

PROTECTION FOR FAMILIES: NEW STANDARDS DEVELOPING IN ASYLUM LAW

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INTRODUCTION

As a basic principle of asylum law, individuals should be protected from persecution based on personal traits that they cannot change.¹ Family ties make up some of the most fundamental and permanent connections in life. Therefore, persecution based on one's family has long been considered a ground for asylum in the United States.² Still, the scope and meaning of that protection has come under dispute recently and, as a result, may be expanding.

In the 1951 Refugee Convention and 1967 Refugee Protocol, a "refugee" is defined as a person who is outside of his or her country of nationality and is unable or unwilling to avail himself or herself of that country's protection, and has a "well-founded fear of being persecuted for

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¹ See, e.g., *Arteaga v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007) ("[A] [protected] social group is defined abstractly as a group united by 1) a voluntary association which imparts some common characteristic that is fundamental to the members' identities, or 2) an innate characteristic which is so fundamental to the identities or consciences of its members they either cannot or should not be required to change it.") [<https://perma.cc/X4B7-YCMY>]; *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (recognizing sexual orientation and sexual identity as "immutable" and "fundamental to one's identity" and therefore able to constitute a social group for purposes of asylum protection) [<https://perma.cc/YE2Q-H8WU>]; *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (finding that "parents of Burmese student dissidents do share a 'common, immutable characteristic' sufficient to comprise a particular social group" for purposes of asylum) [<https://perma.cc/R5YY-K8DS>]. The legal standards discussed in this Essay generally apply to withholding of removal as well as asylum; however, the burden of proof is higher for withholding of removal than for asylum. Compare *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (citation omitted) (holding that an asylum applicant must establish that "persecution is a reasonable possibility") [<https://perma.cc/GM78-EJYX>], with *INS v. Stevic*, 467 U.S. 407, 429-30 (1984) (holding that an applicant for withholding of removal must establish that "[persecution] is more likely than not") [<https://perma.cc/XWG9-PUQ2>]. See 8 C.F.R. § 1208.16(b) (2016) (discussing burden of proof for withholding of removal) [<https://perma.cc/ND6K-EHEE>].

² See, e.g., *Ayele v. Holder*, 564 F.3d 862, 865, 872 (7th Cir. 2009) (remanding with directions to consider persecution based on parents' political activities in Ethiopia) [<https://perma.cc/BV3T-PYWR>]; *Vumi v. Gonzales*, 502 F.3d 150, 154-55 (2d Cir. 2007) (finding that the BIA erred by not considering familial ties to actors who may have participated in a political assassination) [<https://perma.cc/C5WL-6KSR>]; *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004) (recognizing applicant had a potential claim for asylum based on applicant's family members' persecution for violation of the one-child policy in China) [<https://perma.cc/89GR-QC6J>]; *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("Perhaps a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.") [<https://perma.cc/4LGH-CBBZ>]; *In re H-*, 21 I. & N. Dec. 337, 346 (B.I.A. 1996) (remanding denial of asylum because of applicant's membership in a persecuted Somalian clan) [<https://perma.cc/ZCL5-FA9L>].

reasons of race, religion, nationality, membership of a particular social group or political opinion.”³ Family-based persecution has been recognized under the “particular social group” ground of the Refugee Convention.⁴ Over the past several years, however, a circuit split has emerged between U.S. courts of appeals over whether, in mixed-motive cases, persecution based on one’s family ties can form the basis of an asylum claim. For example, if a mother is threatened after her son refuses to join a gang, has she been persecuted for being her son’s mother, or is she the victim of a threat aimed at coercing her son to join the gang with no asylum implications? If a man is shot the day after his brother testifies in a murder trial, has he been persecuted on account of his family connection, or was the act only retaliation for his brother’s testimony?

The current legal answer depends on which court you ask. Some courts of appeals have accepted the more expansive interpretation—persecution caused by family relationships can be sufficient to form the basis for a claim of asylum even in cases with multiple motives.⁵ Other courts of appeals, however, have taken a narrower approach and have asked whether “hatred for a family” was the persecutor’s sole motive or whether the family connection was related to another goal.⁶ The Board of Immigration Appeals (BIA) has not yet issued a published decision on the question,⁷ and the U.S. Supreme Court has not ruled on the issue.⁸

This Essay analyzes the heart of the legal dispute—the nexus requirement, or what it means to have a well-founded fear of persecution “on account of” or “for reasons of” a protected characteristic. The Essay argues that courts and the BIA should adopt a “family focus” approach to asylum claims involving persecution on the basis of family ties. The Essay looks at several existing nexus frameworks to develop the family focus approach including sole cause, but-for, circumstantial/contributing cause, and bifurcated nexus tests. The family focus approach combines the but-for

³ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention] [<https://perma.cc/6K3P-NSA5>].

⁴ See *supra* note 2.

⁵ See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 129 (4th Cir. 2011) (remanding case of an asylum applicant who feared persecution based on family ties and threats of gang violence) [<https://perma.cc/UJ4B-WUA4>].

⁶ See, e.g., *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (“[T]he evidence that gang members sought information from Ramirez-Mejia about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family.”) [<https://perma.cc/84TR-4KV9>].

⁷ The BIA almost always defers to circuit court precedent in those courts’ jurisdictions. In jurisdictions with no controlling circuit court precedent, the BIA applies its own decision or precedent. See *In re Anselmo*, 20 I. & N. Dec. 25, 31–32 (1989) (“[W]e have historically followed a court’s precedent in cases arising in that circuit.”) [<https://perma.cc/57JX-96AF>]; Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1772 (2010) (“When confronted with a split in circuit precedent, the BIA defers to the federal courts of appeals and follows the law of a given circuit in cases arising within that circuit, even if the BIA disagrees with that particular court’s precedent.”) [<https://perma.cc/WR42-93GS>].

⁸ The U.S. Supreme Court previously denied certiorari on this issue in the case *Demiraj v. Holder*, 132 S. Ct. 2454 (2012) [<https://perma.cc/DB9A-TVVX>].

and circumstantial/contributing cause models and finds sufficient nexus where the asylum applicant's family ties were either a but-for cause of a fear of persecution or increased the risk of persecution. Under this approach an asylum seeker would satisfy the nexus requirement if the asylum applicant would be free from fear of harm if not for a family connection or would be at greater risk of harm because of family ties.

