LEGITIMATE PERSECUTION: THE EFFECT OF ASYLUM'S NEXUS CLAUSE

Nicholas Bolzman[*]

INTRODUCTION

For the past forty years, the United States has suffered from a schizophrenic asylum policy. To obtain asylum, applicants must meet two requirements—that they fear or have experienced actual persecution, and the persecution was on account of one of five listed grounds: race, religion, nationality, membership in a particular social group, or political opinion.[1] While the first requirement is expansive and able to adapt to whatever new creative forms of harsh treatment persecutors develop, the second, called the nexus clause, finitely and arbitrarily narrows and limits asylum to only those who have suffered a type of persecution foreseeable to the statute's drafters.

Although an improvement to the prior ad hoc and geographically limited criteria for asylum, the internal tensions in today's asylum law have resulted in both inconsistent results and distracting litigation—both of which harm the very people asylum law is supposed to help. Despite being an attempt to modify the persecution element, the nexus clause, as interpreted by the courts, has become, at best, an unnecessary complication and, at worst, an inadvertent legitimation of the persecution that an asylum law should protect against. The result is a policy that arbitrarily excludes victims of persecution when their persecutor's motivation is not recognized under the limited nexus clause, a practice that inadvertently declares the persecution legitimate. Examples of such exclusions are victims of persecution based on gender and sexual orientation, those targeted for female genital mutilation (FGM) or recruitment as child soldiers, and those subjected to persecutory laws of general application.

This shortcoming could be addressed by adding gender, age, or laws that violate other basic human rights to the nexus clause list. But this would only be a surface fix. The heart of the difficulty is an inherent conflict written into the asylum law itself. Identifying this conflict makes the solution simpler than creating a laundry list of the various types of persecution that people may face around the world. Instead, the United States can simply offer asylum to those who are persecuted for any illegitimate motivation. This would recast the nexus clause as a

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[1] 8 U.S.C. § 1101(a)(42).

classification, instead of an additional criterion, or could even be used to remove the clause altogether.

HISTORY OF THE U.S.'S ASYLUM POLICY

The United States' asylum policy is historically intertwined with—and is still a subset of—its immigration policy. When immigration rules were lax, there was no need for a separate asylum procedure for refugees to obtain permission to enter the United States. The only time the issue of asylum would come up was in response to extradition procedures when an alien's home country demanded its citizen back.[2] Refugees were not even given legal recognition until 1948.[3]

From the nation's founding until 1875, there were virtually no immigration restrictions.[4] Refugees could enter the same as anyone else. Restrictions began in 1875 with prohibitions on prostitutes and criminals,[5] and continued over the next several decades: Chinese immigration was prohibited in 1882,[6] anarchists were excluded in 1903,[7] and illiterates were barred in 1917.[8] The first quotas restricting the number of foreigners allowed to enter the country annually were enacted in 1921, but there were still no affirmative eligibility requirements to meet before entry.[9] During this era, because the immigrants' reason for seeking entry was simply irrelevant and there was no need to place refugees into a separate class, refugees would be admitted or excluded on the same criteria as any other alien. Yet, with the adoption of quotas, refugees competed with all other types of immigrants. The result, as Fragomen and Bell explain, was that refugees were increasingly squeezed out:

> While restrictions on immigration increased, no special provision was made to permit the continuing entry into the United States of persons seeking sanctuary from persecution in their home countries. The result was that the previously open doors were shut completely to refugees; the worst example of this policy came in the 1930s, when Congress refused on several occasions to enact legislative exceptions to

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[2] *See* MATTHEW E. PRICE, RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS 25 (2009).

[3] *See* AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION PRIMER 194 (1985).

[4] *See id.*

[5] *See id.*; Act of March 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 476, 477.

[6] *See* FRAGOMEN & BELL, *supra* note 3, at 194 n. 3; Act of May 6, 1882, ch.126, § 1, 22 Stat. 58, 58–59.

[7] *See* FRAGOMEN & BELL, *supra* note 3, at 194; Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (repealed 1907).

[8] *See* FRAGOMEN & BELL, *supra* note 3, at 195; Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875 (repealed 1952).

[9] *See* FRAGOMEN & BELL, *supra* note 3, at 195; Act of May 29, 1921, ch. 8, § 2, 42 Stat. 5 (repealed 1952).

> the strict quota policy then in effect in order to permit the entry of refugees from Nazi terror, including proposed exceptions for groups of Jewish orphans.[10]

Although likely unintended, the effect of the increasingly restrictive immigration policies adopted in the early twentieth century was to leave out refugees altogether.

