “inferences reasonably drawn from that evidence, and the nature of the ultimate fact the evidence would be offered to prove, would expand to accommodate the insight that disparate treatment can result from the uncorrected influence of implicit stereotypes as well as from their deliberate, fully conscious use.”¹³⁰ Similarly, as shown below, asylum applicants should be able to use the types of evidence they have always used to prove their cases, but under the proposed framework, the inferences drawn from those pieces of evidence will accommodate the notion of implicit or unspoken bias.

This Article proposes a framework for assessing nexus in asylum cases that is inspired by the current framework for demonstrating causation in antidiscrimination cases but that also accounts for the criticisms of the motive requirement in the antidiscrimination law scholarly literature. Although *The New Nexus* provided a framework for assessing causation in asylum cases generally, the framework proposed in this Article is aimed at determining nexus in mixed or multiple motives cases. What follows is a discussion of mixed motives in U.S. asylum law.

III. MIXED MOTIVES IN ASYLUM CASES

Before passage of the REAL ID Act, the Agency and courts evaluating the nexus requirement in asylum claims had only *Elias-Zacarias* to look to for guidance. That decision’s requirement that an applicant prove persecutor motive offered little by way of guidance with respect to claims involving mixed or multiple motives. Consequently, the courts and Agency struggled to assess such claims. Unfortunately, the guidance provided by REAL ID’s “one central reason” amendment proved inadequate. Courts continue to face difficulties assessing claims involving mixed or multiple motives, resulting in inconsistent rulings. This Article sets forth a proposal for determining nexus in these claims that will lead to more consistent and fair results. What follows is an examination of the asylum case law on mixed motives or multiple motives before and after enactment of the REAL ID Act.

In 1996, the Board carried out an exhaustive analysis of mixed motives claims in *In re S-P*.¹³¹ In that case, the applicant was a native of Sri Lanka and ethnically Tamil.¹³² In 1993, the applicant was taken by members of the militant separatist organization the Liberation Tigers of Tamil Eelam (the “Tigers”)¹³³ and forced to work as a welder and live in their camp.¹³⁴ Although the Tigers did not harm him, the applicant believed that they were watching him and would severely punish him if he attempted to escape.¹³⁵

Several months later, Sri Lankan Army soldiers raided the Tigers’ camp.¹³⁶ They accused the applicant of being a Tiger, and they took him and twelve other workers

130. Krieger & Fiske, *supra* note 125, at 1059.

131. 21 I. & N. Dec. 486 (B.I.A. 1996).

132. *Id.* at 487.

133. *Krishnapillai v. Holder*, 563 F.3d 606, 609 (7th Cir. 2009) (describing the Tigers as “a terrorist organization based in northern Sri Lanka that for more than thirty years has been waging a violent campaign to create an independent state for Sri Lanka’s Tamil minority”).

134. *In re S-P*, 21 I. & N. Dec. at 487.

135. *Id.*

136. *Id.*

to an army camp.¹³⁷ They later transferred the applicant to an army prison in Colombo, where he was imprisoned for approximately six months.¹³⁸ During this time, the applicant was interrogated, threatened, tied up, beaten, and “placed in a room with burning chilies which caused choking and smoke inhalation.”¹³⁹ The soldiers also put a gun to his head, told him they would kill him if he did not “tell the truth,” and dunked his head in a bucket of water.¹⁴⁰ The beatings and torture sometimes took place during the interrogations, but otherwise took place merely because the soldiers were drunk.¹⁴¹ The applicant was released from prison when his uncle bribed a prison official.¹⁴² He escaped from Sri Lanka to the United States a few months later, but before he left the country, policemen looked for him at his uncle’s home.¹⁴³

The immigration judge denied asylum, finding that the abuse was inflicted due to “ongoing civil strife in Sri Lanka,” as opposed to on account of any of the protected grounds.¹⁴⁴ On appeal, the Board stated that it was required to consider whether the harm inflicted upon the applicant occurred “for reasons related to government intelligence gathering,”¹⁴⁵ which does not constitute a Convention ground; on account of “political views imputed to the applicant,”¹⁴⁶ which is a Convention ground;¹⁴⁷ “or for some combination of these reasons.”¹⁴⁸ The Board characterized this case as one involving multiple or mixed motives.¹⁴⁹

The Board sustained the applicant’s appeal, finding that he had met his burden of proving that he had been persecuted at least in part on account of his imputed political opinion.¹⁵⁰ The Board reasoned that because the applicant was not charged with any crime by the Sri Lankan Army, the abuse continued long after the conflict ended, and the abuse occurred in situations unrelated to intelligence gathering, it was “reasonable to believe that those who harmed him were in part motivated by an assumption that his political views were antithetical to those of the Government.”¹⁵¹

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 487–88.

141. *Id.* at 488.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 492.

146. *Id.*

147. It is well settled that persecution on account of imputed political opinion constitutes persecution on account of political opinion under the Act. *See, e.g., Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003) (“[T]here is wide endorsement of the concept of persecution on account of imputed political opinion”); *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997) (“[The court] consider[s] . . . the political views the persecutor rightly or in error attributes to his victims. If the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant’s political opinion as required under the Act.”); *Canas-Segovia v. INS*, 970 F.2d 599, 601–02 (9th Cir. 1992) (holding that imputed political opinion is still a valid basis for asylum under *Elias-Zacarias*).

148. *In re S-P-*, 21 I. & N. Dec. at 492.

149. *See id.*

150. *See id.* at 495–96.

151. *Id.* at 496.

The Board also made some important, broad observations about mixed motives claims. First, the Board noted the difficulty in proving the exact motives of the persecutor.¹⁵² It stated that persecutors often act for more than one reason, that an applicant is not required to prove “conclusively” why the persecution occurred or would occur in the future, and that such a requirement would run contrary to the “well-founded fear” standard set forth in the Act’s definition of a refugee because those words indicated that the harm should be viewed from the perspective of the victim rather than the persecutor.¹⁵³ Second, the Board noted the importance of keeping in mind the “fundamental humanitarian concerns of asylum law.”¹⁵⁴ Specifically, the Board noted that Congress’s goal in enacting the Refugee Act was to bring the United States into conformity with the Refugee Convention and to evince a national commitment to addressing humanitarian concerns.¹⁵⁵

The Board cited the U.N. General Assembly’s declaration that the grant of asylum be considered a “peaceful and humanitarian act,” not to be regarded as “unfriendly by any other state.”¹⁵⁶ It reasoned that the goal of asylum law was to provide protection to applicants who met the definition of a refugee, not to pass judgment against the applicant’s home country.¹⁵⁷ Instead, the judgment is “about the reasonableness of the applicant’s belief that persecution was based on a protected ground.”¹⁵⁸ The Board concluded, “Such an approach is designed to afford a generous standard for protection in cases of doubt.”¹⁵⁹

Despite the “generous standard” that the Board appeared to endorse in *In re S-P-*, just two years later and in the same jurisdiction, the Board denied the mixed motives claim at issue in *Gafoor v. INS*.¹⁶⁰ Gafoor, a Fijian of Indian descent, was a police officer in Fiji at a time when severe mistreatment of Indo-Fijians by native Fijians was rampant.¹⁶¹ One day when Gafoor was on patrol, he heard screams coming from a nearby street.¹⁶² When he investigated, he found a man dressed in civilian clothing raping a thirteen-year-old girl.¹⁶³ He arrested the man, but when he took him to the police station, he learned from his superior that the man was a high-ranking army officer.¹⁶⁴ He was ordered to release the man without charging him.¹⁶⁵ Immediately thereafter, Gafoor was targeted by the army officer and other army officials.¹⁶⁶ He was beaten, imprisoned in an army camp for one week, and threatened with death.¹⁶⁷

152. *See id.* at 492.

153. *See id.* at 489.

154. *Id.* at 492.

155. *See id.*

156. *Id.* (quoting Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR, Supp. No. 16, at 81, U.N. Doc. A/6716 (1967)).

157. *See id.*

158. *Id.*

159. *Id.*

160. 231 F.3d 645, 648 (9th Cir. 2000).

161. *See id.* at 648–49.

162. *Id.* at 649.

