But For and a Good Bit More: Conflicting Nexus Standards Within Asylum Law and the Role of Animus in Forced Recruitment

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ABSTRACT

To establish eligibility for asylum, an immigrant must demonstrate that they suffered persecution "on account of" one of the five enumerated grounds, "race, religion, nationality, membership in a particular social group or political opinion." This showing is also commonly referred to as "the nexus requirement." Recent decisions by various federal Courts of Appeals highlight the ongoing debate within asylum law spaces over the appropriate analysis to find a nexus between persecution and a protected class. The analysis utilized by these Courts contrasts with precedential decisions of the Board of Immigration Appeals (BIA) and endorses a more expansive interpretation of the nexus requirement. Three notable cases—*Saban-Cach v. Attorney General*, *Chicas-Machado v. Garland*, and *Argueta-Hernandez v. Garland*—illustrate this shift in approach, rejecting the narrow interpretation of nexus put forth by the BIA.

These cases involve individuals targeted for forcible recruitment by gangs due to their religious or ethnic backgrounds. The Circuit Courts' rulings depart from the BIA's approach in gang recruitment scenarios, which largely limits nexus to situations where persecutors target the victim to punish them for having a specific trait. Rather, these rulings have found that a persecutor's coveting of a victim's protected characteristic is sufficient to establish that the persecution was *on account of* the protected characteristic, regardless of whether the goal was to punish the victim for possessing the characteristic. Even with the absence of animus in these scenarios, the courts note that the persecutors still targeted the victim *because* of the victim's protected characteristics. These decisions signal space for asylum seekers who have faced persecution by ethnocentric or religiocentric militant organizations to potentially establish a nexus to persecution on the basis of their religion or ethnicity. Despite the apparent lack of overt animus in situations where ethnocentric or religiocentric militant organizations limit recruitment to individuals who share the organizations' ethnic or religious identity, these organizations still target these victims *because* of their religious or ethnic identity. Furthermore, and similar to persecution motivated by animus toward the victim's religious or ethnic identity, these recruitment efforts threaten to control and chill the victim's religious or

ethnic expression. Given the nexus jurisprudence of these Circuit Courts, these efforts are clearly persecution on account of a protected class.

INTRODUCTION

Recent decisions from various federal Courts of Appeals have underscored the ongoing debate surrounding the nexus analysis and the role of animus in mixed motive asylum cases. In a departure from previous precedent set by the Board of Immigration Appeals (BIA), several Circuits have recently adopted a more expansive approach to establishing nexus, particularly in cases involving religion and ethnicity-based persecution claims. The but-for logic utilized by these Circuits has significant implications for individuals targeted by ethnocentric or religiocentric militant organizations, as it challenges the BIA's narrow interpretation of persecution on account of a protected characteristic. This analysis examines key rulings from the Third, Fourth, and Fifth Circuits, highlighting the shift in legal reasoning and its potential impact on asylum claims related to forcible recruitment efforts by such organizations.

The first section of this Note provides a short foundation on the roots of asylum law in the United States and the statutory definition of refugee provided for in the Refugee Act of 1980, which an asylum applicant must meet to be granted asylum. The next part of this Note maps the evolving agency and judicial interpretations of the statutory terms "persecution" and "on account of" to include more than simply an intent to harm. The following section contains a discussion on the struggle to create coherent standards for mixed motive cases and the enactment of the REAL ID Act's requirement that protected characteristics must be "at least one central reason" for the persecution an applicant experienced or fears. The next part traces the evolution of a rift in how the agencies and courts have interpreted "one central reason" and the BIA's eventual adoption of a narrow standard that amounts to "but-for and a bit more." The subsequent section contains an analysis on a series of recent decisions by various Circuit Courts, which highlights the emergence of a more expansive reading of the nexus requirement whereby courts utilize a but-for standard to find the absence of animus does not defeat the nexus establishment. The final section considers the implications of these decisions for individuals fleeing forceable recruitment efforts by ethnonationalist or religiocentric militant organizations.

I. BACKGROUND

A. International Refugee Law and the Beginnings of U.S. Asylum Law

Despite Thomas Paine's reveries that America would become "an asylum for mankind"[1] and the subsequent American collective self-image of itself as "a haven for the oppressed," [2] the United States first codified the concept of refugee in the mid-twentieth century.[3] In response to the vast number of Europeans left displaced in the aftermath of World War II, President Truman signed into law the Displaced Persons Act of 1948.[4] The Act offered sanctuary to up to 205,000 European "displaced persons" or "refugees" over two years.[5] Congress would later follow up this response with the 1953 Refugee Relief Act,[6] and other similarly ad hoc refugee admission legislation.[7] At this time, the United States immigration policy largely relied on an intensely restrictive national origins quota system to

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[1] THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE, AND OTHER WRITINGS 35 (Mark Philip ed., 1995) ("O! receive the fugitive, and prepare in time an asylum for mankind.").

[2] Joint Resolution to Authorize the Admission into the United States of a Limited Number of German Refugee Children, First Session on S.J. Res. 64 and H.J. Res. 168, (Statement of Robert Wagner, Senator) ("By long tradition America has been a haven for the oppressed.").

[3] U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968) [*hereinafter* Refugee Protocol].

[4] Displaced Persons, Refugees, and Orphans Act of June 25, 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219; CONG. RSCH. SERV. LIBRARY OF CONGRESS, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980). *See also,* ROGER WHITE, IMMIGRATION POLICY AND THE SHAPING OF U.S. CULTURE: BECOMING AMERICA, 70 (2018) ("In 1948, the Displaced Persons Act was passed . . . authoriz[ing] the entry of up to 200,000 Europeans who had suffered persecution at the hands of Germany's Nazi government."); ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952, 113 (1957).

[5] Displaced Persons, Refugees, and Orphans Act of June 25, 1948, Pub. L. No. 80-774, § 3, 62 Stat. 1009, 1010 (1948), *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219. The Act also incorporated the definition of a "displaced person" as provided for in "Annex I of the Constitution of the International Refugee Organization." *Id.* § 2(b). *See also* Constitution of the International Refugee Organization, opened for signature Dec. 15, 1946, Annex I, pt. 1, § B, 62 Stat. 3037, 3050 T.I.A.S. No. 1846 (entered into force in the United States Aug. 20, 1948) ("The term 'displaced person' applies to a person who . . . has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons."); DIVINE, *supra* note 4 ("Advising the American people that the United States could not ignore the sufferings of those uprooted by the war, the president outlined a plan to give displaced persons preferential treatment under the existing quotas.").

[6] The Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2(a), 67 Stat. 400 (1953), *amended by* 68 Stat. 1044 (1954), 50 U.S.C.A. Appendix, § 1971d. The Act applied to three categories of refugees: (1) "Refugee[s]" who hailed from non-communist countries, (2) "Escapee[s]," refugees who fled the Soviet Union, or other communist-controlled countries, and (3) "German expellee[s]," refugees forced to flee Eastern Europe because of their German ethnic origin. *Id.*

[7] *See, e.g.*, Azorean Refugee Act of 1958, Pub. L. No. 85-892, § 2, 72 Stat. 1712 (providing special non-quota visas for the victims of the earthquakes and volcanic eruptions on the Island of Fayal who "are out of their usual place of abode in such islands and unable to return thereto, and who are in urgent need of assistance for the essentials of life."); Fair Share Refugee Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504 (1960) (implementing legislatively endorsed parole status for refugee-escapees under the definition utilized in the 1957 amendment to the INA: "any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion," Pub. L. No. 85-316, § 15(c)(1), 71 Stat. 639, 643 (1957)).

dictate admission into the United States,[8] and so the Congressional Acts necessarily created avenues for non-quota visa allocations to those who met the varying definitions of "refugee." It was not until 1965 that Congress passed Immigration and Nationality Act Amendments,[9] which, for the first time, provided a permanent refugee admission quota.[10] More importantly, the amendments set aside 6 percent of the annual overall immigrant quota for refugees, termed "conditional entries."[11] The law defined these entrants in geographic and ideological terms as persons who fled and are unwilling to return to "any Communist or Communist-dominated country or area" or the Middle East because of persecution on account of race, religion, or political opinion.[12]

Similarly motivated by the displacement effects of World War II and the Soviet takeover of Eastern Europe, the international community reacted to the resulting humanitarian crisis by adopting a series of immigration policies. These policies included the United Nations Convention Relating to the Status of Refugees,[13] also known as the 1951 Convention, which applied only to persons who became refugees due to events occurring before that date, and eventually the 1967 Refugee Protocol, which extended protections to all persons who meet the Convention's definition of a refugee.[14]

Central to these protections was the principle of nonrefoulment, the obligation for States parties not to return an individual recognized as a refugee to a place where their life or freedom could be in jeopardy.[15] In 1968, the United States joined with the international community and ratified the U.N. Protocol relating to the Status of Refugees.[16] A decade later, Congress finally conformed with international law and adopted new protective

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[8] WHITE, *supra* note 4, at 71 ("The adoption of the national origins formula was a rational and logical method of numerically restricting immigration in such a manner as to best preserve the sociological and cultural balance in the population of the United States."); DIVINE, *supra* note 4, at 18 ("Instead of judging men by their character and ability, the new law selected immigration on the ground of their racial and national affiliations.").

[9] Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1956).

[10] *Id*. The Immigration and Nationality Act Amendments of 1965 also repealed the national origins quota system and shifted the emphasis away from nationality, race, and ethnic considerations instead onto family reunification and needed skills. *See* CONG. RSCH. SERV. LIBRARY OF CONGRESS, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980).

[11] Immigration and Nationality Act Amendments, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1956).

[12] *Id.* The amendments also required that persons be "unable or unwilling to return to such country or area" and or "uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode." *Id.*

[13] U.N. Convention on the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S 137 (entered into force in the United States Apr. 22, 1954) (recognizing a formalized definition of refugee and prescribed the series of protections and rights to which a refugee is entitled) [*hereinafter* 1951 Convention].

[14] Refugee Protocol, *supra* note 3, at Art. I § 2.

[15] 1951 Convention, *supra* note 13, at Art. 33, § 1 ("No Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[16] Refugee Protocol, *supra* note 3.

obligations through the enactment of the Refugee Act of 1980.[17] This landmark legislation, which abandoned prior geographic and ideological constraints for defining "refugees," largely established the contemporary U.S. asylum system.[18]

B. The Refugee Act of 1980

The United Nations Convention Relating to the Status of Refugees, with its subsequent amendment, defined a "refugee" as a person who possesses a "well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion," is outside their country of nationality, and is "unable or, owing to such fear, is unwilling to return to it."[19] The Refugee Act of 1980 embraced a similar definition of refugee,[20] defining it as: any person who is outside of the country of their nationality who is unable or unwilling to return to that country because of "persecution or a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion."[21] In addition to the adoption of this broad definition, the Act also provided for regular admission of refugees on an annual basis,[22] created a comprehensive framework for refugee admission and resettlement,[23] and provided the Attorney General with the authority to

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[17] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. *See also* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 SAN DIEGO L. REV. 9, 11 (1981) ("By adopting a universal approach to refugee admissions consistent with international standards and norms, the new law places primary emphasis on 'special humanitarian concerns.'").