It was not until after World War II, in the Displaced Persons Act of 1948, that refugees first received legal recognition.[11] However, it was so highly restrictive and technical that ninety percent of displaced Jews, whom this act was supposed to help, did not qualify.[12] This act was extended in 1950, 1951, and 1952, but remained geographically limited to the countries liberated from German rule.[13]

In 1953, Congress also adopted the Refugee Relief Act, which provided for the admission of 28,000 refugees, half of which needed to be from Eastern European countries.[14] The purpose was largely political: "[s]pecial allotments were provided for Sweden, Iran, and Greece (countries viewed as bulwarks of democracy against Soviet expansionism)."[15] Sponsorship by U.S. citizens was required for all applicants.[16] However, these combined acts, which addressed refugees "on an ad hoc basis . . . while failing to devise an overall policy,"[17] were inadequate for the refugee crisis following the 1956 Hungarian revolution and the subsequent invasion of Hungary by the Soviet Union.[18]

The Hungarian revolution produced approximately 200,000 refugees, and the United States was unable to meet its portion of the demand under the Refugee Relief Act of 1953.[19] Once all refugee slots were full, President Eisenhower, after consulting with Congress, authorized the Attorney General to use the newly created parole power to admit additional 15,000 refugees.[20] This new parole power had been

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10 FRAGOMEN & BELL, *supra* note 3, at 193.

11 *Id.* at 194; Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009.

12 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, 13 (1981-82).

13 *See* FRAGOMEN & BELL, *supra* note 3, at 195; Anker & Posner, *supra* note 12, at 13; Act of June 16, 1950, ch. 262, 64 stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96; Act of June 27, 1952, ch. 477, 66 Stat. 277.

14 *See* BARBARA M. YARNOLD, REFUGEES WITHOUT REFUGE: FORMATION AND FAILED IMPLEMENTATION OF U.S. POLITICAL ASYLUM POLICY IN THE 1980'S 13 (1990); Refugee Relief Act of 1953,,ch. 336, 67 Stat. 400.

15 Anker & Posner, *supra* note 12, at 14.

16 *See* YARNOLD, *supra* note 14, at 13.

17 FRAGOMEN & BELL, *supra* note 3, at 195.

18 *See* Anker & Posner, *supra* note 12, at 14–15.

19 *See id*. at 14–15.

20 *Id.* at 15; FRAGOMEN & BELL, *supra* note 3, at 195–96.

added by the Immigration and Nationality Act of 1952.[21] Anker and Posner describe it as follows:

> Section 212(d)(5) was originally enacted to authorize the parole of otherwise inadmissible aliens. Derived from early administrative practice and operational instructions, it was designed to overcome some of the stringent entry requirements contained in the INA without allowing the alien the legal protections granted with formal entry into the United States. While both the prior administrative practice and the legislative history of the INA indicate a purpose to benefit *individual* aliens in emergency situations, the 1956 Hungarian crisis heralded "the first, but by no means the last," use of the parole provision for the *mass* admission of refugees.[22]

The parole power was again used to admit refugees from the Cuban revolution of 1959, and then again for Chinese, Czechs, and Indochinese in the 1960s and 1970s.[23] Each time Congress tacitly approved the measure by passing legislation permitting the paroled refugees to adjust their statuses to that of legal permanent resident.[24]

Congress finally created an immigration category for refugees in the 1965 amendments to the Immigration and Nationality Act.[25] These amendments also did away with the national quota system and replaced it with the priority system that is the basis for today's immigration policy.[26] However, most of the refugee restrictions from the prior ad hoc acts were kept.[27] To be eligible for asylum, applicants had to meet four criteria:

> 1) departure from a communist-dominated country or from a country within the general area of the Middle East; 2) the departure constituted a flight; 3) such flight was caused by persecution or fear of persecution on account of race, religion, or political opinion; and 4) an inability or unwillingness to return.[28]

Because of these geographic and ideological limitations, the act was inadequate to deal with refugees globally, and de facto refugee policy continued to be largely set by the executive branch's parole power.[29]

Congress eventually adopted today's refugee policy in the Refugee Act of 1980.[30] This new policy was designed to "remedy the ideological

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21 *See* FRAGOMEN & BELL, *supra* note 3, at 195–96; 8 U.S.C. § 1182(d)(12).

22 Anker & Posner, *supra* note 12, at 15 (footnotes omitted).

23 FRAGOMEN & BELL, *supra* note 3, at 196.

24 *Id.*

25 *See* Anker & Posner, *supra* note 12, at 17.

26 *See id.* at 18.

27 *Id.* at 17.