163. *Id.*

164. *Id.*

165. *See id.*

166. *Id.*

167. *Id.*

At one point, the soldiers beat him to the point of unconsciousness and left him in a ditch.¹⁶⁸ During some of the abuse, the soldiers asked Gafoor why he had arrested the high-ranking officer.¹⁶⁹ They also accused him of opposing the army. During the last beating, they told him he “should go back to India.”¹⁷⁰

The immigration judge denied Gafoor’s application for asylum, finding that the persecution was motivated by revenge, not by Gafoor’s ethnicity or political opinion.¹⁷¹ In September 1998, the Board affirmed the immigration judge’s decision; while it did not dispute that the treatment Gafoor endured rose to the level of persecution, it found that there was no nexus between the persecution and a protected ground.¹⁷²

The Court of Appeals for the Ninth Circuit remanded, reasoning that the record evidence “compels a conclusion that [Gafoor] was persecuted *not solely* because he arrested a high-ranking army officer, but also because of his race and the political opinion imputed to him by the soldiers.”¹⁷³ The court reasoned that the statements the officers made to Gafoor evidenced their belief that Gafoor had “challenged the notion that ethnic Fijians were above the law.”¹⁷⁴ The court cited principles of antidiscrimination law in concluding that applicants for asylum are not required to show that the persecution occurred solely on account of a protected ground; rather, a showing that the persecution occurred “at least in part” on account of a protected ground was sufficient.¹⁷⁵

Gafoor was not an isolated case. In other mixed motives cases after *In re S-P-*, the Board improperly applied mixed motives analysis and declined to find that the applicant had demonstrated nexus to a protected ground.¹⁷⁶

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 651 (emphasis in original).

174. *Id.* at 652.

175. *See id.* at 653.

176. *See, e.g.,* *Aliyev v. Mukasey*, 549 F.3d 111, 119 (2d Cir. 2008) (“[T]he record in this case shows that the BIA failed to use the proper legal framework, *i.e.*, mixed-motive analysis, and likely failed to consider material evidence supporting Aliyev’s claim.”); *Ndonyi v. Mukasey*, 541 F.3d 702, 710–11 (7th Cir. 2008) (“In determining that Ndonyi did not suffer ‘on account of’ her political opinions regarding Anglophone rights, the BIA completely ignored the doctrine of mixed motives—the opinion does not analyze whether Ndonyi’s oppressors were partially motivated by politics or religion, and makes no mention of any of our precedent on the issue.”); *Singh v. Gonzalez*, 406 F.3d 191, 199 (3d Cir. 2005) (“The BIA’s failure to apply a mixed motive analysis to Singh’s case after noting that there was likely more one than one reason for Singh’s arrest, one of which was a protected ground under the INA, is inexplicable. . . . Singh’s credible, un rebutted testimony compels the conclusion that the mistreatment he suffered at the hands of the police after his arrest and the threats that were made against his life were motivated, at least in significant part, by the political opinion that was imputed to him. Singh has therefore established eligibility for asylum.”); *De Brenner v. Ashcroft*, 388 F.3d 629, 637 (8th Cir. 2004) (“Given the overwhelming evidence of an imputed political opinion in this case, and given the BIA’s apparent imposition of a single motive requirement, we do not find substantial evidence to support the BIA’s conclusion.”).

A review of the remainder of the pre-REAL ID case law reveals that the Agency and courts struggled with mixed motives cases in the absence of congressional or Supreme Court guidance; nevertheless, the consensus appeared to be that an applicant in a mixed motives case was required to prove that the persecution took place “at least in part” on account of a protected ground.¹⁷⁷

Then in 2005, Congress enacted the REAL ID Act, which required the Convention ground to be “at least one central reason” for the persecution.¹⁷⁸ The Act gave no guidance as to the proper interpretation of the word “central,” and the Agency and courts have struggled to define the term ever since.

Shortly after passage of the REAL ID Act, the Board pointed to the language of the Act and its legislative history along with the plain meaning of the word “central” and concluded that the standard set forth in the statute did not “radically alter[]” its existing standard for adjudicating mixed motives cases.¹⁷⁹ The Board clarified that an applicant must show that the protected ground played more than a minor role in

177. See, e.g., *Sanchez Jimenez v. U.S. Attorney Gen.*, 492 F.3d 1223, 1232 (11th Cir. 2007) (“One of those five grounds need not be the *only* motivation for the persecution. Rather, it is by now well-established in our case law that an applicant can establish eligibility for asylum as long as he can show that the persecution is, ‘at least in part, motivated by a protected ground.’” (emphasis in original) (citations omitted)); *Mohideen v. Gonzales*, 416 F.3d 567, 570 (7th Cir. 2005) (“We agree with our sister circuits that the statute’s reference to persecution ‘on account of’ one of the specified grounds does not mean persecution *solely* on account of one of those grounds.” (emphasis in original)); *De Brenner*, 388 F.3d at 637 (“[T]he BIA in this instance improperly demanded that persecution occur *solely* due to a protected basis. There is no such requirement in the statute and the BIA’s insertion of such a requirement is not the type of reasonable agency interpretation that demands our deference.” (emphasis in original)); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (“A persecutor may have multiple motives for inflicting harm on an asylum applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor’s action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum.”); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 236 (4th Cir. 2004) (“Petitioner is correct that to qualify for asylum, the persecution feared falls within the statute so long as the illicit motive was a cause—not necessarily the *sole* cause—of the persecution.” (emphasis in original)); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (“A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds.”); *Girma v. INS*, 283 F.3d 664, 668 (5th Cir. 2002) (“Although an applicant is not required to present evidence showing, to the exclusion of all other factors, that the persecutor was motivated by a protected ground, the evidence must still be of such weight that it compels the factfinder to conclude that the applicant suffered past persecution or has a well-founded fear of future persecution on account of a protected ground.”); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) (“The plain meaning of the phrase ‘persecution on account of the victim’s political opinion,’ does not mean persecution *solely* on account of the victim’s political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution.” (emphasis in original)).

178. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)); 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” (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (Dec. 7, 2000))).

179. *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

the persecution, “[t]hat is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecuting the respondent.”¹⁸⁰

The Third Circuit Court of Appeals largely upheld the Board’s definition of “central,” though it excised the word “subordinate,” citing Congress’s choice of the phrase “*one* central reason” as opposed to “*the* central reason.”¹⁸¹ The court reasoned that this language made clear that there may be more than one central reason for persecution, and it is irrelevant which of those reasons is *most* important.¹⁸²

Despite the Board’s clarification of the definition of “central,” the courts continued to struggle with the analysis of mixed motives asylum cases. For example, in *Parussimova v. Mukasey*, the Ninth Circuit Court of Appeals considered the case of Tatyana Parussimova, a native and citizen of Kazakhstan.¹⁸³ Parussimova testified that she was an ethnic Russian and that, while growing up in Kazakhstan, she witnessed riots against the Soviet government.¹⁸⁴ She faced discrimination as a result of her ethnicity, and in 1999 she narrowly escaped a sexual assault.¹⁸⁵ In 2005, a group of Kazakhs beat and killed her cousin.¹⁸⁶ That same year, Parussimova was attacked by two Kazakh men.¹⁸⁷ She was walking down the street, wearing a pin from the American company for which she worked, when the men dragged her into a building entryway.¹⁸⁸ They told her she “did not have the right to work for an American company,” and they pulled the pin off of her clothing.¹⁸⁹ Parussimova lost consciousness, and when she awoke, the men were kicking her and spitting on her.¹⁹⁰ They called her a “Russian pig” and told her to “get out of their country.”¹⁹¹ They attempted to rape her, and when she screamed, a passerby came to her aid.¹⁹² The passerby called the police, and they took her to the hospital.¹⁹³ One week later, Parussimova saw the same men on the street.¹⁹⁴ Her father called the police, who arrested the men, but they were apparently released because she saw them again a few days later while she was walking with her cousin.¹⁹⁵ The men threatened to kill

180. *Id.*

181. *See* *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F.3d 124, 129 (3d Cir. 2009) (emphasis in original) (“We conclude that the BIA’s interpretation of the ‘one central reason’ standard is in error only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not ‘subordinate’ to any unprotected motivation. That particular term is inconsistent with the plain language of the statute . . .”).

182. *Id.*

183. 555 F.3d 734 (9th Cir. 2009).