[18] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

[19] 1951 Convention, *supra* note 13, at Art. 1 § A(2); *see also*, Refugee Protocol, *supra* note 3, at Art. I § 2.

[20] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.; s*ee also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 15 (1983) ("The United States Refugee Act of 1980 abandons the earlier ideologically and geographically based definition of refugees in favour of that offered by the Convention and Protocol."); LAWYERS COMM. FOR HUM. RTS., THE IMPLEMENTATION OF THE REFUGEE ACT OF 1980: A DECADE OF EXPERIENCE 23 (1990) ("The 1951 Convention's definition of 'refugee' required a person to establish that he or she had a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.'"); Anker & Posner, *supra* note 17, at 60 (1981) ("Both House and Senate sponsors emphasized that the purpose was to create a nondiscriminatory definition of refugee and to make United States law conform to the UN Convention.").

[21] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; s*ee also*, Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 386 (2014) (suggesting that the change from the Convention nexus language of "for reason of" to "on account of" was largely insignificant).

[22] Refugee Act of 1980, Pub. L. No. 96-212, § 207, 103 Stat. 103; *see also* The Lawyers COMM. for HUM. RTS., *supra* note 20, at 9.

[23] Refugee Act of 1980, § 101(b), Pub. L. No. 96-212, 109 Stat. 102 ("The objectives of this Act are to provide a permanent and systemic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."). *See also,* LAWYERS COMM. FOR HUM. RTS., *supra* note 20, at 1. Prior to the Refugee Act of 1980, the United States generally characterized refugees as only those fleeing from Communist countries or the Middle East. *See* Refugee Relief Act of 1953, Pub. L. 83-203, § 2(b), 67 Stat. 400, 400 (defining an "escapee" as someone fleeing from the Soviet Union or other Communist or Communist-dominated areas because of persecution or

grant asylum to aliens who met the statutory definition of refugee.[24] Importantly, and for the first time, the Act established the legal status of asylum and directed the creation of uniform procedures for aliens present in the United States or arriving at a U.S. border or port to apply for asylum.[25]

Section 208(b)(1) of the Immigration and Nationality Act, provides the Secretary of Homeland Security or the Attorney General discretion to grant asylum to individuals who apply for asylum in accordance with the procedures established by the immigration agencies.[26] The burden of establishing that an applicant satisfies the statutory definition of refugee falls on the applicant.[27] An asylum applicant must demonstrate that (1) they suffered past persecution or have a "well-founded fear" of future persecution; (2) the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion; and (3) they are unable or unwilling to return to, or avail themselves of the protection of, their country of nationality or (if stateless) last habitual residency because of this persecution or fear of persecution.[28]

C. Defining Persecution, Punitive Intent, and "Overcoming" a Protected Characteristic

Fundamental to the conception of asylum is the definition of persecution, which, undefined in the statute itself, has long been constructed through case law.[29] The BIA promulgated a definition for persecution in 1985, in the Board's decision in *Matter of Acosta*.[30] The respondent, a Salvadorian national, suffered severe violence at the hands of anti-

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fear thereof); Hart-Celler Act, Pub. L. 89-236, § 7, 79 Stat. 911, 913 (1965) (adding to the refugee definition people fleeing persecution "from any country within the general area of the Middle East"); Refugee Act of 1980, Pub. L. 96-212 § 201(a)(42), 94 Stat. 102, 102–03, 8 U.S.C. § 1101(a)(42) (eliminating geographical and ideological limitations on the definition of a refugee in place of the current definition).

[24] Refugee Act of 1980, § 208(b)(1), Pub. L. No. 96-212, 103 Stat. 102 ("[T]he alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)).").

[25] Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 103 Stat. 102 (describing the objectives of the Act to provide a permanent and systemic procedure for the intake of refugees into the United States). *See also,* John A. Scanlan, *Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, 5 IN DEFENSE OF THE ALIEN 23, 24–25 (1982). The main difference between an asylee and a refugee lies at the point with which they apply and gain status; a refugee is granted refugee status while outside of the United States. Conversely, an asylum seeker, who has met the requisite definition of a refugee, is granted asylee status *after* entering the United States or arriving at a port of entry. NOAH SCHOFIELD & AMANDA YAP, U.S. DEP'T HOMELAND SEC., REFUGEES: 2023, 1 (2024).

[26] *See* 8 U.S.C. §1158(b)(1)(A).

[27] *See* 8 U.S.C. § 1158(b)(3), 8 C.F.R. § 208.13(a); *See* INS v. Stevic, 467 U.S. 407 (1984) (clarifying that the "clear probability of persecution standard" applies to withholding of removal claims); Nagy, 11 I. & N. Dec. 888, 889 (B.I.A. 1966); Sihasale, 11 I. & N. Dec. 759, 760–62 (B.I.A. 1966).

[28] *See* 8 U.S.C § 1101(a)(42)(A).

[29] Acosta*,* 19 I. & N. Dec. 211, 222–23 (B.I.A. 1985) ("[W]e presume that Congress, in using the term 'persecution' in the definition of a refugee under section 101(a)(42)(A) of the Act, intended to adopt the judicial and administrative construction of that term existing prior to the Refugee Act of 1980."), *abrogated in part by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987) .

[30] *Acosta,* 19 I. & N. 211.

government guerrillas following his founding of COTAXI, a cooperative organization of taxi drivers.[31] The Board, relying on pre-Refugee Act definitions of persecution, defined persecution to include "harm or suffering . . . inflicted upon an individual in order to *punish* him for possessing a belief or characteristic a persecutor sought to overcome."[32] In requiring an intent to "*punish,*" the Board implied that the applicant must demonstrate that their perpetrator's persecutorial actions were motivated by some punitive intent.[33] The Board then set out four elements for establishing a well-founded fear of persecution, which they elucidated further in *Matter of Mogharrabi*: "(1) the alien possesses a belief or characteristic a persecutor *seeks to overcome* in others by means of *punishment* of some sort; (2) the persecutor is already aware, or . . . could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the *inclination to punish* the alien."[34] Consistent with these decisions, the BIA promulgated a construction of persecution that focused on the subjective intention of the persecutor to inflict punishment upon the asylum applicant—thereby establishing punitiveness as a central inquiry for the establishment of persecution.

When faced with the unsatisfying limitations of a punitive-focused definition of persecution, the Board was forced to revisit the need for punitive intent when deciding *Matter of Kasinga*, some ten years later.[35] Fauziya Kasinga, a young female member of the Tchamba-Kunsuntu Tribe of northern Togo, sought asylum protections from the practice of female genital mutilation ("FGM") within her tribe.[36] She appealed the denial of her asylum application to the Board of Immigration Appeals,[37] and the BIA set out to determine if the practice of FGM constituted persecution for purposes of asylum.[38] One of the problematic characteristics of FGM, for purposes of meeting the BIA's prior definition of persecution, is the difficulty of establishing a punitive intent within the communities that practice it.[39] Often,

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[31] *Id.* at 216. Per the Board's findings, the anti-government guerrillas anonymously requested that COTAXI members participate in work stoppages—and retaliated after the COTAXI members refused. *Id*.

[32] *Id*. at 222 (emphasis added). The Board characterized the history of judicial construction of persecution to encompass two aspects: (1) the harm had to be inflicted on an individual to punish him for possessing a belief or characteristic that the persecutor wanted to overcome, and (2) the harm had to be inflicted by the government of a country or persons, or an organization that the government was unable or unwilling to control. *Id*.

[33] *Id.*

[34] *Mogharrabi*, 19 I. & N. Dec. at 446 (emphasis added).

[35] Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

[36] *Id.* at 357–58.

[37] *Id.* at 357.

[38] *Id*. at 358.

[39] *See* Gupta, *supra* note 21, at 394 (2014) ("Indeed, according to the attorney who litigated Kasinga's case, documentary evidence demonstrated that '[i]t was often midwives or elders who carried out the [genital mutilation] itself, which they believed was a positive act for the young woman and larger community,' and . . . 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."'") (alterations in original) (second omission in original).

the practitioners who carry out FGM do not view its practice on young females as a punishment but rather as a cultural rite.[40] In ruling that FGM constitutes persecution, the Board agreed with the INS General Counsel's characterization that "the practice is a 'severe bodily invasion' that should be regarded as meeting the asylum standard even if done with 'subjectively benign intent.'"[41] Likely recognizing that the Board's definition to persecution as requiring "punitive intent" failed to provide protection to victims fearing FGM,[42] the BIA pivoted, stating that "many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution."[43] Instead, the Board focused on the perpetrator's intent to "overcome" some protected characteristic.[44] The Board explained its reliance on the "seeking to overcome" concept by stating that this "formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980."[45] The Board determined that the trait which FGM aimed to overcome was the "sexual characteristics of young women of the tribe" not previously subjected to FGM.[46]

Despite *In re Kasinga* and the BIA's purported shift away from a requirement of subjective intent to punish, a year later, the Ninth Circuit was called upon to overturn the BIA's denial of asylum to Alla Pitcherskaia. Pitcherskaia, a Russian woman, was subjected to involuntary psychiatric treatments and threats of institutionalization by militia in response to her suspected homosexuality.[47] The BIA denied Pitcherskaia's asylum claim, concluding that although she was credible, the involuntary psychiatric treatments and institutionalization did not constitute persecution because they were "intended to 'cure' her, not to punish her."[48] In remanding the case, the Ninth Circuit lamented the BIA's "erroneous definition of persecution,"[49] and the resulting conflation of punishment with

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[40] *Id.*

[41] *Kasinga*, 21 I. & N. Dec. at 366–67.

[42] *Id.* at 365.

[43] *Id.*

[44] *See id.* ("[W]e have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. . . . However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution.").

[45] *Id.*

[46] *Id.* at 366 ("FGM 'has been used to control woman's sexuality.' It also is characterized as a form of 'sexual oppression' that is 'based on the manipulation of women's sexuality in order to assure male dominance and exploitation.'") (quoting NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 42 (Gloria Jacobs ed., 1993)). *But cf.* Lori Leonard, *"*We Did It for Pleasure Only*"*: Hearing Alternative Tales of Female Circumcision, 6 QUALITATIVE INQUIRY 212, 214, 223 (2000) ("They say female circumcision is about patriarchy. And women are not circumcised, they are mutilated. Circumcision is a way for men to control women, to make sure they are virginal, clean, pure, obedient, faithful, chaste. . . . I told them stories from Myabé—how girls were first circumcised around 1980, how they organized themselves to do it, how their parents and the chief of the land felt about it.").