28 *Id.*

29 *See* YARNOLD, *supra* note 14, at 15; Anker & Posner, *supra* note 12, at 18–19.

and geographical biases that had infected earlier US refugee policy."[31] To accomplish this end, it opened up the refugee definition to applicants worldwide, rather than limiting it to certain geographic areas.[32] It also modeled the definition of refugee devised by the 1967 United Nations Protocol Relating to the Status of Refugees.[33] As Price explains, this act "for the first time created an explicit statutory basis for asylum."[34] This definition of refugee is still in effect today. But as will be shown, while it eliminated the arbitrary geographic limitations and opened up the ideological restrictions, it still falls short of providing a truly expansive refugee policy.

U.S.'S ASYLUM POLICY TODAY

Today's asylum structure has two main criteria: the persecution element and the protected grounds element. To qualify, an applicant must show that he or she (a) has been "persecuted" or "has a well-founded fear of persecution" and (b) that the persecution was "on account of" one of the following five grounds: race, religion, nationality, membership in a particular social group, or political opinion.[35] Failure to show either of these elements results in a denial of asylum. Each element is examined in turn.

(1) Persecution

"Persecution" is undefined in both the statute and in international documents, and the agencies and courts tasked with implementing the statute have had to develop their own definition.[36] To say this development has been muddled would be an understatement.[37] In its

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[30] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 USC, 20 USC & 22 USC); 8 U.S.C. § 1101(a)(42).

[31] PRICE, *supra* note 2, at 86.

[32] *See id.*

[33] *Id.*; Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (removing date cut-off from Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150).

[34] PRICE, *supra* note 2, at 86.

[35] 8 U.S.C. § 1101(a)(42).

[36] Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law,* 60 OKLA. L. REV. 109, 119 (2007).

[37] *See* Sahi v. Gonzales, 416 F.3d 587, 588–89 (7th Cir. 2005) (citations omitted):

> The primary responsibility for defining key terms in the immigration statute that the statutes themselves do not define, such as "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(a), is that of the Board of Immigration Appeals as the Attorney General's delegate. The Board has failed to discharge that responsibility. Neither the parties' research nor our own has brought to light a case in which the BIA has defined "persecution." The Board's interpretation of "well-founded" fear of persecution as meaning

foundational case of *Acosta*, the Board of Immigration Appeals (BIA) has described persecution as meaning:

> [E]ither a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive. The harm or suffering inflicted could consist of confinement or torture. It also could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom. Generally harsh conditions shared by many other persons did not amount to persecution. Prosecution for violating travel restrictions and laws of general applicability did not constitute persecution, unless the punishment was imposed for invidious reasons.

Two significant aspects of this accepted construction of the term "persecution" were as follows. First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. Thus, physical injury arising out of civil strife or anarchy in a country did not constitute persecution. Second, harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.[38]

In subsequent opinions, the BIA narrowed the definition of persecution, explaining that it does not include "harassment"[39] or other action that society may consider "unfair, unjust, or even unlawful or unconstitutional."[40]

Even as a comprehensive definition remains elusive, the courts have also considered the question:

> Courts generally require that the suffering or harm in question be severe, and recognize that persecution is "an extreme concept that does not include every sort of treatment our society regards as offensive." Conduct falling below this threshold, such as harassment or discrimination, is not usually considered persecution, but may rise to the level of persecution if sufficiently severe. Moreover, although persecution is usually associated with an alien suffering severe

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that the alien was more likely than not to be persecuted if returned to his country of origin was rejected by the Supreme Court in the *Cardoza–Fonseca* case as a misinterpretation of the statute, but the Board had not attempted to define "persecution" itself. Similarly, although the Board in *In re A–M–* adopted the definition in *Lie v. Ashcroft* of a "pattern or practice" of persecution as "persecution of a group that is 'systemic, pervasive, or organized,'" again it did not define "persecution." It said in *In re A–E–M* that incidents of "harassment" do not constitute persecution, but did not explain the distinction between mere harassment and outright persecution. It has also said that "persecution" does not include "all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional," but has not said what it does include. We haven't a clue as to what it thinks religious persecution is.

38 *In re* Acosta, 19 I&N Dec. 211, 222 (BIA 1985) (citations omitted).

39 *In re* A–E–M–, 21 I&N Dec. 1157, 1159 (BIA 1998).

40 *In re* V–T–S–, 21 I&N Dec. 792, 798 (BIA 1997).

> physical abuse, such as torture or beatings, threats of harm may in some instances be sufficient to amount to persecution. Similarly, even if an alien suffers no physical abuse, pure economic harm may also constitute persecution if it is sufficiently severe. Persecution may also arise in the absence of violence where a government compels an individual to renounce his or her religious beliefs or completely prohibits religious practice.[41]

All federal courts, however, require the definition of persecution to be something greater than merely prosecution for violation of a criminal or otherwise legitimate law.[42] While that distinction can be made in free or democratic societies, it can have troubling results when applied to those fleeing oppressive laws in less free countries—such as Chinese Christians[43] or those fleeing China's one-child policy.[44] This fuzzy line between persecution and prosecution will be returned to later, but courts generally tend to look to whether the prosecution can be characterized as "excessive or arbitrary"[45] or "pretextual"[46] enforcement of domestic law.