184. *Id.* at 737.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

Parussimova because she had reported them to the police.¹⁹⁶ Though she escaped, they beat her cousin until he was unconscious.¹⁹⁷ They threatened her several times after this incident.¹⁹⁸ Parussimova arrived in the United States in May 2005.¹⁹⁹

The immigration judge denied Parussimova's application for asylum, finding, *inter alia*, that she had not shown that the treatment she endured occurred on account of a protected ground.²⁰⁰ The Board affirmed based on the same reasoning.²⁰¹ Relying on the REAL ID Act's "one central reason" standard and the Board's definition of "central," the court of appeals affirmed.²⁰² The court reasoned that the REAL ID Act's "one central reason" requirement led to two conclusions. First, the applicant need not show that the protected ground was the only reason for the persecution.²⁰³ Second, the applicant need not show that the protected ground was the "most important" reason for the persecution.²⁰⁴ "The Act states that a protected ground must constitute 'at least one' of the central reasons for persecutory conduct; it does not require that such reason account for 51% of the persecutors' motivation."²⁰⁵ Nevertheless, the court concluded that the new statutory language imposed a more onerous burden than was previously applied by the court, and that "[a] central reason—one that is 'primary,' 'essential,' or 'principal'—represents more than a mere 'part' of a persecutor's motivation."²⁰⁶ The court held that Parussimova had simply not met her burden of proving that her ethnicity played more than a mere part in her persecution because it was "simply not clear" whether her ethnicity caused the attack or increased its severity.²⁰⁷ It reasoned, "The assailants' reference to Parussimova's ethnicity in the course of their attack may suggest that such trait played a role in this incident. Nevertheless, we cannot conclude that the utterance of an ethnic slur, standing alone, compels the conclusion that her ethnicity was a central motivating reason for the attack."²⁰⁸

The court's statement that it was "simply not clear" whether Parussimova's ethnicity caused the attack leads to the inference that it was *possible* her ethnicity caused the attack. The court's denial of asylum in light of this possibility is troubling given that the aim of asylum law is not to punish persecutors, but to provide protection for individuals who fear persecution on account of traits they cannot, or should be required to, change.²⁰⁹

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 738.

201. *Id.*

202. *Id.* at 740–42.

203. *Id.* at 740.

204. *Id.*

205. *Id.*

206. *Id.*

207. *See id.* at 742.

208. *Id.*

209. *See In re S-P-*, 21 I. & N. Dec. 486, 496–97 (B.I.A. 1996).

Other courts have similarly struggled with the proper formulation of mixed motives claims and the definition of “central” after the REAL ID Act.²¹⁰

Moreover, applicants with other types of asylum claims, though not explicitly referred to as mixed or multiple motives claims by the Agency or courts, have also been denied asylum because the adjudicator identified other, nonprotected reasons for the persecution. In domestic violence cases, 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.²¹¹ Similarly, in cases based on fear of forced marriage or human trafficking, adjudicators have denied claims, reasoning that economic, personal, or criminal considerations motivated the persecution as opposed to the victim’s gender or social group membership.²¹² These cases raise the issue of unconscious motives for the

210. See, e.g., *Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012) (A Pakistani couple who alleged persecution based on their marriage and political beliefs were denied asylum because “the Real ID Act modifies our earlier mixed motive cases only to require among that mix of motives a protected ground qualifying as a central reason. Indeed, that ground may be a secondary (or tertiary, etc.) reason and still justify asylum. In short, when more than one possible motive exists, the asylum applicant must show that the protected status played more than a minor role in motivating a persecutor.”); *Ndayshimiye v. Attorney Gen. of U.S.*, 557 F.3d 124, 129 (3d Cir. 2009) (finding that the applicants’ nationality was an incidental factor in the persecution they experienced and holding that the BIA’s interpretation of the “one central reason” standard was largely correct except for the inclusion of the word “subordinate”); *Parussimova*, 555 F.3d at 740 (finding that the REAL ID Act “states that a protected ground must constitute ‘at least one’ of the central reasons for persecutory conduct; it does not require that such reason account for 51% of the persecutors’ motivation,” and finding that the applicant’s ethnicity was not “one central reason” for her persecution); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (reasoning that “the BIA did *not* hold that the REAL ID Act requires a protected ground to be *the* central reason or even a dominant central reason for persecution, only that it cannot be an ‘incidental, tangential, superficial, or subordinate’ reason,” and denying relief on the basis that religion was not a central reason for the applicant’s persecution (emphasis in original)); *In re J-B-N-*, 24 I. & N. Dec. 208, 214, 215–16 (B.I.A. 2007) (“[T]he protected ground cannot play a minor role in the alien’s past mistreatment or fears of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecuting the respondent.” The BIA denied relief to the applicants, holding that their nationality was a tangential reason for the persecution they faced.).

211. See *In re R-A-*, 22 I. & N. Dec. 906, 927 (B.I.A. 1999) (“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 psychological disorder, pure meanness, or no apparent reason at all.”); *Musalo & Knight*, *supra* note 128, at 1535 (stating that in *Matter of D-K-*, 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’” (citation omitted)).

212. See *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (recalling that the Board found the persecution occurred on account of “a dispute between two families” in a claim based on forced marriage); *In re Anon.*, A# redacted (New York, N.Y., Immigration Ct., Feb. 4, 2004), at 19–20 (CGRS Case #1034) (referring to the victim’s trafficker as a “spurned suitor” and

persecution, described above in the antidiscrimination context. The persecutors in these cases might not affirmatively list gender or social group membership as motivations for their actions (even if speaking truthfully), but it does not follow that gender or social group membership did not play a role in the persecution.²¹³

This Article sets forth a new framework for assessing nexus in mixed motives cases and cases involving unconscious motives for persecution—one that is clear, that can be consistently applied, and that furthers the goals of asylum. This framework is modeled on the frameworks for establishing causation in discrimination and, to a lesser extent, tort cases. Accordingly, the next Part discusses those frameworks.

IV. CAUSATION FRAMEWORKS

Title VII of the Civil Rights Act of 1964 (“Title VII”) is seen as the main federal antidiscrimination statute in the United States. It provides:

It shall be an unlawful employment practice for an employer—
 (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

citing the trafficker’s motivation for trafficking her as “personal”); *see also* Gupta, *supra* note 36, at 403, 405–06 (giving examples of cases in which courts have cited economic, personal, and criminal reasons for persecution in human trafficking and forced marriage cases).

213. *See, e.g.*, Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(4) (2012) (“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.”); *In re R-A-*, 22 I. & N. at 939 (Guendelsberger, dissenting) (“The factual record reflects quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender”); Cianciarulo & David, *supra* note 79, at 362 (“It is indisputable that women suffer various levels of harm on account of their sex. Gender-based harm includes employment discrimination, domestic violence, and rape, as well as forced marriage, female genital mutilation, and ‘honor crimes.’”); Gupta, *supra* note 36, at 406 (noting that trafficking and forced marriage overwhelmingly affect females and minors); Lobo, *supra* note 105, at 361 (“‘Gender persecution’ refers to women’s persecution *qua* women, including domestic violence, FGC, rape, and forced prostitution.”); Musalo, *supra* note 119, at 781–82 (“[T]he harms inflicted on women were often not considered to be persecution because they were condoned or required by culture or religion (e.g., female genital mutilation (FGM), repressive social norms), [or] disproportionately inflicted on women (e.g., domestic violence) [W]omen are often persecuted because of their gender, and gender is not one of the five grounds in the Convention definition.”); 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” (footnote omitted)); U.N. Human Rights, Office of the High Commissioner for Human Rights, Not a Single Girl Should Be Forced to Marry (Oct. 12, 2012), <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.”).

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²¹⁴

In 1973, the Supreme Court set forth a framework for proving intentional discrimination under Title VII in *McDonnell Douglas Corp. v. Green*.²¹⁵ It later clarified the framework for mixed motives cases in *Price Waterhouse v. Hopkins*,²¹⁶ and Congress changed the *Price Waterhouse* rule slightly in the Civil Rights Act of 1991.²¹⁷

Although the common law method of proving causation in U.S. tort law is the but-for test, this method has been subject to revision for certain types of cases. Because the proposal set forth in this Article draws from both U.S. antidiscrimination and tort law, this Part discusses the evolution of the applicable frameworks in both areas.

A. The McDonnell Douglas Framework

In *McDonnell Douglas*, the Supreme Court created a three-part, burden-shifting framework for evaluating causation in discrimination cases in which the plaintiff alleges that an adverse employment action occurred because of her protected status and the defendant claims that the action occurred because of a nondiscriminatory reason. Under the framework, the plaintiff alleging discrimination (for example, that she was not hired for a job due to her race) must first establish a prima facie case of discrimination.²¹⁸ The plaintiff may do so by showing: (i) that she belongs to a racial minority; (ii) that she qualified for a job for which she applied and for which the employer was seeking applicants; (iii) that she was rejected despite her qualifications; and (iv) that the position remained open after her rejection and the employer continued to seek applications from persons with qualifications similar to complainant.²¹⁹ Once the plaintiff has established a prima facie case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”²²⁰ Finally, if the defendant is able to do so, the plaintiff must prove that the defendant’s articulated reasons were merely pretext.²²¹ For example, the plaintiff could show that white applicants who would also be subject to the nondiscriminatory basis stated by the defendant for not hiring the plaintiff were nevertheless hired for the job or that the employer had a policy or practice of hiring along racial lines.²²²

214. Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a) (West 2014).

215. 411 U.S. 792 (1973).

216. 490 U.S. 228 (1989).

217. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.A. § 2000e-5 (West 2014)).

218. *McDonnell Douglas*, 411 U.S. at 802.

219. *Id.*

220. *Id.*

221. *Id.* at 804.

222. *See id.* at 804–05.

B. The Price Waterhouse Framework

McDonnell Douglas did not address the proper framework for assessing claims based on mixed motives (that is, cases in which the adverse employment decision was based on the applicant's protected status as well as a nondiscriminatory reason). The Supreme Court addressed this issue in *Price Waterhouse v. Hopkins*.²²³

In *Price Waterhouse*, the plaintiff challenged her employer's denial of partnership, alleging that the employer had discriminated against her on the basis of sex.²²⁴ The lower courts and Supreme Court found that there was evidence that the company had, in fact, engaged in improper stereotyping in making its decision; thus, the plaintiff had shown that gender played a part in the employment decision.²²⁵ However, there was also evidence that the plaintiff was lacking in interpersonal skills, and the defendant company maintained that it was for this reason that the company refused her the partnership.²²⁶ The Supreme Court was tasked with deciding the proper framework for assessing causation in such a case.

Price Waterhouse, the defendant, argued that "an employer violates Title VII only if it gives *decisive* consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee."²²⁷ Under this proposed theory, even if the plaintiff successfully showed that a protected trait played a role in the adverse employment action, it was still her burden to show that the same action would not have been taken absent the protected trait.²²⁸ The plaintiff argued, however, that once the plaintiff has shown that a protected trait played a role in the employment decision, the employer is liable.²²⁹ The Supreme Court concluded that "the truth lies somewhere in between."²³⁰

The Court reasoned that because the statute prohibits adverse employment actions taken "because of" a protected trait, Congress must have intended that the protected trait be irrelevant to employment decisions.²³¹ In other words, employers could not take a protected trait into account when making employment decisions.²³² Accordingly, the Court reasoned that the defendant erred when it construed "because of" as a shorthand for "but-for causation."²³³ The Court also reasoned that "'because of' do[es] not mean 'solely because of,'" and concluded that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."²³⁴ It therefore held that once the plaintiff shows that a protected trait played a "motivating

223. 490 U.S. 228 (1989).

224. *Id.* at 231–32.

225. *See id.* at 237.

226. *See id.* at 234–35.

227. *Id.* at 237 (emphasis added).

228. *See id.* at 237–38.

229. *See id.* at 238 ("Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability.").

230. *Id.*

231. *See id.* at 240.

232. *See id.* at 239.

233. *Id.* at 240.

234. *Id.* at 241 (emphasis in original).

part” in an employment decision, the defendant can only avoid liability by showing that absent the protected trait, the same action would have been taken.²³⁵

Significantly, the Court did not require the plaintiff to “identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges.”²³⁶ She need only show that the employer relied upon protected trait-based considerations when coming to its decision.²³⁷

As set forth above, the Court explained that by “motivating factor,” the Court meant that “if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.”²³⁸

The Court also addressed briefly the types of evidence the plaintiff might use to make such a showing. It stated, for example, that remarks about stereotypes on the part of the defendant could serve as evidence that the protected trait played a role in the employment decision.²³⁹ However, it refrained from setting forth the precise parameters of a plaintiff’s evidentiary burden.

The Court stated that the employer could not meet its burden simply by showing that the decision was motivated only in part by a legitimate reason. “The very premise of a mixed-motives case is that a legitimate reason was present The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.”²⁴⁰

Scholars agree that in such mixed motives cases, the Court essentially shifted the burden of proving but-for causation (or lack thereof) from the plaintiff to the defendant.²⁴¹

C. The Civil Rights Act of 1991 Framework

The Civil Rights Act of 1991 amended Title VII to provide that “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.”²⁴²

235. *Id.* at 250.

236. *Id.* at 241.

237. *Id.* at 241–42.

238. *Id.* at 250.

239. *See id.*

240. *Id.* at 252.

241. *See White & Krieger, supra* note 107, at 504 (“This approach essentially shifted to the defendant the burden of proving that sex was not the but-for cause of its decision.”); *see also* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal To Let Employment Discrimination Speak for Itself*, 62 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).”); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 643 (2008) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) as recognizing “a burden-shifting mechanism by which plaintiffs can prove ‘motivating factor’ causation and thereby shift the burden to defendants to prove a lack of ‘but for’ causation”).

242. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended

Under the Act and consistent with the Supreme Court's holding in *Price Waterhouse*, the plaintiff must first prove that the protected trait played a "motivating factor" in bringing about the adverse employment action.²⁴³ The burden then shifts to the defendant to show that the "same action" would have been made absent the protected characteristic.²⁴⁴ However, contrary to the Supreme Court's holding in *Price Waterhouse*, 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.²⁴⁵

The Supreme Court thereafter clarified that in proving that a protected trait was a "motivating factor" in the adverse employment decision, the plaintiff bringing a Title VII claim need not provide direct evidence; circumstantial evidence could be sufficient.²⁴⁶ In *Desert Palace, Inc. v. Costa*, the plaintiff provided evidence that "(1) she was singled out for 'intense stalking' by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men in the assignment of overtime, and (4) supervisors repeatedly 'stack[ed]' her disciplinary record and 'frequently used or tolerated' sex-based slurs against her."²⁴⁷ The defendant claimed that the plaintiff had failed to provide direct evidence that gender was a motivating factor in the employment decision and accordingly objected to the mixed motive instruction given to the jury.²⁴⁸ The court gave the instruction over the defendant's objection, and the Supreme Court affirmed, finding that nothing in the statute suggested that the plaintiff can only meet the "motivating factor" requirement through direct evidence.²⁴⁹

D. Causation Frameworks in Tort Law

To succeed on a tort claim for negligence, the plaintiff must prove not only negligent breach on behalf of the defendant but also causation. 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; if not, causation is established.²⁵⁰ In other words, if the defendant's negligence was a necessary element in causing the plaintiff's harm, then the negligence is a cause in fact of the harm.

at 42 U.S.C.A. § 2000e-5 (West 2014)).

243. *See id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989).

244. *See* 42 U.S.C.A. § 2000e-5(g)(2)(B).

245. *See id.* It appears that Congress felt it important to hold defendants liable in such circumstances, even if the plaintiff was not entitled to damages, in order to fulfill the antidiscrimination objectives of Title VII. *See* S. REP. NO. 101-315, 24 (1990) ("If Title VII's ban on discrimination in employment is to be meaningful, proven victims of discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.").

246. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003).

247. *Id.* at 96 (alteration in original) (citation omitted).

248. *See id.* at 96–97.

249. *See id.* at 97, 101–02.

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

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. For example, some courts have found causation even when there were multiple causes of the harm, each of which would have been sufficient to cause the harm on its own.²⁵¹ To illustrate, if two fires set in two different areas converge to burn down the plaintiff's house, even if either one of the fires alone would have burned down the house, both fires may be seen as factual causes.²⁵² This is true even if one of the fires was set negligently and the other was an act of nature.²⁵³ The Third Restatement of Torts sets forth the rule as follows: "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."²⁵⁴

Another exception to the but-for rule that bears noting is the "loss of chance" doctrine or the "lost chance" rule. *Herskovits v. Group Health Coop. of Puget Sound* provides an illustration of the rule.²⁵⁵ In that case, a lung cancer patient initially had a 39% chance of survival, but because of a negligent misdiagnosis by a doctor, his chance of survival was reduced to 25%.²⁵⁶ Clearly, the plaintiff could not show that but for the doctor's negligence, the patient would have survived, since his chance of survival to begin with was less than 50%. Nevertheless, because the doctor's negligent actions increased the chances of death, the court ruled that there was sufficient evidence to let a jury decide whether the doctor's negligence and the ensuing increased risk of death was a "substantial factor" in causing the patient's death.²⁵⁷

Summers v. Tice provides another example of an alternative to the but-for test.²⁵⁸ In that case, the plaintiff was on a hunting trip with the two defendants when both defendants negligently fired their shotguns.²⁵⁹ The plaintiff was struck and injured, but he was unable to prove which of the defendants caused the injury or whether both caused the injury (he was hit by at least two pellets).²⁶⁰ Thus, while it was clear that at least one of the defendants had injured the plaintiff, neither of the defendants was more likely than the other to have caused the injury.²⁶¹ Nevertheless, the court ruled in favor of the plaintiff.²⁶² It shifted the burden of proof to each of the defendants to show that the other had caused the injury, and if neither could, both would be held

251. See, e.g., *Vincent v. Fairbanks Mem'l Hosp.*, 862 P.2d 847, 851–53 (Alaska 1993); *Mitchell v. Gonzales*, 819 P.2d 872, 878–79 (Cal. 1991).