The Essay then argues that courts and the BIA should recognize family-based social groups without additional descriptors in mixed-motive cases.⁹ For example, persecution on account of being part of the social group "family members of those who resist MS-13 gang recruitment" should instead be formulated as "family members of [name of family member who resisted recruitment]," "members of the [family name] family," or simply "family."¹⁰ Because groups based on kinship ties alone meet asylum social group requirements, there is no reason to modify the group with non-asylum ground factors. Furthermore, excluding non-asylum ground factors in the protected group formulation simplifies and clarifies the nexus analysis. This Essay will demonstrate that the family focus approach is not only logically sound, but is also consistent with asylum protection offered to other individuals who face persecution for multiple reasons.

Finally, the Essay discusses *In re Alba*, an important mixed-motive, family-based asylum case currently being considered by the BIA.¹¹ In April 2016, the Department of Homeland Security (DHS) filed a brief in the case that could signal a wider acceptance of mixed-motive, family-based asylum claims in the future.

I. FAMILIES AS PARTICULAR SOCIAL GROUPS

Family-based groups have long been recognized under the "particular social group" ground of the Refugee Convention, and kinship groups have been found to meet the BIA's current particular social group requirements for asylum.¹² In *In re Acosta*, the BIA defined persecution on account of particular social group as:

[P]ersecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or

⁹ Family groups are not explicitly listed in the Refugee Convention but are considered protected under the Convention ground of "particular social group." See Refugee Convention, *supra* note 3, art. 1(A)(2). See *infra* Section I for a full explanation of family-based particular social groups.

¹⁰ The BIA has not recognized groups that resist gang recruitment as particular social groups. See, e.g., *In re M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014) [<https://perma.cc/732D-LSQY>]; *In re W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014) [<https://perma.cc/356D-JNLJ>]; *In re S-E-G-*, 24 I. & N. Dec. 579, 582–84 (B.I.A. 2008) (rejecting the particular social group "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth") [<https://perma.cc/5ZHU-X3NY>]; *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (rejecting the particular social group "persons resistant to gang membership") [<https://perma.cc/VNC6-9FSS>].

¹¹ *In re Alba*, No. A200 533 090 (B.I.A. 2016) (briefs filed Mar. 21, 2016, decision pending); see also Dep't of Homeland Sec. Supplemental Brief, *In re Alba*, No. A200 533 090 (B.I.A. 2016) [hereinafter DHS Brief] [<https://perma.cc/9QKR-QAU5>].

¹² See *supra* note 2.

kinship ties [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹³

In addition to the “immutability” requirement articulated in *Acosta*, the BIA has held that “particularity” and “social distinction” are also requirements for particular social groups.¹⁴ In one of the BIA’s most recently published particular social group decisions, *In re M-E-V-G-*, the social distinction requirement is described as:

[W]hether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group.¹⁵

In the same decision, the BIA described the particularity requirement as the group being “discrete and hav[ing] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”¹⁶

The Ninth Circuit, in a 1986 decision, described family as a “prototypical example of a ‘particular social group.’”¹⁷ More recently, in *Crespin-Valladares v. Holder*, the Fourth Circuit found that the social group of family is “paradigmatically immutable” and, in reference to particularity, “possesses boundaries that are at least as ‘particular and well-defined’ as other groups whose members have qualified for asylum.”¹⁸ The Fourth Circuit found that families are socially distinct, as “few groups [are] more readily identifiable than the family.”¹⁹ In fact, “every circuit to have considered the question has held that family ties can provide a basis for asylum.”²⁰ The BIA also held in *In re C-A-* that “family relationship[s] are generally easily recognizable and understood by others to constitute social groups.”²¹

II. THE NEXUS REQUIREMENT IN U.S. ASYLUM LAW

In addition to establishing membership in a particular social group, the applicant must show that he or she fears persecution because of membership in that group. This aspect of the international definition of refugee was modified slightly when it was incorporated into U.S. law in the

¹³ 19 I. & N. Dec. 211, 233 (B.I.A. 1985) [<https://perma.cc/UL6B-FPKJ>], *rev’d on other grounds*, *In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) [<https://perma.cc/VC32-GZ4A>].

¹⁴ *M-E-V-G-*, 26 I. & N. Dec. at 239–40.

¹⁵ *Id.* at 238.

¹⁶ *Id.* at 239.

¹⁷ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

¹⁸ *Crespin-Valladares v. Holder*, 632 F.3d 117, 124–25 (4th Cir. 2011).

¹⁹ *Id.* at 126.

²⁰ *Id.* at 125.

²¹ 23 I. & N. Dec. 951, 959 (B.I.A. 2006) [<https://perma.cc/JH7U-TAX4>].

1980 Refugee Act, which defined refugee as a person with a “well-founded fear of persecution on account of” (rather than “for reasons of”) “race, religion, nationality, membership in a particular social group, or political opinion.”²²

The “for reason of” or “on account of” causation clause in the definition of refugee is commonly referred to as the “nexus requirement.”²³ The Refugee Convention gave “no guidance as to how to interpret or implement the nexus requirement” and there are currently no “prescribed standards or tests for determining causation in asylum cases.”²⁴

In the 1992 case *INS v. Elias-Zacarias*, the U.S. Supreme Court addressed the nexus requirement, finding that an applicant must fear persecution “because of” a protected ground and that direct proof of the persecutor’s motives was not required, but that “[the applicant] must provide *some* evidence of it, direct or circumstantial.”²⁵ Although there is no definitive nexus standard in U.S. asylum law, courts and the BIA have accepted mixed-motive asylum claims.²⁶

In 2005, the U.S. Congress passed the REAL ID Act, which required that an enumerated Convention ground be “at least one central reason” for the persecution suffered by the applicant.²⁷ Notably, the REAL ID Act “does not set forth any standards or tests for determining causation.”²⁸ In 2007, the BIA explained the REAL ID Act’s “one central reason” standard further in *In re J-B-N- & S-M-*.²⁹ The Board held that under the standard, “the protected ground cannot play a minor role in the alien’s past mistreatment or fears of future mistreatment. That is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm.”³⁰

In the seminal asylum case *In re Mogharrabi*, the BIA found that an applicant must show that:

²² Immigration & Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2014) [<https://perma.cc/VKR3-FUDV>].

²³ Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 386 (2014) [hereinafter *New Nexus*] [<https://perma.cc/4UQG-R5E7>].

²⁴ *Id.* at 387; see also Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465, 469–75 (2015) (discussing the history of the nexus requirement) [<https://perma.cc/P245-H55N>].

²⁵ 502 U.S. 478, 483 (1992) [<https://perma.cc/SZ7X-9EAP>].