[47] Pitcherskaia v. INS, 118 F.3d 641, 644 (9th Cir. 1997).

[48] *Id.* at 645.

[49] *Id.* at 648 n.6 ("This erroneous definition of persecution infected much of the Board's analysis.").

persecution.[50] The Court instead opted for an objective definition of persecution previously promulgated by the Ninth Circuit——"the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[51] The Court noted that whether "the persecutor inflicts the suffering or harm in an attempt to elicit information, . . . for his own sadistic pleasure, . . . to 'cure' his victim, or to 'save his soul' is irrelevant. Persecution by any other name remains persecution."[52] Despite the Ninth Circuit's reaffirmation of *Kasinga*'s less restrictive definition of persecution, and the shifting of the focus away from the subjective intent of the persecutor and towards the protected characteristics of the victim,[53] the Court retained, as central to the inquiry of persecution, a persecutor's desire to "get rid of" or "overcome" the protected trait. The Court devalued the subjective intent of the persecutor while not entirely disavowing the role of the persecutor's intent to rid the asylee of a particular trait. In essence, the court's definition remained only one step removed from the punitive-intent-centered definition originally put forth by the BIA in *Matter of Acosta*.[54]

D. Nexus, the REAL ID Act, and "One Central Reason"

While the concept of persecution is central to relief under the INA, it is equally necessary that any claim meet the additional elements of INA protection: that "persecution" be "on account of" one of the five enumerated grounds, "race, religion, nationality, membership in a particular social group, or political opinion."[55] The "on account of"[56] language included in the statutory definition of a "refugee"[57] has been read to require a connection between the persecutor, the persecution suffered, and membership in the protected social group.[58] This showing is also commonly referred to as "the nexus requirement."[59] While the logical linkage of the nexus rule may seem uncomplicated, in practice, courts have struggled to interpret the degree of connection necessary to establish a nexus. This is especially so in "mixed

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[50] *Id.* at 646 ("Neither the Supreme Court nor this court has construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm."); *Id.* at 647 (describing how the tests outlined in *Acosta* & *Mogharrabi,* to establish a well-founded fear of persecution, "confuse[] punishment and persecution.").

[51] *Id.* (omission in original) (quoting *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir.1997) (citing *Sagermark,* 767 F.2d at 649)).

[52] *Pitcherskaia*, 118 F.3d at 647.

[53] *Id.*

[54] Acosta, 19 I& N Dec. 211, 222–23 (B.I.A. 1985), *abrogated in part by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

[55] 8 U.S.C. § 1101(a)(42)(A).

[56] Note that while the U.S. definition of refugee uses the language "on account of," the 1951 Convention uses the language "for reasons of." *Compare* 1951 Convention, *supra* note 13, *with* 8 U.S.C. § 1101(a)(42)(A).

[57] *See* 8 U.S.C. § 1101(a)(42)(A).

[58] *See* INS. v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992) (requiring evidence of the motive of the persecutor to prove that the asylum seeker was being persecuted on account of a protected ground).

[59] DAVID MARTIN & GERALD SEIPP, ASYLUM CASE LAW SOURCEBOOK § 2:2 (24th ed. 2024).

motive" cases, where an actor may be motivated by a combination of both nonprotected and protected reasons for the persecution.

In the 1992 Supreme Court case, *INS v. Elias-Zacarias*, the Court constrained an asylum applicant's ability to establish persecution on account of political opinion based on the applicant's refusal to join a guerilla organization.[60] The court held that Elias-Zacarias's fear of persecution was not "on account of . . . political opinion," because he both failed to prove that (1) his refusal to join was an expression of political opinion, and (2) the guerillas "persecute[d] him *because of* that political opinion, rather than because of his refusal to fight with them."[61] In reaching this holding, and recognizing that a persecutor's acts of harm may be influenced by a variety of motives, the Supreme Court evaluated the "on account of" language in the statute and determined that a showing of fear of persecution required *some* evidence that the persecutor was motivated by the protected trait of the victim.[62] Given the potential that the guerillas were motivated to "augment their troops[,] rather than to show their displeasure,"[63] the court determined that to establish persecution "on account of" political opinion, a refugee must show that the persecutors were motivated to harm the refugee by more than simply the refugee's resistance to their forced recruitment. In essence, the Court's decision precluded claims of asylum if the persecution inflicted by guerillas or gangs occurred only as a reaction to the applicant's refusal of the recruitment efforts. Notably, this did not preclude claims where the non-state actors had other motives, *in addition* to forceable recruitment efforts, for which to target the applicant.

Four years later, the BIA would further explicate the implications of mixed motive persecution in *Matter of S-P-*,[64] recognizing that "[p]ersecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not."[65] In *Matter of S-P-*, the Board determined that an asylum seeker who had been detained and subjected to torture by the Sri Lankan military on suspicion of aiding rebels had also effectively demonstrated that the perpetrators were partly driven because they believed the applicant to be a political opponent.[66] The Board established the standard of review for mixed motive cases is one which assesses "whether the applicant has produced evidence from which it

[60] INS. v. Elias-Zacarias, 502 U.S. 478 (1993)

[61] *Elias-Zacarias*, 502 U.S. at 482–83.

[62] *Id.* at 483 ("We do not require [direct proof]. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.").

[63] *Id.* at n.2.

[64] S-P-, 21 I. & N. Dec. 486 (B.I.A. 1996).

[65] *Id.* at 489.

[66] *Id.* at 497 ("Although there was interrogation and an attempt to gain information in each case, an additional underlying reason for the abuse was the belief that the victim held political views opposed to the government.").

is reasonable to believe that the harm was motivated [*in part*] by a protected ground."[67]

Congress acted to codify and partly modify the rulings of *I.N.S. v. Elias-Zacarias* and *Matter of S-P-* on May 11, 2005, when it passed the REAL ID Act,[68] which included an amendment to the asylum statute addressing mixed motive cases.[69] The Act provided that, for an applicant to demonstrate that they are a refugee, "the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least *one central reason* for persecuting the applicant."[70] Consistent with prior case law,[71] Congress acknowledged that refugees may experience persecution for multiple reasons, but emphasized as relevant the degree to which the protected ground motivated the persecutor's actions.[72] While *Matter of S-P-* held that the protected ground only needed to be a part of the persecutor's motivation, the REAL ID Act stipulated that the ground needed to be a "central" reason.[73]

II. A RIFT IN DEFINING "ONE CENTRAL REASON": THE BIA'S *BUT-FOR* & *A GOOD BIT MORE* APPROACH

Although the REAL ID Act established a "one central reason" requirement, the Act did not define "one central reason" or clarify how to determine if a reason is "central." This lack of clarity gave room for differing

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[67] *Id.* at 490, 496 ("[W]e find that the applicant has produced evidence from which it is 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." (emphasis added)).

[68] REAL ID Act of 2005, Publ. L. No. 109-12, 119 Stat. 305.

[69] *Id.* § 101(2), 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). These Amendments were in response to a string of Ninth Circuit decisions establishing that applicants in mixed motive asylum claims need to only "produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground." Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999); *see also* Briones v. INS, 175 F.3d 727 (9th Cir. 1999) (en banc) (remanding for a determination of the applicant's credibility after holding that the mixed motives presented could be sufficient grounds for asylum); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995) (finding that persecutors might have more than one motive, and "so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied."); H.R. Rep. No. 109-72, at 163 (2005) ("Ninth Circuit decisions . . . have substantially undermined a proper analysis of mixed motive cases.").

[70] 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added).

[71] *See* INS v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992); *S-P-*, 21 I. & N. Dec. at 489 ("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.").

[72] REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B). *See also* J-B-N- & S-M-, 24 I. & N. Dec. 208, 212 (B.I.A. 2007) ("During conference on the bill, this language was modified to become 'at least one central reason,' the final version of the REAL ID Act. That language thus confirms that aliens whose persecutors were motivated by more than one reason continue to be protected under section 208 of the Act if they can show a nexus to a protected ground." (footnote omitted)).

[73] REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B); *S-P-*, 21 I. & N. Dec. at 489, 496 (finding that "[p]ersecutors may have differing motives for engaging in acts of persecution" and the applicant must show that the persecutors were *in part* motivated by the protected characteristic.); *see also* H.R. Rep. No. 109-72, at 163 (2005) (specifically rejecting a series of Ninth Circuit cases which required that the protected ground have motivated the persecutor "at least in part" and arguing that it "undermined a proper analysis of mixed motive cases.").

interpretations of when a protected ground is "central" enough to a persecutor's motivation to satisfy the "persecution on account of a protected class" element of INA's protection.[74] This section traces the BIA's advancement of a series of decisions which offered an increasingly narrow interpretation of "one central reason," and the responses that both the statutory provision and the BIA's approach received from Circuit Courts.[75]

The BIA first attempted to clarify the meaning behind the "one central reason" requirement two years after the REAL ID Act, in *Matter of J-B-N- & S-M-*.[76] Unpacking this new statutory requirement, the Board considered the statutory language of "at least one central reason" against the backdrop of previous "mixed motive" case law.[77] In particular, the Board noted that the use of "*at least*" when referring to "one central reason" supported the BIA's previous determination that persecutor need not be solely motivated by the protected characteristic.[78] While concluding that the REAL ID Act represented only a partial departure from *Matter of S-P-*,[79] the BIA in *J-B-N- & S-M-* held that under the "one central reason" standard, "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. . . . [I]t cannot be incidental, tangential, superficial, or subordinate to another reason for harm. Rather, it must be a central reason for persecut[ion]."[80]

When similarly called upon to address the meaning of a "central reason" in *Parussimova v. Mukasey*, the Ninth Circuit would go on to agree with the Board's interpretation that the term "central" required that the protected ground play more than "a minor role" in the mistreatment.[81] It noted that "a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist."[82] However, the Court also noted that because there may be multiple central reasons for persecution, "an asylum applicant need not prove which reason was

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[74] *See* H.R. Rep. NO. 109–72, at 161 (2005) ("As there are no explicit evidentiary standards for granting asylum in the INA, standards . . . have evolved through the case law of the Board of Immigration Appeals (BIA) and federal courts. . . . [And] different results have been reached in similar cases, depending on the court that hears the case.").

[75] Note that many of the BIA and Circuit decisions discussed below involve applicants claiming persecution on account of "membership to a particular social group," and, more particularly, to applicants claiming persecution on account of family membership. Statutorily, there is no distinction between the mixed-motive nexus standard for a particular social group of "family membership" as opposed to any of the other protected classes.

[76] *See* J-B-N- & S-M-, 24 I. & N. Dec. 208 (B.I.A. 2007).

[77] *Id.* at 212–13.

[78] *Id.* at 213; *see S-P-*, 21 I. & N. Dec. at 489 ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. . . An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur.").

[79] *J-B-N- & S-M-*, 24 I. & N. Dec. at 214 ("Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.").