252. See, e.g., *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 179 N.W. 45, 49 (Minn. 1920), *overruled in part by Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (1921) (stating that, in the case of a negligently set fire combined with a fire of unknown origin, negligent fire setter can be held liable for all damage); *Joshi v. Providence Health Sys.* 149 P.3d 1164, 1169 (Or. 2006).

253. See *Anderson*, 179 N.W. at 48.

254. RESTATEMENT (THIRD) OF TORTS § 27 (2010).

255. 664 P.2d 474 (Wash. 1983).

256. See *id.* at 475.

257. See *id.* at 487.

258. 199 P.2d 1 (Cal. 1948).

259. See *id.* at 1–2.

260. See *id.* at 2–3.

261. See *id.* at 5.

262. See *id.*

jointly and severally liable.²⁶³ In so holding, the court relied on “reasons of policy and justice,” stating, “where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress.”²⁶⁴

V. THE PROPOSED RULE

This Article borrows from principles of antidiscrimination and tort law to propose a rule for demonstrating causation, or nexus, in asylum cases. To be clear, this rule addresses *only* the causation prong of the asylum law analysis. An asylum applicant would first have to show that she formerly experienced or presently fears harm that rises to the level of persecution,²⁶⁵ and she would then have to show that she possesses a trait protected by the Act.²⁶⁶ Much has been written on these subjects, particularly the latter,²⁶⁷ and the proposal set forth in this Article does nothing to

263. *See id.* at 2–3.

264. *Id.* at 5.

265. *See, e.g.,* *Toptchev v. INS*, 295 F.3d 714, 720 (7th Cir. 2002) (“The statute does not supply a definition of ‘persecution,’ but we have repeatedly described it as punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate. . . . [P]ersecution means more than harassment and may include such actions as detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.” (citation omitted) (internal quotation marks omitted)); *Bradvida v. INS*, 128 F.3d 1009, 1012 (7th Cir. 1997) (“Persecution is not defined by the statute, but we have held that it must be punishment or the infliction of harm; mere harassment does not amount to persecution.”); *Abdel-Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996) (“The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” (quoting *In re Laipenieks*, 18 I. & N. Dec. 433, 456–57 (B.I.A. 1983), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985))); *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (“‘[P]ersecution’ is an extreme concept that does not include every sort of treatment our society regards as offensive.”).

266. 8 U.S.C.A. § 1101(a)(42)(A) (West 2014) (defining a refugee as “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection 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”).

267. *See, e.g.,* Leonard Birdsong, *A Legislative Rejoinder to “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . . ,”* 35 WM. MITCHELL L. REV. 197, 208 (2008) (arguing for a reconceptualization of the refugee definition to include a clear definition of persecution to better aid those seeking asylum based on sexual persecution); Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 85 (2000) (examining how the federal circuit courts have defined persecution and applied the definition while denying asylum to certain asylum seekers); Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133, 141 (2005) (noting that the Supreme Court of the United States reframed the asylum analysis in *Elias-Zacarias*, particularly pertaining to the applicant’s political beliefs or those imputed to her); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 379 (2007) (“[T]here has never been a succinct, definitive

change these burdens. This Article sets forth a framework for establishing a link between the two—a framework, in other words, for determining whether the persecution occurred “on account of” the protected trait.

In a previous article, I demonstrated that there is currently no clear framework for assessing nexus in asylum cases and that this lack of guidance with respect to nexus has led to inconsistent and unfair results in many cases, particularly those involving gender-based or private harms.²⁶⁸ I proposed a rule for assessing nexus in most cases; the proposed rule was modeled closely after the but-for rule, which, as set forth above, has traditionally been used to determine causation in tort law.²⁶⁹ The but-for rule has also been held to be a sufficient method for proving causation in antidiscrimination law.²⁷⁰ My proposed rule for determining nexus in asylum cases stated that an applicant could establish nexus by showing that but for the protected characteristic, it is more likely than not that the persecution would not have occurred or would not occur in the future.²⁷¹ I stated that this rule could be employed to accurately determine nexus in the vast majority of asylum cases.²⁷²

As I also stated, and as is clear from the discussion above regarding causation analyses that have evolved in antidiscrimination and tort law, this framework may not be appropriate for all cases, particularly those involving mixed or multiple motives. While other commentators have suggested looking to antidiscrimination law for guidance with respect to nexus,²⁷³ this Article is the first to propose a burden-shifting framework inspired by U.S. antidiscrimination and tort law. This rule would obviate the need for the “one central reason” language of the REAL ID Act,²⁷⁴ language that is at best unhelpful and at worst violates the spirit of the Refugee Convention.²⁷⁵

definition of ‘persecution,’ because the nature of persecution and our understanding of it keep changing.”). *See generally* Lobo, *supra* note 105 (arguing for the inclusion of women in the enumerated particular social group); Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47 (2008) (rejecting the BIA’s “social visibility” requirement of the particular social group protected ground); 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); Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283 (arguing for a comprehensive definition of persecution).

268. Gupta, *supra* note 36, at 380–81.

269. *Id.* at 422–23.

270. *See id.* at 428; *see also* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2352 (2009) (holding that in the age discrimination contexts, the courts should apply a but-for test); Katz, *supra* note 241, 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.”).

271. Gupta, *supra* note 36, at 439.

272. *Id.*

273. *See* Foster, *supra* note 31, at 318–34; James C. Hathaway & Michelle Foster, *The Causal Connection (“Nexus”) to a Convention Ground*, 15 INT’L J. REFUGEE L. 461, 469 (2003).

274. REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

275. *See, e.g.,* Ndayshimiye v. Attorney Gen. of U.S., 557 F.3d 124, 129–31 (3d Cir. 2009)

The proposed rule would operate as follows. First, pursuant to the proposal set forth in my previous article, if an applicant is able to show that but for the protected characteristic it is more likely than not that the persecution would not have occurred, nexus is established and the court need not do any further nexus analysis. In cases in which it is not possible for an applicant to prove but-for causation, an applicant can make out a prima facie case for nexus by showing (through direct or circumstantial evidence) that the protected trait played a role in the persecution. At that point, the burden shifts to the DHS to show that the persecution would have occurred (or would occur in the future) for some other nonprotected reason, even absent the protected trait. If the DHS cannot make this showing, nexus is established. If the DHS successfully makes this showing, the burden shifts back to the applicant to show one of three things: (1) that even absent the DHS's proffered reason for the persecution, the persecution would have occurred; (2) that the likelihood of the persecution increased because of the protected trait; *or* (3) that the severity of the persecution increased because of the protected trait. If the applicant is able to show any of these three things, nexus is established.

This rule, the reasoning behind each part, and a description of the types of evidence that would be relevant to the analysis are discussed in further detail in this Part.

A. The Rule

Under the rule proposed in this Article, the applicant can make out a prima facie case for nexus by showing that the protected trait played a role in bringing about the persecution. Although this prong of the analysis is inspired by U.S. antidiscrimination law, I decline to adopt the “motivating factor” language from the discrimination cases and statute because this language unnecessarily emphasizes the intent of the discriminator or persecutor. As described above, intent is difficult to prove in discrimination cases, but it is even more difficult to prove in asylum cases where the persecutor is not in the country, let alone the courtroom. Moreover, as other scholars have noted, the Supreme Court’s statement that a motivating factor is one that would be identified by the persecutor in a “truthful response”²⁷⁶ is

(holding that the BIA misinterpreted the “one central reason” standard by using the word “subordinate” in its interpretation); *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009) (“The REAL ID Act requires that a protected ground represent ‘one central reason’ for an asylum applicant’s persecution, but the phrase ‘one central reason’ is not explicitly defined.” The court further stated that “the plain meaning of the phrase ‘one central reason’ indicates that the Real ID Act places a more onerous burden on the asylum applicant than the ‘at least in part’ standard we previously applied.”); *In re J-B-N-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007) (explaining “one central reason” language by examining Congressional intent and consulting the dictionary); Rachel D. Settlege, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT’L L.J. 61, 97 (2009) (finding that “[i]t is unclear if this mixed motive standard can survive under” the “one central reason” formulation). See generally Victor P. White, *U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act*, 8 SAN DIEGO INT’L L.J. 209 (2006) (positing that REAL ID is in conflict with the Refugee Convention and international laws); *Immigrants’ Rights under Attack in House Bill (H.R. 10)*, HUMAN RIGHTS WATCH\ (Oct. 6, 2004), <http://www.hrw.org/en/news/2004/10/05/immigrants-rights-under-attack-house-bill-hr-10>.

276. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

problematic because it ignores the concept of unconscious discrimination.²⁷⁷ Similarly, in the persecution context, some motives for persecution are unconscious for the persecutor and unacknowledged by the courts. For example, if an abuser were asked why he was abusing his wife, even if answering truthfully, he may not answer that it was because of her gender, notwithstanding the well-documented relationship between gender and domestic violence.²⁷⁸ Finally, in a discrimination case, the defendant's liability is at issue; accordingly, it makes sense to inquire into the defendant's motives. The goal of asylum law, on the other hand, is not to punish the persecutor but to protect the applicant from persecution based on traits the applicant either cannot change or should not be required to change. Accordingly, the focus should be on the status of the victim and whether that status led to the persecution.²⁷⁹

An applicant could establish this *prima facie* prong by producing either direct or circumstantial evidence that the trait led to (or would lead to) the persecution. The types of evidence an applicant could use would not differ from the types of evidence applicants routinely use in asylum cases today. For example, the applicant could use as evidence statements made by the persecutor directly to the applicant;²⁸⁰ statements made by the persecutor to others, such as the media; the prevalence of persecution against members of the applicant's protected class (for example, evidence that 95% of the individuals persecuted by a government are from a certain ethnic group or evidence that 95% of the victims of sex trafficking in a country are women of a certain age group); evidence that the state fails to protect members of the protected class; or other circumstantial evidence (for example, that the persecutor targets parts of the country that are heavily inhabited by members of a certain ethnic group).²⁸¹

277. See, e.g., Baron, *supra* note 126, at 271 (noting that "discrimination that affects upper-level women is often unintentional and unconscious."); White & Krieger, *supra* note 107, at 509 ("That 'unconscious' discrimination frequently occurs is well documented; many people are unaware that race or sex has influenced their assessment of an individual."). See generally Krieger, *supra* note 108 (arguing that courts should adopt doctrine that consider subtle or unconscious discrimination).

278. See, e.g., U.N. Secretary-General, In-Depth Study on All Forms of Violence Against Women, at 89, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (citing the explicit link between gender and domestic violence across the world); Copelon, *supra* note 129, at 303–05 ("Domestic violence is not gender-neutral. . . . Indeed, domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women."); Gupta, *supra* note 36, at 449–50.

279. See Gupta, *supra* note 36, at 430 ("The focus . . . should be on the status or perceived status of the applicant and whether that status is an actual cause of the persecution." (footnote omitted)); Musalo, *supra* note 82, 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.").

280. See *In re S-P-*, 21 I. & N. Dec. 486, 494 (B.I.A. 1996) (An applicant can demonstrate motive through five different approaches, including "[i]ndications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends).").

281. It is worth noting that these types of evidence roughly parallel the types of evidence routinely accepted in discrimination cases. See, e.g., Krieger & Fiske, *supra* note 125, at 1059–60. Krieger and Fiske listed types of evidence of causation accepted in discrimination cases, including:

The ability to use such circumstantial evidence to prove a prima facie case is especially important in cases involving unconscious or unacknowledged motives for the persecution—such as domestic violence cases. Because abusers, even if speaking truthfully, may not list gender as a motivating factor for the abuse, victims of domestic violence may have a difficult time providing direct evidence of nexus to gender. But if an applicant is able to offer evidence demonstrating that the vast majority of victims of domestic violence in the home country are women or that the state fails to protect women on the basis of gender, she will be able to meet her prima facie burden.²⁸²

Once an applicant has made out a prima facie showing of nexus, the burden then shifts to the DHS to show that, even absent the protected trait, the persecution would have occurred for some other nonprotected reason. This prong mirrors the requirement in discrimination cases that the defendant show that the same adverse employment action would have been taken for a legitimate reason, even absent the protected trait. Under this proposal, however, the DHS is not required to prove that the nonprotected reason is “legitimate.” Unlike adverse employment decisions, which can be taken for a variety of reasons, some legitimate and some not, acts rising to the level of persecution will rarely be carried out for “legitimate” reasons.²⁸³ Nevertheless, not every act of persecution leads to asylum eligibility; a persecutory act must be performed on account of a protected ground if asylum protection is to be

Comparative evidence showing whether similarly situated persons not in the plaintiff’s protected group were treated more favorably than the plaintiff or other members of the plaintiff’s group; Statements or expressive conduct by decision makers evincing negative stereotypes or attitudes toward the plaintiff or others in his or her protected group; The employer’s willingness to tolerate harassment of the plaintiff or other members of the plaintiff’s protected group; The employer’s general pattern of treatment of members of the plaintiff’s group, including statistical evidence; The specific decision maker’s treatment of plaintiff and other members of the plaintiff’s protected group

Id. (footnotes omitted).

282. Gender is not one of the five protected grounds. However, many formulations of the particular social group ground accepted by courts include gender as a component. *See, e.g.,* *Cece v. Holder*, 733 F.3d 662, 667 (7th Cir. 2013) (“young women who are targeted for prostitution by traffickers in Albania” (internal quotation marks omitted)); *In re Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (“[T]he applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”). Moreover, many scholars have argued that gender should be a protected ground. *See, e.g.,* Jenny-Brooke Condon, *Asylum Law’s Gender Paradox*, 33 SETON HALL L. REV. 207, 250 (2002) (calling for a sixth category of protected grounds for women facing gendered persecution). *See generally* Lobo, *supra* note 105 (advocating for United States asylum law to recognize gender as a protected ground); Randall, *supra* note 267 (arguing that the particular social group analysis should encompass gender based claims). Whether or not gender should be a protected ground is beyond the scope of this Article. As I argued in the previous article, however, even if gender were accepted as a protected ground, in many cases, claims based on gender would nevertheless fail on nexus grounds. Gupta, *supra* note 36, at 447. I use gender as an example here to illustrate how the rule proposed in this Article would help to open up eligibility for asylum to applicants with gender-based claims.

283. *See supra* note 17 and accompanying text.

granted. In carrying out its burden, the DHS may use the same types of evidence an applicant may use in making out a prima facie case.

Allowing the DHS an opportunity to prove that the persecution would have occurred absent the protected ground makes some sense. Some scholars have argued that in order to prove nexus, an applicant need only show that the protected trait was a “contributing factor” to the risk of being persecuted.²⁸⁴ This test is similar to the prima facie test proposed in this Article. However, evidence proffered by an applicant might lead an adjudicator to believe that the protected trait was a contributing cause of the persecution, even if it was not so. For example, suppose an applicant is imprisoned for a nonprotected reason. While in prison, one of the captors makes derogatory comments about the applicant’s race to the applicant. Taken out of context, these comments could be seen as evidence that the applicant’s race was a contributing cause of the persecution. The DHS might be able to provide evidence, however, that the applicant was imprisoned for the nonprotected reason, and others not of the applicant’s race were imprisoned for the same reason and suffered the same severity and duration of persecution as the applicant. In this way, the DHS could prove that the derogatory comments did not *lead* to the persecution but were in fact *part of* the persecution. This step, therefore, effectively allows the DHS an opportunity to rebut the applicant’s evidence that the protected trait caused the persecution.²⁸⁵

This part of the test might have changed the result in the *Parussimova* case, described above. Although the Ninth Circuit Court of Appeals acknowledged that the evidence Parussimova presented suggested that her Russian ethnicity “played a role” in the persecution,²⁸⁶ it nevertheless found that she had not established nexus because it was “simply not clear” whether her ethnicity caused the attack or increased its severity.²⁸⁷ Under the proposed rule, the evidence presented by Parussimova might have been sufficient to make out a prima facie case. The burden would have then shifted to the DHS to show that she would have been persecuted even if she were not Russian. If the DHS could not make that showing, the nexus requirement would have been met. Such a result is in line with the aims of asylum law. Notably, the court did not find that Parussimova’s ethnicity did not cause the persecution; it merely found that it was “simply not clear” that it did.²⁸⁸ That phrasing leaves open

284. See Foster, *supra* note 31, at 338 (“[T]he Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. A Convention ground will be a contributing cause if its presence increases the risk of being persecuted.”); James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT’L L. 207, 215 (2002) (“The causal link between the applicant’s predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant’s country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.”).

285. Of course, the DHS could present such evidence even if the contributing factor standard were applied. However, the approach proposed in this Article would afford the DHS a more formal opportunity for rebuttal and would focus immigration judges and the Board toward a systematic assessment of the evidence presented from both sides.

286. *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009).