²⁶ See, e.g., *Sanchez Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223, 1235–36 (11th Cir. 2007) (finding that a Colombian businessman was persecuted both for extortion and for his political affiliations) [<https://perma.cc/EKZ7-3H32>]; *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (finding that an asylum applicant was extorted by Philippine communist guerillas “at least in part” because of her political opinion) [<https://perma.cc/Z73W-YYYL>]; *In re S-P-*, 21 I. & N. Dec. 486, 495–97 (B.I.A. 1996) (discussing mixed motives for threats, including the applicant’s anti-government political views) [<https://perma.cc/4NJA-CB2Y>].

²⁷ REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(i) (2009) [<https://perma.cc/NNB6-RBKG>]. The BIA has also extended the “one central reason” standard to include withholding of removal cases. See *In re C-T-L-*, 25 I. & N. Dec. 341, 348 (B.I.A. 2010) [<https://perma.cc/QB33-ASWF>].

²⁸ *New Nexus*, *supra* note 23, at 389.

²⁹ 24 I. & N. Dec. 208, 212 (B.I.A. 2007) [<https://perma.cc/3US8-7L4C>]. In *In re C-T-L-*, the Board held that the “one central reason” standard applies to asylum and withholding of removal. 25 I. & N. Dec. at 348.

³⁰ *In re J-B-N- & S-M-*, 24 I. & N. Dec. at 214.

(1) [he or she] 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 easily 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.³¹

Later, however, in *In re Kasinga*, another foundational asylum case involving a woman who feared female genital mutilation, the BIA held that even though “many of [their] past cases involved actors who had a subjective intent to punish their victims . . . [T]his subjective ‘punitive’ or ‘malignant’ intent is not required for harm to constitute persecution.”³² In female genital mutilation cases, “[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 had no hatred towards or intent to punish the woman for her status or group.³³ The nexus requirement has caused significant disagreement among circuit courts in family-based asylum claims.

III. FAMILY-BASED ASYLUM AND THE NEXUS CIRCUIT SPLIT

Courts have definitively established that family meets the criteria of a particular social group, so the primary challenge for asylum seekers in family-based asylum claims is establishing nexus (or causation). Complications arise when the persecutor has additional motives beyond the family relationship—for example, coercion, extortion, or revenge. In these situations, the Fifth and Seventh Circuits require an inquiry into the original motives of the persecutor, while the First, Fourth, and Ninth Circuits have not considered the persecutor’s additional motives to be determinative.

A. *Fifth and Seventh Circuits: Additional Motives Determinative*

In *Demiraj v. Holder*, the Fifth Circuit held that the wife and son of a prospective witness in a U.S. trial against a suspected Albanian human smuggler would not be targeted “on account of” their family ties if returned to Albania.³⁴ Because any acts against the wife and son would be “motivated solely by criminal intent, personal vendettas, or personal desires for revenge,” the court found that the wife and son could not satisfy the nexus requirement, as the family would not be persecuted “*as such*.”³⁵ However, the dissent argued that “there [was] no evidence that Bedini [had] any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals—rather, his only interest in them [was]

³¹ 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (citing *In re Acosta*, 19 I. & N. Dec. 211, 226 (B.I.A. 1985)).

³² 21 I. & N. Dec. 357, 365 (B.I.A. 1996) [<https://perma.cc/5YD9-PGUU>].

³³ *New Nexus*, *supra* note 23, at 394 (alterations in original) (citation omitted) (citing Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 799 (2003) [<https://perma.cc/HS9A-RB2N>]).

³⁴ 631 F.3d 194, 195–98 (5th Cir. 2011) [<https://perma.cc/2PDZ-7JCQ>].

³⁵ *Id.* at 199.

because of their membership in the family of Mr. Demiraj.”³⁶

In *Ramirez-Mejia v. Lynch*, the Fifth Circuit similarly rejected a family-based asylum claim from a Honduran woman who argued that “she was persecuted, at least in part, on the basis of her family membership.”³⁷ The applicant claimed she was persecuted on the basis of her family group after receiving threatening notes from a gang seeking information on her brother because “[w]ithout her relationship to her brother” the gang would not have targeted her, and the “request for information by the gang members was . . . inseparable from her relationship with her brother.”³⁸ However, the court disagreed:

there is no reason to suppose that those who persecute to obtain information also do so out of hatred for a family, or vice versa. . . . This is particularly true in light of the fact that other members of her family, who have remained in Honduras, have not faced persecution on the basis of their membership in the family.³⁹

In *Yin Guan Lin v. Holder*, the Seventh Circuit held that “family members of known Chinese debtors who fear punishment from creditors for outstanding debt” did not meet the requirements of the nexus test.⁴⁰ While the court did find that “the family unit can constitute a social group,” it held that “Lin [did] not demonstrate[] that his family ties motivated the alleged persecution.”⁴¹ Instead, the harm that “Lin faced arose from a personal dispute between his father and his father’s creditors. Debtors who fear creditors do not qualify for social-group membership.”⁴² Essentially, the Seventh Circuit held that because his father’s social group was not cognizable, the applicant’s also could not be.⁴³

The Fifth and Seventh Circuits require an inquiry into the origins of persecutor’s motives. Under this approach, it is not enough that familial ties motivated the feared persecution. Instead, the motive of the persecutor must be an animus towards the family itself, rather than retaliation against, or punishment of, a family member for a reason unrelated to family membership. The Seventh Circuit suggested in *Lin* that it would accept mixed-motive, family-based asylum claims, but only if the original family member were targeted for another protected reason, such as political opinion.

³⁶ *Id.* at 202 (Dennis, J., dissenting).

³⁷ 794 F.3d 485, 492 (5th Cir. 2015) [<https://perma.cc/6SD4-4B7W>].

³⁸ *Id.* at 492–93 (alteration in original).

³⁹ *Id.* at 493.

⁴⁰ 411 F. App’x 901, 905 (7th Cir. 2011) [<https://perma.cc/63AG-H4W2>].

⁴¹ *Id.*

⁴² *Id.* at 906.

⁴³ *Id.*; see also *Zhang v. Gonzales*, 154 F. App’x 520, 522 (7th Cir. 2005) (“We have suggested that an immediate family qualifies as a social group, but typically such a situation involves the family in question being targeted for a reason that is also a protected ground.”) (citation omitted) [<https://perma.cc/F8A8-DNUA>].

B. First, Fourth, and Ninth Circuits: Additional Motives Not Determinative

The First, Fourth, and Ninth Circuits have taken a different approach. In mixed-motive, family-based asylum cases these circuits have not required that the original or sole intent of the persecutor be animus towards the family as a group.