[80] *Id.*

[81] Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009) (quoting *J-B-N- & S-M-*, 24 I. & N. Dec. at 214).

[82] *Id.* at 741.

dominant."[83] The Board would subsequently go on to agree with this Ninth Circuit elucidation of the REAL ID mixed motive standard in the Board's decision in *Matter of N-M-*.[84]

The Fourth Circuit continued to build on the mixed motive nexus inquiry, utilizing a "but-for" standard to establish centrality, which the BIA would—in later decisions—disavow.[85] For example, when considering the death threats Maydai Hernandez-Avalos received from Mara-18 gang members after she refused to permit her twelve-year-old son to join the gang, the Fourth Circuit utilized a but-for logical stream to hold that "Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened Hernandez, rather than another person, because of her family connection to her son."[86] In its analysis of the nexus requirement, the Fourth Circuit considered the critical question, "why she, and not another person, was threatened'?"[87] Under this view, if an applicant's membership to a protected group explains why the applicant, as opposed to anyone else, was targeted for persecution, then the applicant had satisfied the nexus requirement. The Fourth Circuit continued to use this framing of the centrality requirement in the various nexus cases that followed.[88]

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[83] *Id.*

[84] *N-M-*, 25 I. & N. Dec. at 531 (citing *Parussimova*, 555 F.3d at 741) (holding that in cases arising under the REAL ID Act, the "protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment. . . . [A]n alien must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist.").

[85] *See* L-E-A-, 27 I. & N. Dec. 40, 46 n.3 (B.I.A. 2017) (noting the Fourth Circuit's application of the nexus inquiry departs from the BIA's version).

[86] Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015) (noting the protected ground at the heart of this case was membership to the particular social group of family, and/or kindship.).

[87] *Id.*

[88] *See, e.g.*, Cruz v. Sessions, 853 F.3d 122, 130 (4th Cir. 2017), as amended (Mar. 14, 2017) ("[W]e hold that any reasonable adjudicator would have been compelled to conclude that Cantillano Cruz's membership in Martinez's nuclear family was a central reason *why she, and not another person,* repeatedly was persecuted by Avila over a two-year period." (emphasis added)); Zavaleta-Policiano v. Sessions, 873 F.3d 241, 250 (4th Cir. 2017) (holding that Zavaleta Policiano had satisfied the nexus requirement because "Zavaleta Policiano's relationship to her father is why she, rather than some other person, was targeted for extortion."); Diaz-Velasquez v. Barr, 779 F. App'x 154, 158 (4th Cir. 2019) ("We hold that the record in this case, measured against our binding precedent, compels the conclusion that family membership was 'at least one central reason' why Diaz-Velasquez, and not some other person, was targeted by MS-13, and therefore reverse the agency's contrary determination."); Salgado-Sosa v. Sessions, 882 F.3d 451, 458 (4th Cir. 2018) ("There is no meaningful distinction between whether Salgado-Sosa was threatened because of his connection to his stepfather, and whether Salgado-Sosa was threatened because MS–13 sought revenge on him for an act committed by his stepfather. However characterized, Salgado-Sosa's relationship to his stepfather (and to his family) is indisputably 'why [he], and not another person, was threatened' by MS–13." (alteration in original) (citation omitted)); Alvarez Lagos v. Barr, 927 F.3d 236, 250 (4th Cir. 2019) ("[A]s we have repeatedly emphasized, it is enough that the protected grounds be '*at least one* central reason' for the persecution — that is, one central reason, perhaps 'intertwined' with others, 'why [the applicant], and not some other person, was threatened.'" (alteration in original) (citation omitted); Perez-Morales v. Barr, 781 F. App'x 192, 196 (4th Cir. 2019) ("Rather than focusing on the persecutors' reasons for targeting the *group*, we ask whether membership in the group explains the decision to target the *applicant* instead of someone else."); Perez Vasquez v. Garland, 4 F.4th 213, 225 (4th Cir. 2021) ("The *actual, undisputed facts* in this case indicated that

In 2017, the BIA rejected the Fourth Circuit's approach in its precedential decision of *Matter of L-E-A-*,[89] where it attempted to refine the centrality requirement. When considering a family-based persecution claim, the Board noted that "the fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground."[90] The Board determined that the cartel did not target the son of the shopkeeper who had refused to sell the cartel's contraband because of his family membership, but rather, the cartel was motivated by a desire to increase its profits by selling contraband in the store.[91] "Any motive to harm the respondent because he was a member of his family was, at most, incidental."[92] Several other Circuit Courts have chosen to follow the BIA's approach.[93]

Recognizing the rift between the Board's approach and that of the Fourth Circuit, in 2018, the Attorney General's office ("AG") stepped in and attempted to redress this perceived "lack of statutory guidance," first in a 2018 decision, *Matter of A-B- I*,[94] and then more explicitly in a 2021 decision *Matter of A-B- II*.[95] In *Matter of A-B- I*, Attorney General Sessions noted that a key element for establishing persecution was "an intent to target a belief or characteristic" of the victim.[96] The opinion further provided that a "criminal gang may target people . . . simply because the gang inflicts violence on those who are nearby," which would not mean the victims were "targeted 'on account of' their membership in any social group."[97]

In *Matter of A-B- II*, Acting Attorney General Rosen attempted to clarify the requirements to establishing a nexus.[98] He framed his re-review of the matter as providing guidance to "whether a protected ground must be more than a but-for cause in order to be at least 'one central reason' for persecuting an asylum applicant."[99] The Attorney General specifically

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Petitioner's familial relationship to her husband—that is, her membership in her nuclear family—was at least one central reason why the gang targeted her for extortion.").

The Seventh Circuit seemingly adopted the Fourth Circuit's but-for framing. *See* Gonzalez Ruano v. Barr, 922 F.3d 346, 356 (7th Cir. 2019) (holding that a husband's familial relationship to his wife was "the reason he, and not someone else, was targeted").

[89] *See* L-E-A ("*L-E-A- I*"), 27 I. & N. Dec. 40, (B.I.A. 2017). *L-E-A- I* was subsequently vacated by Attorney General Bar and replaced with a far more restrictive decision. L-E-A- ("*L-E-A- II*"), 27 I. & N. Dec. 581 (A.G. 2019). However, following an administrative change in 2021, Attorney General Garland vacated *L-E-A- II*, which left *L-E-A- I* as undisturbed precedent. L-E-A- ("*L-E-A- III*"), 28 I. & N. Dec. 304 (A.G. 2021).

[90] *L-E-A- I*, 27 I. & N. Dec. at 45.

[91] *Id.* at 46. The BIA noted, in a footnote, the Fourth Circuit's application of the "centrality" on these "particular social group" cases diverged from its own nexus jurisprudence. *Id.* at 46 n.3.

[92] *Id.*

[93] *See generally, e.g.*, Orellana-Recinos v. Garland, 993 F.3d 851 (10th Cir. 2021).

[94] A-B- ("*A-B- I*"), 27 I. & N. Dec. 316 (A.G. 2018).

[95] A-B- ("*A-B- II*"), 28 I. & N. Dec. 199 (A.G. 2021).

[96] *A-B- I*, 27 I. & N. Dec. at 337.

[97] *Id.* at 339.

[98] *A-B- II*, 28 I. & N. Dec. at 200 ("I am referring and reviewing this matter to provide additional guidance concerning [] recurring issues in asylum cases involving applicants who claim persecution by non-governmental actors on account of the applicant's membership in a particular social group.").

[99] *Id.*

addressed the Fourth Circuit's but-for approach, arguing that "[e]ven if the protected characteristic is only used opportunistically, the Fourth Circuit appears to believe that a causal relation is sufficient to establish nexus as a matter of law."[100] The AG went on to require more than a but-for causal link between the persecution and the social group.[101] He argued that because the United States Supreme Court has established that the term "on account of" in cases involving anti-discrimination laws is synonymous with a but-for standard,[102] and because Congress chose to add the language "at least one central reason for persecuting the applicant," this addition must have been intended to create a "more than but-for causation" requirement.[103]

Attorney General Rosen, in *Matter of A-B- II*, further expressed support for the BIA's utilization of the version of the but-for test as described in *Matter of L-E-A-*, and stated that "[t]o establish the necessary nexus, the protected ground: (1) must be a but-for cause of the wrongdoer's act; and (2) must play *more* than a minor role—in other words, it cannot be incidental or tangential to another reason for the act."[104] Attorney General Rosen went on to describe that in *Matter of L-E-A-,* the Board defined "incidental" to include situations where the "wrongdoer has no animus against the protected characteristic, and the only significance of the protected characteristic to him is as a means to an end."[105] In such instances, the protected characteristic becomes only "incidental" to the persecutor's motivation.[106] By clarifying the two-prong test from *Matter of L-E-A-* and defining "incidental" as requiring a showing of "animus" so to be more than "as a means to an end," the Board added an additional step to the but-for inquiry.[107] As such, the Attorney General's decision in *Matter of A-B- II* flatly rejected the Fourth Circuit's but-for standard in favor for one that required *a bit more*.

This language, and the emphasis on animus, is reminiscent of earlier BIA precedent, where the Board required a malignant intent to establish persecution.[108] As the Ninth Circuit extrapolated in *Pitcherskaia v. INS*, the distinction between punishment and persecution lies in a difference of vantage points—looking at the perpetrator's reasoning as opposed to looking

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[100] *Id.* at 209.

[101] *Id.* at 211.

[102] Although the Supreme Court has not ruled on the meaning of "on account of" within the INA statute, the Attorney General cites a series of Supreme Court employment discrimination cases as standing for the premise that the proper principle of causation is but-for. *Id.*; *see* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (noting that a proper principle of causation for "because" is "but-for"); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (utilizing statutory construction and, in particular, dictionary definitions of "because of" in an ADEA suit to note that "because of" is defined as "by reason of" and "on account of" and therefore they all denote but-for causation).

[103] *A-B- II*, 28 I. & N. Dec. at 211.

[104] *Id.* at 208 (emphasis added).

[105] *Id.* at 209.

[106] *Id.*

[107] *Id.*

[108] *See* Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997); Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

at their result. "Punishment" implies that the perpetrator believed the victim committed some wrong, whereas "persecution" simply requires that the perpetrator has caused the victim harm.[109] As noted above, in *Kasinga*, the BIA affirmed that persecution does not require "punitive" or "malignant" intent.[110] Of course, the AG's purpose in *A-B- II* was not to define persecution, but rather to determine the significance of the REAL ID Act's inclusion of "central" within the refugee query. Regardless, the Attorney General's requirement of "animus" to find that membership in a protected group is "central" to a persecutor's motive shifts the Board's previous emphasis of a "malignant" or "punitive" intention from the "persecution defining" stage of analysis to the "on account of" stage. Using nuanced logic, the Board appears to be saying that persecution can occur even when a persecutor is not motivated by "punitive" or "malignant" feelings towards the protected class. However, to show that the protected class was one central reason for the persecution, the victim must show that the persecutor held "animus" or "malignant feelings" towards the protected characteristic.