287. *Id.*

288. See *id.*

the possibility that her ethnicity did, in fact, cause the persecution, and therefore might lead to her being persecuted in the future. Given that the goal of asylum is to protect individuals from persecution, not to punish persecutors,²⁸⁹ the benefit of any error in determining causation should go to the applicant, particularly when the applicant has already shown that a protected trait played a role in the persecution.²⁹⁰

If the DHS is unable to meet its burden, nexus is established. If, on the other hand, the DHS successfully shows that the persecution would have occurred for another nonprotected reason even absent the protected ground, the burden shifts back to the applicant to show one of three things: (1) the persecution would have occurred (or would occur in the future) absent the DHS's proffered reason for the persecution; (2) the likelihood of the persecution occurring increased due to the existence of the protected trait; or (3) the severity of the persecution increased due to the existence of the protected trait. These three possible rebuttals merit some explanation.

The first possible rebuttal—that the persecution would have occurred (or would occur in the future) absent the DHS's proffered reason for the persecution—is a loose analogy to the opportunity afforded to plaintiffs under *McDonnell Douglas* to demonstrate that the defendant's proffered reason was pretext.²⁹¹ Of course, it makes no sense to ask whether the nonprotected reason for the persecution given by the DHS is pretext since the DHS is not the persecutor. However, this proposed rebuttal takes into account the possibility of multiple sufficient causes. Suppose, for example, that it is well documented that a certain dictator targets all Asians (a protected ground) and all bus drivers (a nonprotected ground)²⁹² for persecution. The applicant, who happens to be an Asian bus driver, will be able to make out a prima facie case for nexus to a protected ground. The DHS, however, will then be able to show that the persecution would have occurred or would occur in the future on account of the nonprotected ground, even absent the protected ground. Were the applicant not allowed to offer a rebuttal in this situation, Asians would be eligible for asylum while Asian bus drivers, who possess not one but two targeted characteristics, would not be. Such a result would be unjust. Allowing the applicant the opportunity to prove

289. See, e.g., *In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (“It is . . . important to remember that a grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question.”).

290. See *id.* (“In adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law. . . . Such an approach is designed to afford a generous standard for protection in cases of doubt.”).

291. 411 U.S. 792, 804–05 (1973).

292. There is some debate about whether membership in a profession can constitute membership in a particular social group for asylum purposes. See, e.g., *Pavlyk v. Gonzales*, 469 F.3d 1082, 1088 (7th Cir. 2006) (holding that “uncorrupt prosecutors [from Ukraine] who were subjected to persecution for exposing government corruption” do not meet the requirements of a particular social group); *In re Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985) (suggesting that an unskilled taxi driver could change jobs or cooperate with guerrillas to avoid persecution because the persecution he was subjected to was on account of his profession, not membership in a protected social group). But see *Rojas-Contreras v. Attorney Gen. of the U.S.*, 188 F. App'x 121, 126 (3d Cir. 2006) (remanding to the Board to determine whether “health care professionals” can be a cognizable particular social group). For purposes of this illustration, however, the reader is asked to assume that the status of being a bus driver is not a protected status under the Act.

that the persecution would occur even absent the DHS's proffered nonprotected reason for the persecution would avoid this problem.

This part of the analysis differs from the analysis in antidiscrimination law where the concept of multiple sufficient causes might aid the defendant in avoiding liability or damages. For example, suppose it is well documented that an employer refuses to hire individuals from a certain minority group. Suppose that same employer legitimately refuses to hire any individual who has not passed a licensing exam in the employer's trade. A plaintiff who is a member of the minority group and who did not pass the licensing exam would be able to assert a prima facie case; nevertheless, the defendant would be able to avoid damages by offering the failure to pass the licensing exam as a legitimate, nondiscriminatory reason for its decision not to hire.²⁹³ This difference points to an important distinction between antidiscrimination law and asylum law: the result of a discrimination case is to assign liability to the defendant (either in the form of damages or injunctive relief),²⁹⁴ but a plaintiff who legitimately should not have been hired should not be entitled to damages or injunctive relief. On the other hand, the result of a grant of asylum is protection from persecution, and an applicant should be protected if she would be persecuted on account of a Convention ground, even if a persecutor may have other non-Convention reasons to persecute her.²⁹⁵

The second possible rebuttal for an applicant—that the likelihood of being persecuted increased due to the existence of the protected ground—is inspired by the “loss of chance” rule in torts. The *Gafoor* case, described above, provides an opportunity for illustration. Suppose Gafoor were able to make out a prima facie showing of nexus. Indeed, the court of appeals was convinced that there was “no doubt that the soldiers were motivated, at least in part, by his Indian background and by his purported opposition to the army.”²⁹⁶ The DHS might nevertheless be able to show that Gafoor would have been persecuted even absent his ethnicity because he had arrested a high-ranking government official. Perhaps the DHS could provide

293. See, e.g., *Makky v. Chertoff*, 541 F.3d 205, 215–16 (3d Cir. 2008) (applying a mixed motive framework where a Muslim-American aviation security expert had his security clearance revoked and then was suspended from working because of the resulting lack of clearance).

294. See Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-5(g)(1) (West 2014); 42 U.S.C.A. § 1981a(a)(1) (West 2014). The Civil Rights Act of 1964 only provided for equitable relief, Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5(g); however, the Civil Rights Act of 1991 provided for punitive and compensatory damages if “the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual,” 42 U.S.C.A. § 1981a(b)(1).

295. See, e.g., *Melgar de Torres v. Reno*, 191 F.3d 307, 313 (2d Cir. 1999) (denying asylum because the rape the applicant was subjected to was “but an act of random violence”); Michelle A. McKinley, *Cultural Culprits*, 24 BERKELEY J. GENDER L. & JUST. 91, 94 (2013) (“Proponents of female genital cutting may hold culturally endorsed motivations for modifying the genitalia of young girls, and their actions may be legal within their natal communities . . .”); 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, 477–78 (2010) (showing that, for example, a trafficker may not be motivated by harming the trafficking victim but is motivated by an economic incentive).

296. *Gafoor v. INS*, 231 F.3d 645, 652 (9th Cir. 2000).

evidence demonstrating that officers who were ethnically Fijian were similarly persecuted if they arrested high-ranking army officials. Gafoor might still be able to establish nexus by showing that the chances of his being persecuted were increased due to his ethnicity. For example, if the DHS showed that just over half of the Fijians who arrested high-ranking army officials were persecuted, Gafoor could establish nexus to a protected ground by showing that all (or nearly all) of the Indians who arrested high-ranking army officials were persecuted. Just as a reduction in chance of survival gives rise to an inference of a connection between a doctor's negligence and a patient's death in a tort matter, a showing in an asylum case of an increased likelihood of persecution would point to an obvious connection between the persecution and the Convention ground.

Gafoor can also be used to illustrate the third possible rebuttal—that the severity of the persecution increased or would increase due to the existence of the protected trait.²⁹⁷ Suppose again that Gafoor made out a prima facie showing of nexus, and the DHS successfully demonstrated that ethnic Fijians who arrested high-ranking government officials were also persecuted. Gafoor might still be able to establish nexus by showing that his ethnicity increased the severity of the persecution to which he was or would be subjected. Gafoor might offer evidence showing that while ethnic Fijians who arrested high-ranking army officers were detained for a few days and beaten, ethnic Indians in the same situation were detained for lengthier periods of time and were beaten more severely or even tortured. This rebuttal provision is consistent with asylum law. In order to make out a claim for asylum, an applicant must show that he experienced harm that rose to the level of persecution and that the persecution occurred on account of a Convention ground.²⁹⁸ It stands to reason, then, that if an applicant who would have been persecuted absent the Convention ground can demonstrate that he experienced additional harms that rose to the level of persecution solely because of the Convention ground, he should be eligible for asylum.²⁹⁹

B. Possible Critiques

A possible critique of the proposal set forth in this Article is that once the applicant has made a prima facie showing of nexus, the burden of proof shifts to the DHS, a party to which all of the applicable evidence may not be readily available.³⁰⁰ It makes sense in the antidiscrimination context to shift the burden of proof to the defendant,

297. This rebuttal has no corollary in antidiscrimination law in the disparate treatment context because typically in such cases there either is an adverse employment action or there is not. Whether or not the adverse employment action could have been more severe is accordingly not an issue.

298. See 8 U.S.C.A. § 1101(a)(42) (West 2014).

299. Indeed, the Ninth Circuit appeared to acknowledge as much in *Parussimova*. In finding that Parussimova had not established nexus, it reasoned in part, “it is simply not clear whether Parussimova’s ethnicity, as opposed to one of the other possible motives evinced by the record, caused the assailants to initiate their attack *or increase its severity* once it had begun.” *Parussimova v. Mukasey*, 555 F.3d 734, 742 (9th Cir. 2009) (emphasis added).