In the 1993 case *Gebremichael v. INS*, the First Circuit considered a claim concerning Ethiopian security forces targeting a man to extract information about his brother, in a practice referred to as “*cherchez la famille* (‘look for the family’).”⁴⁴ The First Circuit found that “no reasonable factfinder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of ‘[past] persecution on account of . . . membership in a particular social group.’”⁴⁵

In a more recent case, *Aldana-Ramos v. Holder*, the First Circuit heard a claim in which a criminal gang kidnapped a Guatemalan business owner and sought ransom from his two sons.⁴⁶ Once the sons paid the ransom the gang murdered their father.⁴⁷ Subsequently, the members of the gang began threatening the sons, causing them to flee the country and seek asylum based on the social group of family.⁴⁸

The immigration judge and the BIA denied relief in the case, holding that the applicants’ father was the victim of a crime motivated by the gang’s perception of his wealth and not on the basis of a protected characteristic.⁴⁹ The BIA denied relief and “appear[ed] to have concluded . . . that a family cannot qualify as a particular social group unless a member of the family (or, perhaps, the family itself) can also claim another protected ground.”⁵⁰ However, the First Circuit reversed the immigration judge and BIA and found that kinship ties alone form a basis for asylum.⁵¹ It found, for example, that there would be grounds for asylum if:

a local militia . . . single[d] out a prominent wealthy family, kidnap[ped] family members for ransom, effectively dr[o]ve the family into poverty, and pursue[d] them throughout the country in order to show the local community that even its most prominent families are not immune and that the militia’s rule must be respected.⁵²

⁴⁴ 10 F.3d 28, 36 (1st Cir. 1993) (defining the practice as “terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward”) [<https://perma.cc/EQ8T-H2L8>].

⁴⁵ *Id.* (alteration in original) (citing 8 U.S.C. § 1101(a)(42)(A)).

⁴⁶ 757 F.3d 9, 12–13 (1st Cir. 2014) [<https://perma.cc/4VRQ-ZF7U>].

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ *Id.* at 13–14.

⁵⁰ *Id.* at 15.

⁵¹ *Id.* (“The law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.”).

⁵² *Id.* at 19.

Thus the First Circuit found that in mixed-motive cases, initial non-asylum ground motivations would not necessarily disqualify applicants from protection.⁵³ The court reasoned that motives can change over time and that, just like other protected social groups, family can be one “central reason” for persecution.⁵⁴

In *Crespin-Valladares v. Holder*, the applicant was granted asylum by an immigration judge based on the social group “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses.”⁵⁵ Crespin-Valladares faced threats after his uncle testified in a murder trial against MS-13 gang members.⁵⁶ On appeal, the BIA rejected Crespin-Valladares’s claim because “those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” did not form a particular social group.⁵⁷ The Fourth Circuit found that the BIA committed legal error in making this determination because it did not consider the proper social group—Crespin-Valladares’s family.⁵⁸ Furthermore, it found that the BIA erred in disregarding the immigration judge’s finding that Crespin-Valladares was targeted based on his relationship to his uncle.⁵⁹

The Fourth Circuit recently held in *Hernandez-Avalos v. Lynch* that an applicant’s “relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members’ demands leveraged her maternal authority to control her son’s activities.”⁶⁰ The court found that although there were multiple reasons for the gang targeting Hernandez, it was unreasonable to assert that her status as her son’s mother “[was] not *at least one* central reason for her persecution.”⁶¹

Finally, in 2015, the Ninth Circuit found in *Rios v. Lynch* that the asylum applicant feared persecution based on a “vendetta against his family” which stemmed from a family member agreeing to testify against a gang member in court, rather than belonging to the group “witnesses against gangs.”⁶² The Ninth Circuit held that the BIA erred in not considering the applicant’s family as a social group and instead only focusing on the group “witnesses against gangs.”⁶³ The court remanded the decision to the BIA to consider his family-based social group, describing

⁵³ *Id.* at 18 (“[A]sylum is still proper in mixed-motive cases even where one motive would not be the basis for asylum, so long as one of the statutory protected grounds is ‘at least one central reason’ for the persecution.”) (citing 8 U.S.C. § 1158(b)(1)(B)(i)).

⁵⁴ *Id.*; see REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

⁵⁵ 632 F.3d 117, 121 (4th Cir. 2011).

⁵⁶ *Id.* at 120.

⁵⁷ *Id.* at 125.

⁵⁸ *Id.* at 125–26.

⁵⁹ *Id.* at 127.

⁶⁰ 784 F.3d 944, 950 (4th Cir. 2015) [<https://perma.cc/3S4R-226Y>]; see also *Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014) (finding that the BIA failed to consider the family-based claim of an applicant who was targeted for his family members’ membership in a rival gang) [<https://perma.cc/K978-TSMF>].

⁶¹ *Hernandez-Avalos*, 784 F.3d at 950.

⁶² 807 F.3d 1123, 1126 (9th Cir. 2015) [<https://perma.cc/4C7X-YQJ6>].

⁶³ *Id.* at 1128.

the family as the “quintessential particular social group.”⁶⁴

The First, Fourth, and Ninth Circuits did not rely solely on the original intent of the persecutor to establish nexus and instead focused on whether there was a causal link between the family relationship and the harm feared.

IV. DISPUTES IN THE FAMILY-BASED ASYLUM NEXUS CIRCUIT SPLIT

The circuit split on nexus in mixed-motive, family-based asylum cases stems from two main points of disagreement. First, the courts disagree over whether intent to punish the family as such is required to find nexus in family-based asylum cases. The Fifth and Seventh Circuits have held that the family must be persecuted “as such,” meaning as a result of hatred towards, or punishment of, the family itself. While this description of nexus has generally been accepted in other areas of U.S. asylum law,⁶⁵ it is not always necessary to establish nexus.⁶⁶ Examples of persecution not solely based on account of hatred or punishment of the persecuted group include forced sterilization, female genital mutilation, and domestic violence.⁶⁷ Furthermore, as the First Circuit aptly points out, in many mixed-motive, family-based asylum cases the intent of the persecutor is to punish the family itself after being crossed by one of its members or after initially targeting the family for another reason.⁶⁸ In fact, “‘generalized . . . vengeful’ hatred of entire families frequently originates from retaliation for an individual’s actions.”⁶⁹ For example, “the legendary Hatfield-McCoy feud had its roots in the alleged murder of a McCoy by a Hatfield.”⁷⁰

If this same reasoning were extended to other groups, protection would be impermissibly limited. For example, if a persecutor originally had a confrontation with a person of a certain racial or religious group unrelated to that characteristic which then led that person to develop a hatred of that whole group, and target others in the group, those persons would not qualify for protection. Requiring that hatred of the family itself be the sole motivation for persecution contradicts the established acceptance of mixed-motive cases and the object and purpose of the Refugee Convention and Protocol.⁷¹

Second, the Seventh Circuit suggested that, for mixed-motive, family-based asylum claims to be successful, the persecutor’s motives other than the family connection must also be a ground for asylum.⁷² However, as long as the family connection forms at least one central reason for the feared persecution, there is no reason to evaluate the other motivations if

⁶⁴ *Id.*

⁶⁵ *See In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

⁶⁶ *See In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

⁶⁷ *New Nexus*, *supra* note 23, at 390–403.