The change in Administration following the 2020 presidential elections led to a re-consideration of this issue. Under President Biden, Attorney General Merrick Garland vacated *Matter of A-B- I* and *A-B- II*.[111] The decision instructed Immigration Judges and the BIA to follow pre-*A-B- I* precedent when adjudicating cases. In particular, the decision concluded that *Matter of A-B- II* had not been promulgated following a "thorough consideration of the issues involved."[112] Attorney General Garland decided to readdress the issues in "forthcoming rulemaking, where they can be resolved with the benefit of a full record and public comment."[113] However, since the 2020 vacation of the matter the Attorney General has not issued rules to address the issue.

More recently, in December 2023, the BIA again interpreted nexus utilizing *Matter of L-E-A-*'s two-prong analysis in *Matter of M-R-M-S.*[114] Despite the Board designating this decision as precedential, the opinion provides very little of the underlying facts, merely saying that the asylum applicants were Mexican citizens and members of a family who were forced off their land by a cartel.[115] The Immigration Judge denied the respondents' asylum claim because they failed to demonstrate a nexus between their persecution and their membership in the proposed particular social group of

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[109] *Pitcherskaia,* 118 F.3d at 647–48 ("Although we have held that unreasonably severe punishment can constitute 'persecution,' 'punishment' is neither a mandatory nor a sufficient aspect of persecution." (citation omitted)).

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

[111] A-B- ("*A-B- III*"), 28 I. & N. Dec. 307, 307 (A.G. 2021).

[112] *Id.* at 309.

[113] *Id.*

[114] M-R-M-S-, 28 I. & N. Dec. 757, 763 (B.I.A. 2023).

[115] *Id.* at 757–58.

their family membership.[116] The judge instead reasoned that the cartel targeted the family members out of a desire to control the family's land but was not motivated by their family membership.[117]

On appeal, the BIA took a position largely reminiscent of that outlined in *Matter of A-B- II* and noted that: "To be successful in an asylum claim based on family membership, an applicant must demonstrate that the persecutor's motive for the harm is a desire to overcome the protected characteristic of the family or otherwise based on animus against the family."[118] The Board opined that family-based claims of persecution by gangs are generally rejected, as courts view the family relationship as, "at most, incidental or tangential to more commonplace goals including financial gain and furthering, or preventing interference in, a criminal enterprise."[119] Relying on the reasoning introduced in *Matter of L-E-A-*, the Board determined the family membership was "tangential" because the record did not contain evidence that the cartel harbored specific animus against the Respondent's family for reasons other than their land ownership.[120] The Board honed in on the motives behind the cartel's actions and assigned "the impetus of [the Cartel's] conduct" as being a desire to control the family's land, rather than the family itself.[121] The Board suggested that even when a victim is persecuted because of their family membership and would not have been targeted but-for their family membership, this motivation becomes tangential if the persecutor only targeted the victim to achieve a different goal. [122]

III. BUT-FOR VERSUS BUT-FOR & A GOOD BIT MORE: "INCIDENTAL" AND THE ROLE OF PERSECUTION AS REQUIRING ANIMUS OR OVERCOMING A PROTECTED CHARACTERISTIC

Recent decisions of various Circuit Courts highlight the continuation of conflicting approaches taken to the nexus analysis and the role that animus

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[116] *Id.* at 758.

[117] *Id.* at 760 It is noteworthy that this case for withholding of removal comes from the Tenth Circuit, a circuit that has largely adopted the Board's interpretation of the "one central reason" standard.

[118] *Id.*

[119] *M-R-M-S-*, 28 I. & N. Dec. at 760.

[120] *Id.* at 762–63. It cannot be ignored that the Board did not provide specifics as to what the record contained, aside from generally alluding to Cartel actions to disposes land from a family. *Id.* at 757–58. In fact, the factual and procedural history section is relatively short: "The respondents are natives and citizens of Mexico, where they lived together with the lead respondent's grandson. A criminal cartel forced them off their land because the cartel wanted the land for its own purpose. The cartel killed the lead respondent's grandson for unknown reasons, although the respondents believed it was related to the cartel's efforts to obtain their land. The cartel also forced other families off land in the same area." *Id.* at 757–58

[121] *Id.* at 763.

[122] *Id.* at 762. This language largely echoes, *Matter of A-B-II*'s definition of incidental as being when a "wrongdoer has no animus against the protected characteristic, and the only significance of the protected characteristic to him is as a means to an end." *A-B- II*, 28 I. & N. Dec. 199, 209 (2021).

plays in mixed motive cases.[123] In a recent turn of events, four Circuits tackling guerilla recruitment and religion- or ethnicity-based persecution claims have chosen to apply a broader but-for nexus standard than that promulgated by the BIA. Specifically, these Circuits have rejected the BIA's requirement that a persecutor must harbor direct "animus" or a desire to "overcome the protected characteristic," in order to establish that a persecutor's motive is more than "a means to an end" and therefore "one central reason" for the persecution.[124] The implications of these Courts' logic, particularly the rejection of an "animus" or "overcoming" requirement in the nexus inquiry, raises questions as to the potential applicability of this but-for approach in the context of forcible gang recruitment by ethnocentric or religiocentric militant organizations.[125] The following section will briefly outline and describe the importance of a series of recent decisions of the Third, Fourth, Fifth, and Eleventh Circuits. Each of these decisions utilize a but-for logic to find the applicants had established nexus between their persecution and their protected characteristic, even in cases where the persecutors did not harbor overt animus towards the applicant's protected characteristic. After that, I will discuss the potential applicability of this nexus to aid victims of forceable recruitment efforts by ethnocentric or religiocentric militant organizations in establishing the requisite nexus to their persecution.

A. Using Saban-Cach as "Bait": Indigenous-ness as More Than Incidental

On January 25, 2023, the Court of Appeals for the Third Circuit issued a ruling in *Saban-Cach v. Attorney General*.[126] Selvin Heraldo Saban-Cach, a Guatemalan of Kaqchikel Mayan Indigenous ethnicity, was persecuted at the hands of a local gang associated with the international MS-13 gang.[127] Saban-Cach was targeted for recruitment because the gang believed that they could use him—in particular—his Indigenous identity as "bait."[128] Saban-Cach testified that he, his grandmother, parents, and siblings were the only Indigenous people living in Montufar[129] and that the gang members aggressively pursued him out of a desire to take advantage of his Indigenous status.[130] Gang members harassed, beat, and insulted Saban-Cach in an

[123] *See* discussion *infra* Sections IV.A–D.

[124] *See* discussion *infra* Sections IV.A–D.

[125] Asylum claims related to gangs have been submitted by individuals who actively resist recruitment and gang-associated activities. *See* Shane Dizon & Pooja Dadhania, *Gang-Related Asylum Claims*, IMMIGR. L. SERV. 2d. (West) §10:163 (2024). Within immigration proceedings, these types of asylum applicants encounter challenges in establishing the basis for their asylum claims and establishing the nexus between their gang resistance and the persecution they have experienced or anticipate facing due to the forced recruitment efforts against them. *Id.* Additionally, they struggle to demonstrate that the government is either unwilling or unable to provide them with adequate protection. *Id.*

[126] Saban-Cach v. Att'y Gen., 58 F.4th 716, 721 (3d Cir. 2023).

[127] *Id.* at 720–22.

[128] *Id.* at 732.

[129] *Id.* at 720 n.1.

[130] *Id.* at 732.

attempt to coerce him into joining the gang.[131] The gang members warned Saban-Cach that he would continue to be beaten until he agreed to join their faction of the MS-13 gang.[132] Despite attempting to relocate within Guatemala, Saban-Cach was unable to escape the attacks from gang members.[133] He eventually fled Guatemala and entered the United States in 2015.[134] Saban-Cach also testified that his immediate family members had been subjected to assaults by gang members angered by Saban-Cach's escape.[135]

The Immigration Judge found Saban-Cach's testimony to be credible but held that he had failed to establish a likelihood of persecution and determined that even if the harm rose to the level of persecution, Saban-Cach had not established that the persecution was "on account of" a protected ground.[136] The Judge found that "while the gang may have sought the respondent's race as being useful to their agenda, the gang only harmed [him] when [he] refused to succumb to those recruitment efforts."[137] As such, the Judge determined that even though the gang viewed Saban-Cach's Indigenous status as desirable for their aims, Saban-Cach was not harmed on account of his being Indigenous but rather because he refused to join.[138] On appeal, the BIA affirmed the rulings of the Immigration Court.[139]

Following a careful review of the record, the Third Circuit disagreed with the Immigration Court and BIA's analysis, vacated the decision, and remanded the case.[140] The Circuit Court found that Saban-Cach had established membership to a particular social group as an Indigenous person in Guatemala,[141] and highlighted Saban-Cach's testimony that the gang wished to recruit him as "bait."[142] The Court reasoned that Saban-Cach had "established membership in a particularized group as evidenced from the

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[131] *Id.* at 720–21. The Third Circuit Court notes that "[t]he gang began to harass and act aggressively toward Saban-Cach, including insulting him based on his ethnicity. Gang members threw stones at him and kicked him. His father stated that '[m]any times [Saban-Cach] came home with cuts and bruises from getting beaten up by [the gang].'" *Saban-Cach*, 58 F.4th at 720. The record further provides that "Saban-Cach was physically attacked on at least four occasions, and he was threatened numerous other times." *Id.* at 728.

[132] *Id.*

[133] *See id.* at 721 ("Saban-Cach showed the Immigration Judge multiple scars from these attacks. These scars are on his right eyebrow, mid chest, right arm, and lower back.").

[134] *Id.* at 722.

[135] *Id.* ("Saban-Cach testified that, after he left Guatemala, the gang kidnapped, beat, and raped his 16-year-old sister. They held her at a house for more than a month. 'The gang members told her that since [Saban-Cach] escaped[, his] family was going to have to pay.'").

[136] *Saban-Cach*, 58 F.4th at 722.

[137] *Id.* at 723.

[138] *Id.*

[139] *Id.* It is notable that the BIA, agreed with the IJ, and found that Saban-Cach had not established a likelihood of persecution. *Id.* Hedging its analysis at this point, the Board declined to address the remaining issues, "including whether [the] proposed particular social group was cognizable and whether [Saban-Cach] demonstrated the requisite nexus between past harm and future fear and a protected ground under the Act." *Id*. at 731.

[140] *Saban-Cach*, 58 F.4th at 737.

[141] *Id.* at 731–32.