300. See *Katz*, *supra* note 241, at 655 (“In the law of evidence, it is common to place the burden of proving a particular fact on a party who controls the means for proving that fact.”).

the party that is in the best position to provide evidence as to its own motives.³⁰¹ But the DHS is not the persecutor, and arguably the DHS has no more access to evidence of the persecutor's motives than does the applicant.³⁰² Accordingly, it is inappropriate to place such a burden on the DHS.

It is important to note, however, that a burden-shifting framework such as the one proposed in this Article would not be new to asylum law. As set forth in Part I, under the asylum statute, the applicant has the burden of proving eligibility for asylum.³⁰³ However, once an applicant demonstrates that she has suffered past persecution, she is entitled to a presumption that she has a well-founded fear of future persecution.³⁰⁴ The burden then shifts to the DHS to rebut that presumption by showing that there has been a fundamental change in circumstances such that she no longer has a well-founded fear of future persecution or that she could avoid persecution by relocating to a different part of the country.³⁰⁵ The "fundamental change in circumstances" pertains to any change in circumstances, whether a change in the conditions of the country from which the applicant fled or a change in the applicant's personal circumstances.³⁰⁶ With respect to a change in the applicant's personal circumstances, the DHS is certainly not in the best position to provide that information; nevertheless, once an applicant has shown past persecution, it is the DHS's burden to do so. With respect to a change in country conditions, the DHS is arguably in a better position to provide such evidence because, unlike the applicant, the DHS litigates thousands of asylum cases every year and has access to banks of information regarding country conditions.³⁰⁷ But this is also the case with respect to

301. *See id.* ("The access-to-proof argument, combined with defendant's wrongdoing, provide a strong case for making the defendant bear the burden of proof on the issue of 'but for' causation once a plaintiff has proven 'motivating factor' causation."); *see also* Darlene D. Bullock, Case Note, *The Order and Allocation of Proof in Mixed-Motive Discrimination Cases: Price Waterhouse v. Hopkins*, 2 GEO. MASON U. C. R. L.J. 117, 128 (1991) ("This burden-shifting structure is logical and procedurally efficient. Because the [defendant] made the decision, only he knows whether his reason for the adverse employment decision was legitimate. The defendant therefore is the least-cost provider of this information.").

302. *See* 8 C.F.R. § 208.6 (2014); *see also* Tasha Wiesman, *Denying Relief to the Persecutor: An Argument in Favor of Adopting the Dissenting Opinion of Negusie v. Holder*, 44 J. MARSHALL L. REV. 559, 578–79 (2011) (The Agency is required to keep the fact of an individual's asylum application confidential from the home country, thereby making "investigations into claims made by an applicant . . . difficult to conduct because of the confidentiality issues associated with asylum.").

303. *See* 8 U.S.C.A. § 1158(b)(1)(B).

304. *See* 8 C.F.R. § 208.13(b)(1).

305. *See id.*

306. *See* *Singh v. Holder*, 656 F.3d 1047, 1053 (9th Cir. 2011) (concluding that the applicant's wife's arrest could constitute a fundamental change in circumstances); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 654–55 (8th Cir. 2007) (holding that both a change in country conditions and a change in an applicant's personal circumstances can satisfy the definition of a "fundamental change in circumstances").

307. *See* Adam L. Fleming, *Around the World in the INA: Designing a Country of Removal in Immigration Proceedings*, 7 IMMIGR. LAW ADVISOR 1 (U.S. Dep't of Justice, Exec. Office for Immigration Review, D.C.), May 2013, at 1, *available at* <http://www.justice.gov/eoir/vll/ILA-Newsletter/ILA%202013/vol7no5.pdf> ("Every year the Department of Homeland

circumstantial evidence of persecutor motive. For example, in a case involving persecution by government officials from country X, the DHS may be able to provide evidence it amassed in other cases involving country X that tends to show that the government agents routinely persecute individuals not on account of the applicant's protected status but for some other nonprotected reason.

Moreover, the risk that nexus might be overdetermined due to the DHS's lack of access to evidence of persecutor motive is a justified one for at least three reasons. First, as mentioned earlier, the goal of asylum law is to protect individuals who will be persecuted upon return to their home countries. In order to reach the nexus prong, an applicant must prove that she is a member of a protected class of persons. She must also prove that she was subjected to persecution or has a well-founded fear of future persecution.³⁰⁸ Although there is some debate as to what type of conduct rises to the level of persecution, it is generally understood that persecution is more severe than mere discrimination or harassment.³⁰⁹ In many cases, asylum seekers are fleeing the threat of torture or even death.³¹⁰ Under the approach set forth in this Article, the applicant would also have shown that her protected status played a role in the persecution. To the extent that there is error with respect to the nexus determination, such error would only benefit an individual who had successfully made those showings. Accordingly, it is appropriate for the error to be made in favor of the applicant, as opposed to against the applicant, given that the stakes are so high and the consequences of wrongful deportation are so dire.³¹¹

Second, in discrimination cases, a defendant's liability is at issue. So to the extent there is an error in assessment of blame, not only is the defendant punished for having carried out a legitimate employment action but the plaintiff is rewarded for having been legitimately fired. A grant of asylum, however, does not punish the persecutor or impose judgment on the home country.³¹² Accordingly, in asylum cases, there is no risk of unfair punishment to the persecutor or the applicant's home country.

Security removes hundreds of thousands of aliens from the United States”).

308. For this reason, any concern that the proposed nexus framework would open the floodgates to a large amount of asylum seekers is unfounded. *See* Gupta, *supra* note 36, at 454.

309. *See supra* note 265.

310. *See, e.g.,* Garces v. Mukasey, 312 F. App'x 12, 13–14 (9th Cir. 2009) (The applicant and her family received telephonic death threats several times a day due to her political membership, and the applicant was then physically threatened by an armed assailant.); Nuru v. Gonzales, 404 F.3d 1207, 1218 (9th Cir. 2005) (For twenty-five days, the applicant was tied up, naked and bound in the “helicopter” position, and left outside in the hot desert sun. He was forced to urinate and defecate in this bound position, and he was regularly beaten and whipped until the skin broke open on his back and feet.).

311. *See, e.g., In re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (“Such an approach is designed to afford a generous standard for protection in cases of doubt.”). In a different context, the U.S. Supreme Court seems to have acknowledged the need to give asylum applicants the benefit of any doubt. In *INS v. Cardoza-Fonseca*, the Court rejected the argument that applicants for asylum must prove that they “more likely than not” will be persecuted; instead, the Court suggested that even a 10 percent likelihood of persecution could be sufficient for asylum purposes. 480 U.S. 421, 440 (1987).

312. *In re S-P-*, 21 I. & N. Dec. at 492 (“A decision to grant asylum is not an unfriendly act precisely because it is not a judgment about the country involved, but a judgment about the reasonableness of the applicant's belief that persecution was based on a protected ground.”).

Third, in discrimination cases, the offending harm (for example, dismissal from employment or refusal to hire) often would be lawful absent discriminatory motive. On the other hand, harms that rise to the level of persecution (for example, rape, torture, beatings, imprisonment without due process, etc.) are generally not lawful (at least under U.S. law), even absent nexus to a Convention ground. Accordingly, to the extent an asylum applicant has a relative advantage over a plaintiff in a discrimination action, that advantage seems justified. The reasoning behind the *Summers v. Tice* rule in tort law supports this conclusion. Just as the court in that case determined that sound policy reasons counsel giving the benefit of the doubt to the innocent plaintiff over the negligent defendants,³¹³ in refugee law, the benefit of the doubt should go to the applicant who has shown that she was persecuted (or fears persecution).³¹⁴

CONCLUSION

The guidance provided to adjudicators as to the proper analytical framework to be applied when determining nexus in asylum cases has been woefully inadequate. The proposal set forth in this Article, in conjunction with the but-for test proposed in *The New Nexus*, would provide a clear, easy-to-implement test for determining causation in asylum cases. More importantly, the test would lead to more consistent results that are in line with the ultimate aims of refugee protection.

313. 199 P.2d 1, 2–3 (Cal. 1948).

314. It is worth noting that the burden-shifting framework used in discrimination cases has been critiqued on other grounds. For example, in refusing to extend the framework to cases based on violations of the Age Discrimination in Employment Act, the Supreme Court reasoned that the framework “is difficult to apply.” *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2346 (2009). Other courts have made similar observations. *See, e.g., Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998). However, these criticisms go only to the difficulty providing adequate jury instructions with respect to the burden-shifting framework. *Id.* (“Requiring the jury to play the ping-pong-like match of shifting burdens is confusing and entirely unnecessary . . .”). Asylum cases are not adjudicated by juries. Accordingly, this criticism would not apply. To the contrary, the burden-shifting framework proposed in this Article would allow immigration judges and the Board to conduct systematic and deliberate assessments of nexus in asylum claims.