⁶⁸ *See Aldana-Ramos v. Holder*, 757 F.3d 9, 16 (1st Cir. 2014).

⁶⁹ Brief for *Amici Curiae* Human Rights and Refugee Organizations Supporting Petitioners at 11, *Demiraj v. Holder*, 132 S. Ct. 2454 (2012) (No. 10-1545) (citation omitted).

⁷⁰ *Id.*

⁷¹ *See supra* Section II.

⁷² *See Yin Guan Lin v. Holder*, 411 F. App’x 901, 905 (7th Cir. 2011).

the applicant is not claiming protection for those reasons. Requiring an additional ground in family-based cases could force applicants to simultaneously argue the merits of an asylum claim for their family member. This would be problematic because the immigration judge only has jurisdiction over the applicant's claim, and consequently the record before the immigration judge will only be sufficiently developed for the applicant's claim, not his or her family members'. Furthermore, requiring mixed-motive, family-based asylum seekers to show that any of their persecutors' alternative motivations were also Convention grounds gives family an inferior status as a social group because it cannot always stand on its own. It would be unfair to give preference to certain enumerated grounds of protection over others.

The ultimate result in many family-based asylum claims may appear counterintuitive: the family members of a threatened witness or person who resists gang recruitment qualify for asylum while the original person threatened may not. This seemingly odd result is nonetheless valid. The unease with the result likely stems from an underlying belief that the original family member also deserves asylum, rather than that neither do. For example, witnesses and informants are recognized by some courts as forming a social group deserving of protection, while other courts do not recognize such groups.⁷³ But when the original family member's claim has no merit, the validity of family protection alone is clearer. For example, suppose the original family member is targeted because he or she committed a murder or terrorist act. For these actions, his or her innocent family members are targeted for revenge. In this case, it is not counterintuitive that the innocent family members could claim asylum, yet the original family member would not be able to. Unease with the result of many family-based asylum cases suggests that an expansion of protection is needed, rather than a contraction.

V. ANALYZING FAMILY-BASED ASYLUM THROUGH NEXUS MODELS

In the decisions described above, courts accepted opposing models of causation without explicitly acknowledging they were selecting a particular model or explaining why they chose the model they did.⁷⁴ Going forward, judges and the BIA should clarify the model of causation they are accepting and why they are choosing that model. Analyzing the nexus requirement using the nexus models discussed below will help to expose the root of legal disagreements among the circuits and should eventually

⁷³ Compare *Garcia v. Holder*, 746 F.3d 869, 874 (8th Cir. 2014) [<https://perma.cc/79WZ-M7ZQ>], *Scatambuli v. Holder*, 558 F.3d 53, 61 (1st Cir. 2009) [<https://perma.cc/WW48-DQD3>], and *In re C-A-*, 23 I. & N. Dec. 951, 961 (B.I.A. 2006) (finding informants do not qualify as refugees under the definition "refugee") [<https://perma.cc/VC8R-3X8Q>], with *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091–94 (9th Cir. 2013) [<https://perma.cc/BSG8-PU9A>], *Gashi v. Holder*, 702 F.3d 130, 137–38 (2d Cir. 2012) [<https://perma.cc/ZUP9-7AEQ>], and *Garcia v. Att'y Gen.*, 665 F.3d 496, 504 (3d Cir. 2011) (finding witnesses who have helped law enforcement to constitute a protected group) [<https://perma.cc/526U-GBTM>].

⁷⁴ See James C. Hathaway & Michelle Foster, *The Causal Connection ("Nexus") to a Convention Ground*, 15 INT'L J. REFUGEE L. 461, 463 (2003) (arguing that courts do not explain their nexus findings) [<https://perma.cc/HYQ5-DBMH>].

lead to the most cogent approach. This Essay examines four nexus (causation) models including the sole cause, but-for, circumstantial/contributing cause, and bifurcated models. The “family focus” approach this Essay endorses combines the but-for and circumstantial/contributing cause models—either or both models may be used to establish nexus in family-based asylum cases. Neither of these models requires the applicant to establish the sole subjective intent of the persecutor or two asylum grounds.

A. *Sole Cause Nexus Model*

The sole cause model is the “most restrictive method of interpreting the nexus clause.”⁷⁵ It “require[s] that the protected ground constitute the sole cause or reason for the well-founded fear of being persecuted.”⁷⁶ According to Michelle Foster, many courts proceed on the assumption that there can only be one reason for persecution, and that the existence of the non-Convention motivation therefore cancels the Convention ground.⁷⁷ This assumption is problematic because it does not take into account “the complexity of the factual situations and the interlinked matrix of factors that often lead to a person’s need for . . . protection.”⁷⁸

The approach of the Fifth and Seventh Circuits in mixed-motive, family-based asylum claims most closely resembles the sole cause nexus model. The decisions reflect the assumption that there can only be one relevant motivation for persecution, and that asylum may not be granted where that reason is personal vendetta or retaliation.⁷⁹ There is no discussion in the decisions as to the possibility of mixed motives or evolving motives.

The sole cause model should not be accepted in family-based asylum cases for several reasons. First, as Foster notes, the sole cause approach is shallow and superficial and does not accurately capture the complex factual situations often present in asylum cases. Next, it would effectively preclude almost all family-based asylum claims as families are regularly targeted because of the actions of a member. It would be inconsistent to accept the family as a major protected ground for asylum, yet at the same time preclude almost any claim under that ground. Furthermore, the sole cause nexus approach directly contradicts the 2005 REAL ID Act, which recognizes multiple motive cases as valid.⁸⁰

Finally, the sole cause model would exclude mixed-motive political opinion cases, which are widely accepted when political opinion is at least one central reason for past persecution or feared future persecution. Well-founded fear of persecution has been found in cases where additional

⁷⁵ Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265, 269 (2002).