[142] *Id.* at 732.

gang's persecution of him for refusing recruitment that was attempted *because* he was of Kaqchikel Mayan indigenous ethnicity."[143] Therefore, the Court's analysis acknowledged the root cause of Saban-Cache's persecution—the gang member's desire to recruit Saban-Cach *because* he was an Indigenous young man—established a central reason for the persecution that followed when he refused to join.[144] Under the BIA's theory, Saban-Cach's indigenous status likely would have been viewed as merely "incidental" to the harm, and the gang's desire to use Saban-Cach as "bait" in his capacity as an indigenous man, demonstrated they possessed "no animus against the protected characteristic" or any desire to "overcome" this characteristic and instead appeared to view this characteristic as simply a "means to an end."[145] By rejecting this framing, the Third Circuit appeared to step away from the reasoning of *Matter of L-E-A* and the now-vacated *Matter of A-B-* to utilize a more lenient but-for standard when considering the nexus between the gang's motivation and Saban-Cach's protected class.

B. Using Chicas-Machado as a Scout: Chilling religious expression

The Fourth Circuit similarly addressed a situation where the persecutor viewed the victim's protected class as an asset or desirable trait in *Chicas-Machado v. Garland*.[146] Odalis Mireida Chicas-Machado, a citizen of El Salvador and devout evangelical, was repeatedly harassed by MS-13 gang members between 2015 and 2016.[147] In 2016, gang members attempted to recruit Chicas-Machado and threatened her with death.[148] The gang demanded that Chicas-Machado notify them of when a police car passed by "because no one would suspect she would be working with the gang based on her activity and conduct with the church."[149] Although the Immigration Judge found Chicas-Machado to be credible, the Judge determined that she had not met the nexus requirement because she failed to establish that her persecution occurred *on account of* her religion.[150]

On appeal, the BIA affirmed the Immigration Judge's opinion and found that Chicas-Machado's "evangelical Christian faith was tangential to the gang's motivation for threatening her."[151] The Board determined that the gang members saw Chicas-Machado as "an asset they could exploit to further their criminal enterprise."[152] They noted that because the gang's persecution "was not motivated to *stop or hinder* her from practicing her

[143] *Id.*
[144] *Id.*
[145] *See A-B- II*, 28 I. & N. Dec. 199, 209 (A.G. 2021); *Saban-Cach*, 58 F.4th at 732.
[146] Chicas-Machado v. Garland, 73 F.4th 261 (4th Cir. 2023).
[147] *Id.* at 263–64 (also noting that Chicas-Machado worked as secretary of the Pentecostal Church in her community).
[148] *Id.* at 264.
[149] *Id.* at 264–65.
[150] *Id.* at 264.
[151] *Id.* at 274 (Agee, J., concurring in part and dissenting in part).
[152] *Id.* at 266 (majority opinion).

religion," Chicas-Machado had not established the requisite nexus between the persecution and her religion,[153] and, as a result, her persecution was not on account of her religion.[154] The Board's determination that the gang's attempted exploitation of Chicas-Machado's religion was "tangential" because the gang harbored no animus towards her religion similarly mirrors the "means to an end" framework provided in *Matter of L-E-A* and *Matter of A-B-II*.[155]

In reversing the BIA decision, the Fourth Court maintained its tradition of a broader but-for nexus application and rejected "excessively narrow readings" of the "on account of" requirement.[156] The Court cited the but-for approach it previously outlined in *Hernandez-Avalos v. Lynch*,[157] and noted that nexus and the one central reason standard "do[] not depend on the *ultimate goal* of the persecutors or on *why* the protected ground led them to persecute an applicant,"[158] rather it requires a showing of that Chicas-Machado's religious practice is why she, and not some other person, was targeted.[159]

Additionally, the opinion identified harms resulting from the targeted forced recruitment efforts by the MS-13 gang members, even when the gang members viewed her religious expression as an asset. The Court noted that "[b]eing coerced by death threats to assist a gang because its members view her religiosity as an asset is plainly a 'serious measure[] of discrimination.'"[160] The dissenting opinion disagreed that Chicas-Machado was persecuted on account of her religion and confined religious persecution cases to those where the persecutor intended to "restrict[] or suppress[]" the victim's ability to partake in their religious activities.[161] The dissent took issue with the view that Chicas-Machado suffered religious persecution because, rather than suppressing her practice—the classic religious persecution claim—here, the gang desired to encourage Chicas-Machado's practice.[162] However, the majority recognized that even in instances where gang members viewed a protected characteristic as an asset and sought to encourage it, individuals would likely experience a chilling effect on their protected characteristics as they attempted to make themselves out to be less desirable recruits.[163] The majority noted that these chilling effects,

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[153] *Chicas-Machado,* 73 F.4th at 269.

[154] *Id.* at 264.

[155] *See id.*, at 274, 288 (Agee, J., concurring in part and dissenting in part). *See generally*, L-E-A-, 27 I. & N. Dec. 40, 45 (B.I.A. 2017); *see also A-B- II,* 28 I. & N. Dec. 191, 209 (A.G. 2021).

[156] *Chicas-Machado*, 73 F.4th at 266.

[157] Hernandez-Avalos v. Lynch*,* 784 F.3d 944, 950 (4th Cir. 2015).

[158] *Chicas-Machado*, 73 F.4th at 269.

[159] *Id.* at 267.

[160] *Id.* at 270 (second alteration in original).

[161] *Id.* at 269–70.

[162] *Id.* at 279 (Agee, J., concurring in part and dissenting in part) ("No suppression or attempted suppression of religious expression happened here. . . . [T]his case bears none of the hallmarks of a typical religious-persecution case.").

[163] *Id.* at 270 (majority opinion).

regardless of how they are brought about, are what Congress specifically sought to protect against through its various refugee protections.[164]

C. Argueta-Hernandez's relationship with God: Religiousness as a social benefit

In the same year another religion-based persecution claim was decided in the Fifth Circuit. Argueta-Hernandez, President of Evangelism at his Christian church in El Salvador, was the victim of death threats and harassment by MS-13 gang members.[165] Argueta-Hernandez testified that MS-13 gang members both attempted to recruit him to collaborate with them and to extorted him.[166] After he refused, he and his family became the target of repeated death threats and harassment by gang members.[167] Argueta-Hernandez noted that a gang leader told him "[t]his is why we are doing this to you, because you are Christian and you are good with God and that is why we looked for you."[168] After Argueta-Hernandez refused to collaborate with gang member demands, a gang hitman attempted to run his son off the road.[169] Argueta-Hernandez testified that Salvadorian officials informed him that he was targeted by MS-13 gang members "because he was a Christian," recommended that he and his family flee the country, and asked Argueta to sign a waiver of liability for the Salvadoran police should he be tortured by MS-13.[170] For a three-week span, Salvadorian officials detained Argueta-Hernandez in a safe house before sending him in a taxi to the Guatemalan border.[171]

Despite the Immigration Judge finding Argueta-Hernandez's testimony—including his claims that MS-13 targeted him for recruitment due to his religion, and the attempted murder of his son—and other corroborative evidence to be credible, the Immigration Judge denied his application for withholding of removal.[172] The Judge determined that because MS-13 gang members never explicitly stated that Argueta-Hernandez was being targeted as a result of his religion, he was not harmed as a result of his religion.[173] Instead, the Court concluded that Argueta was targeted due to "his reputation as a good person . . . in the community."[174]

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[164] *Chicas-Machado*, 73 F.4th at 270 ("[T]argeting a victim for persecution because of her religion has a chilling effect, even when the threat or persecution is not delivered in the form of an ultimatum or command.").

[165] Argueta-Hernandez v. Garland, 87 F.4th 698, 703 (5th Cir. 2023).

[166] *Id.* at 704.

[167] *Id.* at 703–04.

[168] *Id.* at 711.

[169] *Id.* at 703.

[170] *Id.* at 703–04.

[171] *Argueta-Hernandez,* 87 F.4th at 703–04.

[172] *Id.* Withholding of removal is an alternative avenue of relief, accessible to those who may be ineligible for asylum, which mandates demonstrating a *likelihood* of facing persecution grounded in one of the five protected categories. 8 CFR § 208.16(a)–(b).

[173] *Argueta-Hernandez*, 87 F.4th at 704.

[174] *Id.* (omission in original).

On initial appeal, the BIA affirmed the Immigration Judge's findings and noted that "'the gang may have had an enhanced interest in exploiting [Argueta-Hernandez] because of the privileges he enjoyed as a Christian' but that 'is insufficient to establish that [his] religion and membership in his proposed particular social groups were *central reasons* that the gang subsequently threatened to harm him.'"[175]

On further appeal, the Fifth Circuit reversed the BIA's decision and remanded the case.[176] The Fifth Circuit found that the Immigration Judge and the BIA's assertion that a persecutor must explicitly reference their victim's religion for the victim to suffer persecution was legally unsupported and, therefore, erroneous.[177] The Court further agreed with Argueta-Hernandez's argument that the BIA erred in requiring that he show that MS-13 harmed him to overcome the protected characteristic.[178]

The Fifth Circuit specifically addressed the role of animus in the nexus inquiry in a footnote of the majority opinion.[179] The BIA had asserted that even if the applicant's religion was a "*potential reason[] for the gang's enhanced interest in extorting and collaborating with the applicant*, the applicant has not provided sufficient evidence to establish that the gang harmed or will harm him in order to overcome a protected characteristic."[180] The Board opined that Argueta-Hernandez had not been prevented from preaching or exercising his religious rights.[181] The Fifth Circuit disagreed with the BIA's proposition and hypothesized that a gang could choose to extort a religious person *because* they believe that their religiousness means they have some additional social, political, or economic benefit, "[a]nd when, as here, a religious individual refuses to assist that gang because of his beliefs, the BIA and [Immigration Judge] should consider that as substantial and critical evidence supporting the petitioner's claim" of religious persecution.[182]

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[175] *Id.* (alterations in original).

[176] *Id.* at 714.

[177] *Id.* at 709 ("[T]the extent that the BIA conflates the severity of harm and nexus analyses, it 'committed a legal error by requiring that [he] prove' motive to establish persecution." (alteration in original) (quoting Eduard v. Ashcroft, 379 F.3d 182, 192 (5th Cir. 2004))).

[178] *Id.* at 709, 711.

[179] *Argueta-Hernandez*, 87 F.4th at 709 n.6 ("It is not clear whether the BIA intended to invoke a mixed-motive analysis here, but if so, the BIA should have identified how substantial evidence regarding religious persecution may be whittled to an 'enhanced interest in extorting and collaborating.' The facts in this case could suggest otherwise. For example, a gang could choose to extort an individual based on the perceived social, political, or economic benefits that a religious individual may have. And when, as here, a religious individual refuses to assist that gang because of his beliefs, the BIA and IJ should consider that as substantial and critical evidence supporting the petitioner's claim.").

[180] *Id.*

[181] *Id.* at 704.