⁷⁶ *Id.*

⁷⁷ *Id.* at 269–70.

⁷⁸ *Id.* at 273.

⁷⁹ See *supra* Section III.A.

⁸⁰ See *New Nexus*, *supra* note 23, at 389.

motives include recruitment and extortion, which are not protected.⁸¹ Additional motives do not preclude protection and are not required to stem from a Convention ground in mixed-motive political opinion cases and thus should similarly not be required in family-based claims.

B. “But-for” Nexus Model

In a recent article, Anjum Gupta argues for the “but-for” nexus rule based on her examination of tort and anti-discrimination law.⁸² Under the rule,

the relevant question in asylum cases would be whether, but for the applicant’s protected status, the persecution would have occurred or would occur in the future. If it is more likely than not that the persecution would not have occurred or would not occur in the future, nexus is established.⁸³

In all of the cases described in this Essay, the applicant would not have been persecuted or feared future persecution but for the fact that he or she was a family member of a government witness, a debtor, or someone who resisted gang recruitment, etc. This model would “shift the focus from the particular motives of the persecutor to the status of the applicant.”⁸⁴

There are many sound reasons to adopt a but-for causation model in asylum law. The current lack of a uniform standard or test has “resulted in the inconsistent application of the nexus rule,” and a but-for rule would lead to uniformity and consistency.⁸⁵ Furthermore,

the goal of refugee and asylum law is not to assign blame or to change the persecutory behavior; rather, it is to provide protection to those who face persecution because of a characteristic they cannot or should not be required to change and who are unable to receive such protection from their home countries.⁸⁶

This view of asylum law is consistent with the but-for model that focuses on the status of the applicant. Finally, proving the exact motive of the persecutor may be impossible as that person “is not in the courtroom but instead is generally hundreds or thousands of miles away.”⁸⁷ The but-for rule is a cogent model to use in the mixed-motive, family-based asylum context because “the persecutor might, in fact, be motivated to harm the applicant by a desire for revenge against the applicant’s relative;

⁸¹ See, e.g., *Karki v. Holder*, 715 F.3d 792, 800–06 (10th Cir. 2013) (finding Maoists’ attacks against Nepali asylum applicant were on account of political opinion as well as extortion and recruitment) [<https://perma.cc/7N4M-DPMA>]; *Sanchez Jimenez v. Att’y Gen.*, 492 F.3d 1223, 1235–36 (11th Cir. 2007) (holding asylum applicant targeted for both his financial resources and his political opinions to be protected) [<https://perma.cc/HJ68-QV6N>]; *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 (9th Cir. 1999) (protecting woman from El Salvador whose family’s safety was threatened if they did not join a guerilla group) [<https://perma.cc/KQY6-HU8K>].

⁸² *New Nexus*, *supra* note 23, at 428.

⁸³ *Id.* at 429.

⁸⁴ *Id.* at 388.

⁸⁵ *Id.* at 429.

⁸⁶ *Id.* at 430.

⁸⁷ *Id.* at 432.

nevertheless, the applicant ultimately is being persecuted because of a characteristic she is powerless to change: her family membership.”⁸⁸

Stephen Legomsky and Cristina Rodriguez also endorse the but-for asylum nexus rule, but with some caveats. They explain that under their rule, although the but-for rule is sufficient, it is not necessary to establish nexus.⁸⁹ For example, in cases where two independent motives each on their own could have led to the persecution, their version of nexus would be established if either was a substantial factor and related to a protected ground.⁹⁰ They also qualify their support for the but-for rule in situations where the “persecution technically would not have occurred but for a Convention ground, but where the link between the Convention ground and the persecution is so remote that as a policy matter the nexus requirement should be held not to have been met,” drawing on the doctrine of proximate cause in tort law.⁹¹ For example, if an applicant was attacked on his or her way to church (and religion was otherwise unrelated to the attack), one could still say the attack would not have occurred but for his or her religion. Still, the nexus in that situation would be too tenuous to accept.

C. Circumstantial/Contributing Cause Nexus Model

The Michigan Guidelines on Nexus to a Convention Ground (*Michigan Guidelines*) organized by James Hathaway state that “[t]he requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.”⁹² According to the analysis in the *Michigan Guidelines*, protection should not be made contingent on “whether persecutors choose to announce their motivations,” as that would be “impossible to square with either the text or surrogate protection purposes of international refugee law.”⁹³ Sufficient evidence of causation, absent the persecutor announcing his motives, would include:

evidence that persons who share the applicant’s race, religion, nationality, membership of a particular social group or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of

⁸⁸ *Id.* at 451.

⁸⁹ STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 988 (5th ed. 2009).

⁹⁰ *Id.*

⁹¹ *Id.* at 989. Gupta also qualifies support for the but-for nexus rule. *New Nexus*, *supra* note 23, at 442 (“In tort law, even if a defendant was negligent, the plaintiff was harmed, and the but-for test is met, the defendant will not be held liable if her negligence was too remotely linked to the harm suffered by the plaintiff. Similarly, in refugee law, even if the applicant has a protected status, she is persecuted, and the but-for test for causation is technically met, a court could still find that the nexus has not been established if it determines that the protected status was too remotely linked to the persecution.”).

⁹² James C. Hathaway et al., *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 210, 217 (2002) [hereinafter *Michigan Guidelines*] [<https://perma.cc/T4EV-FQ96>].

⁹³ James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT’L L. 207, 208 (2002) (presenting forward to the *Michigan Guidelines*) [<https://perma.cc/46SV-TQNN>].

circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.⁹⁴

The model presented in the *Michigan Guidelines* also follows the accepted “one central reason” analysis of the REAL ID Act, finding,

[a] Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted, but it must be a contributing cause to the risk. The same test should be applied whether the risk is experienced individually or as part of a group, and whether in war or in peace.⁹⁵

Michelle Foster describes this contributing cause model as a “rejection of the sole test approach.”⁹⁶ The contributing cause model “does not require the decisionmaker to ascertain the relative weight of each of several causes, but rather requires only a finding that a Convention ground is a contributing cause.”⁹⁷ Even if courts reject the sole cause model, there is still a question of “whether there is a minimum threshold that must exist before a protected ground falls within the scope of the test.”⁹⁸ The Fourth Circuit has found that a protected ground need not be “*the* central reason or even a dominant central reason,” but it must be more than an “incidental, tangential, superficial, or subordinate . . . reason for harm.”⁹⁹

The circumstantial/contributing cause model is also compelling and may be preferred to the but-for rule in that it has a less “speculative and hypothetical nature” and may also be more able to “accommodate situations involving multiple causes.”¹⁰⁰ Under a circumstantial/contributing cause nexus model, many of the family-based asylum claims discussed in this Essay would be recognized, although they may be more difficult to establish than under the but-for model. Applicants could have to show, for example, that persecutors tend to target family members (i.e., MS-13 gang members often kill the family members of persons who testify against them in court), or present evidence that other members in their family have been threatened, killed, or are at greater risk.