[182] *Id.* at 709 n.6. In *Rivera v. Garland*, the Eighth Circuit endorsed the Fifth Circuit's decision in *Argueta-Hernandez* and the Fourth Circuit's nexus analysis in *Chicas-Machado*. Rivera v. Garland, 108 F.4th 600, 607 (8th Cir. 2024). There, Jose Maria Rivera, a pastor at a Christian Church in El Salvador, and his family, sought asylum after they were persecuted by gang members because Rivera's preaching had induced a gang member to quit the gang. *Id.* The Court found that even if the "ultimate 'trigger'" for

D. Azurdia-Hernandez's Christian Trustworthiness: When Positive Attributes Serve a Persecutor's Goals

The Eleventh Circuit addressed a similar religion-based claim in a non-precedential decision it issued in 2020.[183] In that case, gang members attempted to coerce Kenneth Azurdia-Hernandez and his mother to launder money for them because they were evangelical Christians, and, therefore, gang members believed they were trustworthy.[184] The Eleventh Circuit expressly rejected the Immigration Judge's determination that because the gang members "viewed their status as Evangelical Christians as a positive attribute rather than as a negative attribute," this "would not lead the cartel members to harm them in any way," and criticized the BIA's failure to consider the religious-based claim.[185]

Although the Eleventh Circuit did not decide the issue as a matter of law, it ruled that the BIA and Immigration Judge had failed to give reasoned consideration to the religion-based persecution claim and directed the BIA to reconsider the issue on remand.[186] Without deciding the issue, the Court stated:

> we cannot rule out—as a matter of law—that an asylum applicant might demonstrate religion-based persecution based on evidence that he was targeted for forced labor or some other oppressive treatment because the persecutor perceived some positive attribute (honesty, diligence, or such) associated with the persecuted person's religion that would serve the persecutor's goals.[187]

This opinion, which predates those out of the Third, Fourth, and Fifth circuits, presents a similar willingness to accept a framing of "persecution on account of a protected class" where a persecutor views a protected characteristic as an asset.

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the gang members' attack on Rivera was that an evangelized gang member wanted to leave the gang, religion could still be an "underlying central reason for the attack." *Id.* (citing Chicas-Machado v. Garland, 73 F.4th 261, 268 (4th Cir. 2023)). The Court disagreed with the BIA's narrow view of nexus and its failure to consider the casual relationship between Rivera's religion and his work to convince gang members to leave the gang. *Rivera*, 108 F.4th at 608. The Court admonished the BIA to bear in mind that "even if a protected ground was not the final 'trigger' for persecution, persecution may, at least in some circumstances, be 'on account of' religion if it is the practice of an individual's religion which leads to him being targeted in the first instance." *Id.* at 609.

[183] Azurdia-Hernandez v. U.S. Att'y Gen., 812 Fed. Appx. 935 (11th Cir. 2020).

[184] *Id.* at 937.

[185] *Id.* at 938.

[186] *Id.* at 940.

[187] *Id.* at 939.

IV. WHAT DOES THIS MEAN FOR THE RECRUITMENT EFFORTS BY ETHNOCENTRIC AND RELIGIOCENTRIC MILITANT ORGANIZATIONS?

The but-for reasoning utilized by these courts opens up an avenue of potential arguments for relief in another line of asylum cases, which to date, remain largely hindered by the Supreme Court's ruling in *INS v. Elias-Zacarias*: forcible recruitment efforts by ethnic or religious militant or guerrilla organizations. Victims of forceable recruitment efforts by ethnic or religious organizations often bring forward claims under a theory of persecution on account of political opinion.[188] The victims argue that their refusal to join these violent organizations reflects a political opinion, opposing the organizations. However, as demonstrated by the Supreme Court's opinion in *INS v. Elias-Zacarias*, this argument rarely succeeds because victims need to establish both that their refusal was, in fact, political and that the persecution occurred because of this political opinion rather than simply because of the refusal to join the group.[189] The Circuit Courts' acceptance of nexus arguments where persecutors viewed a protected characteristic as an asset raises the potential applicability of these arguments in circumstances where religious or ethnic individuals are being forcibly recruited by ethnocentric or religiocentric organizations. An analysis of the facts of several cases involving the recruitment efforts of ethnic or religious militant or guerrilla organizations is beneficial to extrapolate the confines and reach of these Circuit Courts' but-for nexus reasoning.

In 2016, the Eighth Circuit in *Ngugi v. Lynch*[190] considered a case involving Paul Ngugi, an ethnic Kikuyu who was subjected to forceable gang recruitment by the Mungiki, a violent Kikuyu sect in Kenya.[191] Ngugi petitioned for asylum based on persecution on account of religion, political opinion, and his membership to the particular social group of Kikuyus who resist recruitment by the Mungiki.[192] On appeal, the Eighth Circuit rejected these claims and cited *INS v. Elias-Zacarias* as "noting that petitioner who resisted recruitment by guerillas 'has to establish that the record . . . compels

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[188] *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157, 170 (3d Cir. 2003) ("Lukwago does not argue that the LRA persecuted him because of his race, religion or nationality, and he failed to demonstrate that the LRA's past abduction and persecution of him was on account of his political opinions."); R-, 20 I. & N. Dec. 621, 623 (B.I.A. 1992) ("As a primary matter, we find that there is no persuasive evidence in the record to demonstrate that either the Sikh militants or the police who confronted the applicant sought to punish him on account of one of the grounds enumerated in the Act."); Ngugi v. Lynch, 826 F.3d 1132, 1135–36 (8th Cir. 2016) (arguing persecution on account of political opinion, religion, and particular social group).

[189] *See* Ericka Welsh, *The Path of Most Resistance: Resisting Gang Recruitment as a Political Opinion in Central America's Join-or-Die Gang Culture*, 44 PEPP. L. REV. 1083, 1105 (2017) ("[M]any courts relied on *Elias-Zacarias* to deny political asylum to applicants who resisted gang recruitment, asserting that resistance is not a political opinion."). *See also*, INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) (holding that to establish the requisite nexus for persecution on account of political opinion in forceable recruitment cases, respondents must show that: (1) their refusal to join was politically motivated and (2) that the gang or guerilla organization was politically motivated).

[190] *Ngugi*, 826 F.3d at 1132.

[191] *Id.* at 1135.

[192] *Id.*

the conclusion that he has a "well-founded fear" that the guerillas will persecute him *because of* [a protected ground], rather than because of his refusal to fight with them.'"[193] Mr. Ngugi did not present the argument—and therefore, the court did not assess—whether Mr. Ngugi had been persecuted by the Mungiki even before they punished him for refusing their recruitment effort, when they targeted him to join *because of* his Kikuyu ethnicity.[194]

In the 1992 BIA case *Matter of R-,*[195] the applicant, a Sikh man from the Punjab region of India, was subjected to forceable recruitment efforts by a group of Sikh Militants called the All-India Sikh Student Federation.[196] The applicant appealed his asylum denial and, amongst other claims, argued that the violence he suffered at the hands of the Sikh militant group amounted to persecution on account of his political opinion.[197] Relying on the reasoning of *Elias-Zacarias*, the BIA rejected his argument, noting that it is the political opinion of the victim, and not the persecutor, that is at play here, and "the mere resistance of forced recruitment is not an 'expression of political opinion hostile to the persecutor.'"[198] The Court did not consider—as the petitioner did not argue—whether the All-India Sikh Student Federation subjected the applicant to persecution even before they punished him for refusing recruitment, when they tried to force him to join because he was Sikh.[199]

Similarly, in *In re S-P-,* the applicant, an ethnic Tamil, had been kidnapped and forced to work as a welder for the Liberation Tigers of Tamil Ealam ("Tigers") at their military camp.[200] During an attack on the camp by the Sri Lankan Army, he was captured and subsequently tortured by the Army.[201] The BIA granted asylum to the applicant under a theory of imputed political opinion, premised on the torture that the applicant experienced at the hands of the Sri Lankan military.[202] While the applicant was ultimately successful in his petition, it is useful to consider the potential of another argument not raised: whether the very targeting of the applicant for kidnapping and forced labor by the Liberation Tigers of Tamil Ealam would be sufficient to establish persecution on account of ethnicity, as he was likely only targeted because he was ethnically Tamil.

Considering the ethnocentric or religiocentric motivations of these three militant groups, I pose the question: Does it matter that the militants

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[193] *Id.* at 1137 (alteration in original) (omission in original) (citing *Elias-Zacarias*, 502 U.S. at 483).
[194] *Id.* at 1138.
[195] R-, 20 I. & N. Dec. 621(B.I.A. 1992).
[196] *Id.* at 622.
[197] *Id.* at 622–23. The applicant also argued that he was persecuted on account of his political opinion and religion by local police who mistook him for a militant; the BIA was similarly unpersuaded by the arguments. *Id.* at 622.
[198] *Id.* at 623–24.
[199] *Id.* at 628.
[200] S-P-, 21 I. & N. Dec. 486, 487 (B.I.A. 1996).
[201] *Id.* at 487–88.
[202] *Id.* at 496–97.

likely only targeted the respondents *because* they were Sikh, Tamil, or Kikuyu? Rather than targeting any able-bodied man, as seen in *INS v. Elias-Zacarias*, the All-India Sikh Student Federation in *Matter of R-* clearly found the applicant to be a desirable recruit because of this shared faith.[203] The same focus on the protected characteristic of the victim can be seen in *Matter of S-P-*, where the Tamil Tigers would likely not have kidnapped the applicant had he not been Tamil,[204] and in *Ngugi v. Lynch* where the Mungiki sought out Mr. Ngugi out *because* he was Kikuyu.[205] As noted, the applicants did not raise these claims on appeal, and so this theory of nexus escaped analysis by the Courts. However, I argue that the recent Circuit Court opinions appear to provide some support for applicants in similar situations to argue—using an "asset" framing of nexus—that they were persecuted on account of their religion or ethnicity, when these ethno-nationalist militant and religio-militant organizations forcibly recruited them.

In circumstances such as these, the militant group's desire to recruit people of shared religious or ethnic background can hardly be viewed as tangential to their reasons for targeting their victims. In fact, these situations appear to be in keeping with *Matter of L-E-A-*'s idea that key to establishing persecution is "an intent to target the belief or characteristics."[206] Even in the obvious absence of animus or any facial desire to "overcome," the All-India Sikh Student Federation's and the Tigers' desire to fill their ranks with *Sikh* and *Tamil* individuals respectively is central to their cause (as is obviously demonstrated by their very names).[207] This situation is evidently the same for the Mungiki who desire to recruit ethnic Kikuyus and for similarly situated militant organizations who self-identity along ethnic or religious lines.[208] Organizations who purport an ethnic or religious superiority rationale for their actions bear an obvious preference and intent to target individuals who possess those protected characteristics for forceable recruitment, as opposed to targeting any able-bodied individual.

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[203] *R-*, 20 I. & N. Dec. at 622.

[204] *S-P-,* 21 I. & N. Dec. at 487.

[205] Ngugi v. Lynch, 826 F.3d 1132, 1135 (8th Cir. 2016)

[206] *See generally* L-E-A-*,* 27 I. & N. Dec. 40 (B.I.A. 2017).