The family focus approach also includes the circumstantial/contributing cause model as it is more helpful in certain cases where the but-for model is insufficient to establish causation. Like the but-for model, it is in line with the intent of the Refugee Convention and can accommodate both mixed-motive asylum cases and cases with complex factual scenarios.

D. Bifurcated Nexus Model

Karen Musalo advocates for a bifurcated asylum nexus rule. Under the bifurcated model “the nexus consideration [is not limited] to an analysis of

⁹⁴ *Michigan Guidelines*, *supra* note 92, at 217.

⁹⁵ Hathaway, *supra* note 93, at 209.

⁹⁶ Foster, *supra* note 75, at 283.

⁹⁷ *Id.*

⁹⁸ *Id.* at 285.

⁹⁹ *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) [<https://perma.cc/PP3B-4W7V>].

¹⁰⁰ See *New Nexus*, *supra* note 23, at 453–54 (quoting Hathaway & Foster, *supra* note 74, at 471).

the motives of the individual perpetrator of the persecution, but includes societal and State factors in the equation.”¹⁰¹ According to the United Nations High Commissioner for Refugees (UNHCR), when using the bifurcated model,

The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.¹⁰²

The bifurcated nexus model is essential to understanding certain kinds of asylum claims, especially gender-based claims. For example, in the context of domestic violence, the persecutor may have motives beyond hatred or punishment of women, but being a woman is a significant part of the reason the state will not protect the applicant from the persecution. Although this model is very helpful in understanding gender-based and other claims, it would not be as applicable to family-based asylum. Usually the reason the state will not protect those who fear family-based persecution is not because of their membership in the group, but because the state generally is unable to protect its citizens. While this model may not contribute as much to the understanding of mixed-motive, family-based asylum claims, it also does not take anything away from them or suggest they should not be recognized. Mixed-motive, family-based asylum claims would be analyzed on the first prong of the UNHCR model. This model also strengthens the argument that the applicant should not be required to present direct evidence that the persecutor was motivated by hatred of or a desire to punish the applicant for a protected characteristic to establish nexus.

VI. A “FAMILY FOCUS” APPROACH

This Essay endorses a “family focus” approach to mixed-motive, family-based asylum claims. Under this approach, persecution on the basis of family ties may satisfy the nexus requirement in two distinct ways. First, under a but-for analysis, courts could look to whether the persecution would have occurred if not for the family connection. Or, relying on a contributing cause model, courts could look to whether circumstantial evidence establishes that the applicant is at greater risk because of membership in a family group. Either way, nexus would be established. Importantly, advocates need not attach additional descriptors beyond the family group to family-based particular social group formulations. When

¹⁰¹ Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 779 (2003).

¹⁰² U.N. High Comm’r for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [<https://perma.cc/KWG4-JLQ7>].

the family stands alone as the group, the nexus can be more clearly established.

Furthermore, a family focus approach also avoids clashing with negative precedent in family-based asylum claims with a gang recruitment or witness/informant component. For example, in *In re S-E-G-* the BIA found that neither “Salvadoran youth who have been subjected to recruitment efforts by MS-13 . . . who have rejected or resisted membership in the gang” nor “family members of such Salvadoran youth” constituted particular social groups.¹⁰³ While the BIA rejected these groups for lacking particularity and social visibility, it did not “address the question whether ‘family’ alone [would be] a social group under the circumstances of [the] case.”¹⁰⁴

In *Orellana-Monson v. Holder* the Fifth Circuit rejected all the particular social groups suggested by parties in the case: “Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want,” “young Salvadoran males who are siblings of a member of the aforementioned social group,” and “family member[s] of Jose Orellana-Monson.”¹⁰⁵

The final group the Fifth Circuit considered—“family member[s] of Jose Orellana-Monson”—is an example of the family focus approach.¹⁰⁶ Jose feared persecution for resisting gang recruitment, and his brother, Andres, feared persecution because of his family relationship to Jose.¹⁰⁷ Although the Fifth Circuit rejected Andres’s group, they did not consider it properly. The court rejected the group finding:

membership in a particular family is derivative of Jose’s claim which we have already determined to lack particularity. It stands to reason that if Jose’s claim is too amorphous since it encompasses a wide swath of society crossing many political orientations, lifestyles, and identifying factors, then a group consisting of all family members of that already large segment, is even less particularized and therefore does not meet the particularity requirement.¹⁰⁸

The Fifth Circuit erred in that it did not analyze the group “family member[s] of Jose Orellana-Monson.”¹⁰⁹ Instead, it analyzed the group as if it also included “Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang.”¹¹⁰ The Fifth Circuit’s analysis in this case therefore strengthens the argument that a family focus approach could meet particular social group requirements if

¹⁰³ 24 I. & N. Dec. 579, 581 (B.I.A. 2008).

¹⁰⁴ *Id.* at 585 n.2.

¹⁰⁵ 685 F.3d 511, 521 (5th Cir. 2012) (alterations in original) [<https://perma.cc/5MWB-7PH5>]; *see also* Constanza v. Holder, 647 F.3d 749, 753 (8th Cir. 2011) (rejecting the particular social group “a family that experienced gang violence”) [<https://perma.cc/5Z3K-8CQD>].

¹⁰⁶ *Orellana-Monson*, 685 F.3d at 521 (alteration in original).

¹⁰⁷ *Id.* at 516.

¹⁰⁸ *Id.* at 522.

¹⁰⁹ *Id.* at 521 (alteration in original).

¹¹⁰ *Id.* at 521 (alteration in original).

properly considered because “family member[s] of Jose Orellana-Monson” would not include a large, amorphous group of people even if family members of “Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang” would.¹¹¹

A possible objection to not modifying the family group further is that it may run into “social distinction” challenges. For example, if the proposed particular social group is “family members of John Doe” or “members of the Doe family,” society as a whole may not view that group as such (if the family is not famous or well-known throughout society).¹¹² There is still disagreement, however, as to whether social distinction can be established in the mind of the persecutor, and advocates should push for a standard that looks to either the perception of the persecutor or society as a whole.¹¹³ Furthermore, societal recognition is not greatly enhanced by including information describing the original reason a family member was targeted. This is because societal recognition typically stems from understandings of the family unit itself rather than the actions or predicament of a family member.

VII. *IN RE ALBA*: EXPANDING FAMILY-BASED ASYLUM PROTECTION?

The BIA is currently considering an important mixed-motive, family-based asylum case, *In re Alba*.¹¹⁴ The asylum applicant in the case argued he was targeted for persecution by the Mexican cartel, La Familia, based on his family group after his father, a former police officer, refused to assist the cartel in selling drugs.¹¹⁵ Other family members including his cousin and nephew were also targeted by the cartel.¹¹⁶

In early 2016, the BIA requested that the parties to the case (and amici) address whether an asylum applicant who “has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant’s family” has to show that “the defining family member also was targeted on account of another protected ground.”¹¹⁷

In April 2016, the DHS filed a supplemental brief on the question presented by the BIA. The DHS brief suggests that the Department may be more open to mixed-motive, family-based asylum in the future. At the

¹¹¹ *Id.* at 521 (alteration in original).

¹¹² See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 236 (B.I.A. 2014) (requiring a level of “social visibility” to be protected as a particular social group).

¹¹³ See *Pirir-Boc v. Holder*, 750 F.3d 1077, 1083 n.6 (9th Cir. 2014) (noting the persecutor’s perceptions of the group of individuals has an “important place” in social visibility analyses) [<https://perma.cc/BUQ9-7GDT>]; *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–90 (9th Cir. 2013) (“When a particular social group is not visible to society in general (as with a characteristic that is geographically limited, or that individuals may make efforts to hide), social visibility may be demonstrated by looking to the perceptions of persecutors.”) [<https://perma.cc/5282-R7ES>].

¹¹⁴ DHS Brief, *supra* note 11.

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.* at 4.

¹¹⁷ BIA, Amicus Clerk, Amicus Invitation No. 16-01-11 (Family as a Particular Social Group) (Feb. 4, 2016) (requesting submissions that “address the circuit split on the issue”) [<https://perma.cc/872L-NH2Y>].

same time, the brief limits the Department’s endorsement of mixed-motive, family-based asylum to nuclear family members and does not provide a model for analyzing nexus.

According to the DHS brief, “in many, if not most societies, an ‘immediate family’ unit, comprised of a ‘person’s parents, brothers and sisters, husband or wife, and children,’ will qualify as a cognizable particular social group.”¹¹⁸ Furthermore:

if an applicant for asylum . . . has demonstrated that his or her membership in a cognizable family-based particular social group, such as an immediate family, is at least one central reason for the persecution suffered or feared, then the applicant has satisfied the nexus requirement. The applicant need not additionally demonstrate that the “defining family member” was targeted on account of a protected ground. Nexus analysis is fact-specific, and requires a searching review of the evidentiary record to determine if immediate family membership plays a central role for the persecutor’s motivation, rather than an incidental, minor, or tangential role.¹¹⁹

For those presenting mixed-motive, family-based asylum claims with a link to a nuclear family member, the Department agrees that the group would meet the particularity and social distinction tests for particular social group.¹²⁰ The Department’s position does not prohibit other non-nuclear family claims, however: “[w]hether other family relationships are socially distinct would depend upon the degree and nature of the relationship asserted to define the group and the cultural context for how that type of relationship is viewed by the society in question.”¹²¹

In terms of nexus analysis, the DHS brief argues that “[i]f it is a central reason for persecuting the applicant . . . the persecutor’s motivation for targeting the ‘defining family member’ [the person first targeted for a nonfamily-based reason] is not controlling and need not be on account of a protected ground.”¹²² DHS argues that there is no need to analyze other underlying motivations for persecution, as long as one central reason is a family relationship.¹²³ At the same time, however, the Department does not claim that the Fifth Circuit decision in *Ramirez-Mejia*¹²⁴ was necessarily incorrect because “evidence about the circumstances of other family members and whether they have been targeted on account of their family relationship” may lead to the conclusion that the persecution was not based on the family relationship.¹²⁵

In arguing that the circumstances of other family members are relevant to the nexus analysis, the Department is endorsing a

¹¹⁸ DHS Brief, *supra* note 11, at 1 (citing *Immediate Family*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/immediate%20family> (last visited Oct. 10, 2016) [<https://perma.cc/8F89-R63U>]).

¹¹⁹ *Id.* at 1–2.

¹²⁰ *Id.* at 7–8.

¹²¹ *Id.* at 9.

¹²² *Id.* at 10.

¹²³ *Id.* at 12–13.

¹²⁴ *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015).

¹²⁵ DHS Brief, *supra* note 11, at 18.

circumstantial/contributing cause approach; however, it does not explicitly state this. At the same time, the brief argues that “[e]vidence that the persecutor is or was inclined to persecute other individuals [in the family group] . . . should not be required to sustain a claim.”¹²⁶ The DHS brief does not take a clear position on nexus.

Furthermore, establishing nexus through a circumstantial approach will be more difficult if the social group were limited to the nuclear family, as the DHS suggests it should be. Because people may have very few nuclear family members, requiring proof that one or several nuclear family members were also targeted will be difficult. In terms of a nuclear family-limited particular social group, then, a but-for approach would be preferable to a circumstantial approach. If, however, the family group is larger, a circumstantial approach would be helpful to establish nexus. Either way, the Department, courts, and the BIA should explicitly identify the nexus model they are in favor of and why.

CONCLUSION

The current circuit split over mixed-motive, family-based asylum cases has caused uneven application of U.S. asylum law. The conflict, however, may ultimately lead to precedent that expands protection for family-based persecution. Close examination of the nexus requirement shows that the narrow approach adopted in some circuits is inconsistent with the purpose and intent of the Refugee Convention. In the future, adjudicators and courts should more clearly explain the nexus models they are utilizing and why. Courts should accept the “family focus” approach put forth in this Essay and carefully consider the asylum claims of persons persecuted on the basis of their family group. Under this approach, a but-for or circumstantial/contributing cause test would establish nexus. Furthermore, the particular social group would be formulated based on the family group alone, which would separate the claim from non-asylum ground motivations of the persecutor. The family focus approach is preferable to the approach taken by several circuit courts because it is in line with the intention of the Refugee Convention and widely accepted United States asylum law, and can successfully accommodate mixed-motive and complex cases.

¹²⁶ *Id.*