[207] Liane Rothenberger, Kathrin Müller & Ahmed Elmezeny, *The Discursive Construction of Terrorist Group Identity*, 30 TERRORISM & POL. VIOLENCE 428, 442 (2018); IMMIGRATION AND REFUGEE BOARD OF CANADA, THE ALL-INDIA SIKH STUDENT FEDERATION (AISSF), INCLUDING ITS OBJECTIVES AND ACTIVITIES, AND ITS RELATIONSHIP WITH THE INTERNATIONAL SIKH YOUTH FEDERATION (ISYF) (APRIL 2006 – MARCH 2009) (Apr. 16, 2009), https://www.irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=452307.

[208] IMMIGRATION AND REFUGEE BOARD OF CANADA, KENYA: THE MUNGIKI GROUP, INCLUDING ORGANIZATIONAL STRUCTURE, LEADERSHIP, MEMBERSHIP, RECRUITMENT AND ACTIVITIES; THE RELATIONSHIP BETWEEN THE GOVERNMENT AND THE GROUP, INCLUDING PROTECTION OFFERED TO ITS VICTIMS (2016 – APRIL 2018) (Apr. 16, 2018), https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=457455&pls=1. Consider how former militia groups in Afghanistan—primarily in heterogeneous districts—trended towards formation around ethnic identity and, as a result, "recruitment coincid[ed] with ethnicity and party affiliation." EUROPEAN ASYLUM SUPPORT OFFICE, EASO COUNTRY OF ORIGIN INFORMATION REPORT: AFGHANISTAN RECRUITMENT BY ARMED GROUPS 36 (2016). For example, Hezb-i Islami and Ettehad-i Islami were made up of largely Pashtuns, Jamiat-i Islami was comprised of Tajiks, and Jumbesh-i Melli held a base largely of Uzbeks and Turkmen. *Id.*

The degree to which a characteristic is valued to be an "asset" is particularly relevant in these circumstances. Of course, one might distinguish between the role of the "asset" when a religious or ethnic militant organization is recruiting versus when a secular, non-ethno-nationalist group is recruiting. For example, there is a distinction between a gang that recruits individuals for their protected characteristic because it is "other" and therefore valuable in its scarcity, versus an organization that instead recruits *because* the organization's goal is coalesced around this shared protected attribute. However, I argue that, at best, this is a distinction without a difference. Under the but-for reasoning of the recent Circuit Court decisions discussed, the nexus analysis and outcome fundamentally remain the same. In both circumstances, individuals have been subjected to forceable recruitment efforts *because* of their religious views or ethnic identity. The applicants would not have been targeted for recruitment in any of these situations *but for* the identification, and subsequent desiring, of these protected characteristics; if they had not been targeted for recruitment, they would not have been punished for resisting.

The perspective that a persecutor's "positive" or desiring view of a protected characteristic signifies that a victim's subsequent persecution cannot be *because* of the characteristic, appears to conflate these positive sentiments with an inability to harm. In reality, this perspective ignores the repercussions of perceived "desirability" on the victim's expression of their protected characteristic. Such repercussions include harm from the chilling effect whereby an individual is deterred from expressing their religious or ethnic identity so as to lessen their desirability. The Court in *Chicas-Machado* recognized that the gang's forceable recruitment tactics posed the threat of chilling Ms. Chicas-Machado's religious practices even absent a direct order from the gang that she stop practicing her religion.[209] When analyzing the religious persecution claim and the resulting suppression of Chicas-Machado's religious practice, the Court focused on the *effect* of the persecutor's action rather than looking simply the intent.[210]

An *effect*-focused approach to analyzing religious suppression and chilling effects appears equally applicable in instances where the persecutors and victims share the same protected characteristic. In the context of religiocentric militant organizations, a victim who recognizes the recruitment criteria of these organizations to be centered around a shared faith may likely feel pressure to suppress or dampen their religious expression to de-idealize their candidacy for recruitment. This remains true for victims of forced recruitment by an ethno-nationalist militant group; these victims may similarly feel forced to dampen their ethnic identity and

[209] Chicas-Machado v. Garland, 73 F.4th 261, 270 (4th Cir. 2023) ("[T]argeting a victim for persecution because of her religion has a chilling effect, even when the threat or persecution is not delivered in the form of an ultimatum or command.").

[210] *Id.*

be less willing to claim or express their ethnic identity out of fear of drawing the group's interest. Even in situations where ethnic identity is overtly tied to non-changeable bodily features, the chilling harm can still occur. The multi-faceted nature of ethnic identity, and particularly in expressions of ethnic identity, permits the chilling to manifest in the suppression of ethnic expressions, such as language, names, clothing, music, or food. As a result, the chilling-effect, which the Chicas-Machado's court framed as "exactly the harm from which Congress seeks to protect asylees and refugees,"[211] remains present even in the "asset"-incentivized recruitment efforts of both religiocentric or ethnonationalist militant organization.

Beyond the threat of a chilling effect that exists regardless of whether a certain protected characteristic is viewed as "positive," I further posit that it is misleading to even characterize the attitude these organizations harbor as "positive." Central to how *positive* a persecutor views a particular characteristic is the persecutor's belief that they can *control* said characteristic. In desiring to use Saban-Cache's indigenous-ness as "bait," the gang believed that they could control the expression of his identity to their benefit. When Argueta-Hernandez and Chicas-Machado were singled out in their respective communities for their religious practices, gang members sought to control their religious expression to the gang's own advantage.[212] These instances make clear that the persecutors only valued the attributes they sought to recruit to the degree to which they believed this characteristic could be controlled.

The desire to "control" and make subservient the victim's identity is not only present when non-ethnic or secular organizations want to recruit a certain characteristic, this control factor remains present regardless of whether the persecutor purportedly shares this identity with the victim or not. In circumstances of ethnocentric or religiocentric militant organizations who view a certain ethnic or religious characteristic as central to their own identity,[213] the organization's desire to recruit individuals who share this "positive" characteristic is limited by their belief that the victim's identity can be controlled to conform with how the organization *believes* their shared ethnic or religious identity should be expressed.[214] For example, a Sikh

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[211] *Id.*

[212] *Id.* at 264–65 (noting that Chicas-Machado was targeted "because no one would suspect she would be working with the gang based on her activity and conduct with the church."); Argueta-Hernandez v. Garland, 87 F.4th 698, 711 (5th Cir. 2023) (noting the gang told the petitioner that they targeted him "because you are Christian and you are good with God").

[213] Research on the identity formation of terrorist organizations note that ethno-nationalist groups, such as LTTE, "stress ethnic identity as a unifying force, which forms 'a social entity, with their own history, traditions, culture, language and traditional homeland,'" whereas religio-centric organizations utilize "a common set of beliefs (or morals)." Rothenberger, Müller & Elmezeny, *supra* note 207, at 442.

[214] Niels Terpstra & Georg Frerks, *Rebel Governance and Legitimacy: Understanding the Impact of Rebel Legitimation on Civilian Compliance with the LTTE Rule*, 19 CIVIL WARS 279, 290 (2017) ("In its struggle for a hegemonic position in the North and East[,] the LTTE assumed the authority of defining what 'Tamilness' was, and presented itself as the 'sole representative' of the Tamil nation."). *See*

individual and a Sikh militant group, though both technically identifying as "Sikh," may have fundamental disagreements about the permissibility of violence in their religion. Regardless of potential ideological differences, a militant organization may still choose to recruit the Sikh individual under the premise that they can forcibly control their victim's religious expression.[215] This idea that the persecutor can control a victim's protected characteristic is evident in the persistent use of violence in forcible recruitment situations to inspire acquiescence to the gang's will.

Given how closely tied religious or ethnic characteristics are in formulating an ethnonationalist or religious militant group's identity, when the victim is harmed after resisting recruitment efforts, the subsequent persecution is not simply premised on their refusal to join the group—as seen in *Elias-Zacarias*.[216] Here, a victim's resistance threatens the very identity of the organization as the protector of said religious or ethnic group. The rejection results in the victim being recharacterized as a "bad [insert protected class here]."[217] Through this dynamic, it becomes evidently clear that an organization's favorable view of a protected characteristic is intrinsically linked with their belief that they can exert power over it—it is viewed as an asset or positive only so long as it can be controlled. The power that the militant organization exerts is an intentional and calculated effort to force a protected characteristic into submission and subservience. Victims of this force feel pressure to dampen their ethnic or religious expression. This clearly is persecution on account of a protected class.

CONCLUSION

The recent decisions by the various Circuit Courts illuminate an evolving tension in asylum law, particularly concerning the nexus analysis and the role of animus in mixed motive cases. These decisions further highlight a departure from the restrictive standards set forth by the Board of Immigration Appeals in cases like *Matter of L-E-A-* and *Matter of M-R-M-S-* and illustrate the value of a but-for approach in analyzing whether

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Dipak K. Gupta, *Exploring Roots of Terrorism, in* ROOT CAUSES OF TERRORISM: MYTHS, REALITY AND WAYS FORWARD 16, 19 (Tore Bjørgo ed., 2005) ("As an individual succumbs to the organization, there is no room for individual ideas, individual identity and individual decision-making"); Giacomo Mantovan, *Becoming a Fearless Tiger: The Social Conditions for the Production of LTTE Fighters*, 9 CONFLICT & SOC'Y: ADVANCES IN RSCH. 37, 38 (2023) ("Existing research shows how non-state armies shape fighters' subjectivity through control over their bodies and emotions, nationalistic narratives, political rituals, and artistic forms of expression."); Shri D.R. Kaarthikeyan, *Root Causes of Terrorism? A Case Study of Tamil Insurgency and the LTTE, in* ROOT CAUSES OF TERRORISM: MYTHS, REALITY AND WAYS FORWARD 131, 132 (Tore Bjørgo ed., 2005) ("The LTTE, the most ruthless militant group, eliminated moderate Tamil political leadership as well as other militant groups such as TELO, EROS, and EPRLF and became the most dominant Tamil militant group.").

[215] *See, e.g.*, R-, 20 I. & N. Dec. 621, 622 (B.I.A. 1992) (noting the testimony of the petitioner that, after refusing to join the All-India Sikh Student Federation, he was beaten and told that he must join).

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

[217] *See e.g., R-*, 20 I. & N. Dec. at 622 (claiming that the applicant was characterized as a "bad Sikh" for resisting the recruitment efforts of the All-Sikh Student Federation).

persecution is on account of a protected ground. Importantly, in their rejection of the BIA's restrictive view that a protected ground cannot be a "central reason" for persecution unless it was motivated by animus or a desire to overcome the protected trait, the Courts provide room for potential relief for victims of forceable recruitment efforts by ethnocentric or religiocentric militant organizations. Moving forward, it is important to explore further the potential for relief available under this more permissive approach by the Circuit Courts to ensure asylum protection for those who have fallen victim to persecution because of their identities.