Bringing together all of these themes, as well as the theoretical basis for offering asylum in the first place, Price has summarized the three elements of persecution as follows:

> The meaning of "persecution" should be informed by the role of asylum as an international sanction. "Persecution" is conduct so at odds with the principal of communal self-determination that a presumption of legitimacy cannot be justified, and external interference is warranted. Such mistreatment cannot be trivial; it must involve the infliction of serious harm. The mistreatment must also be motivated by "illegitimate reasons" – reasons inconsistent with the theory behind a presumption of legitimacy, namely, that a state acts as the fiduciary of its citizenry. The nexus clause – the requirement that persecution be on account of "race, religion, nationality, membership of a particular social group, or political opinion" – provides examples of such illegitimate reasons. A state that seeks to inflict serious harm on a citizen because he or she is of a different race, religion, nationality, or because of some other ascriptive characteristic, or because he or she possesses a certain political opinion, cannot intelligibly be said to act on behalf of that citizen. "Persecution" thus has three elements: (1)

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41 English, *supra* note 36, at 119–21 (footnotes omitted).

42 *See id.* at 124.

43 *See* Li v. Gonzales, 420 F.3d 500, 510 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005).

44 *See In re* Chang, 20 I&N Dec. 38 (BIA 1989) ("We do not find that the 'one couple, one child' policy of the Chinese Government is on its face persecutive.").

45 Abdel-Masieh v. INS, 73 F.3d 579, 584 (5th Cir. 1996) (quoting *In re* Laipenieks, 18 I&N Dec. 433, 459 n. 18 (BIA 1983)).

46 Cruz-Samayoa v. Holder, 607 F.3d 1145, 1152 (6th Cir. 2010).

> serious harm that is (2) inflicted or tolerated by official agents (3) for illegitimate reasons.[47]

This three-part definition fits nicely with current case law, despite case law not always being quite this clear. Likewise, the foundational *Acosta* decision included all three of these elements: (1) "harm or suffering" which (2) is inflicted "either by the government of a country or by persons or an organization that the government was unable or unwilling to control" and which (3) is inflicted "to punish him for possessing a belief or characteristic a persecutor sought to overcome." [48] As *Acosta* makes clear, these are theoretical elements of persecution independent of the nexus clause.[49]

(2) On Account Of . . .

However, establishing past or future persecution is not sufficient to demonstrate eligibility for asylum under current law. The applicant must also show that the persecutor had one of five enumerated improper motives: race, religion, nationality, membership in a particular social group, or political opinion.[50] While Price described these as "examples" [51] of the illegitimate reasons inherent in the persecution standard—which in theory they are—as applied under the law, they are the complete and exhaustive list. Treatment, even if recognized as persecution, that is motivated for any other reason is not grounds for a grant of asylum. This forms a troubling gap between de facto actual persecution and de jure recognized persecution.

Four of these five categories—race, religion, nationality, and political opinion—are relatively well-defined. While showing the existence of persecution on these grounds may be difficult, the concept is not difficult to identify or apply. It is in the most opaque category, that of "membership in a particular social group," that the real confusion begins. As with persecution, there is no definition in the statute. Nor as U.S. Supreme Court Justice Alito noted, while serving as a judge on the Third Circuit U.S. Court of Appeals, is there any legislative history that helps clarify what this category means:

> The phrase "particular social group" was first placed in the INA when Congress enacted the Refugee Act of 1980. While the legislative history of this act does not reveal what, if any, specific meaning the members of Congress attached to the phrase "particular social group," the legislative history does make clear that Congress intended "to

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47 PRICE, *supra* note 2, at 106–07.

48 *Acosta*, 19 I&N Dec. at 222.

49 *Id.* at 229.

50 8 U.S.C. § 1101(a)(42).

51 PRICE, *supra* note 2, at 106.

> bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." It is therefore appropriate to consider what the phrase "particular social group" was understood to mean under the Protocol.
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> Article I of the Protocol generally adopted the definition of a "refugee" contained in Article I of United Nations Convention Relating to the Status of Refugees. This latter provision defined a "refugee" using terms—i.e., "race, religion, nationality, membership of a particular social group or political opinion"—virtually identical to those now incorporated in the INA. When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase "membership of a particular social group" was added to this definition as an "afterthought." The Swedish representative proposed this language, explaining only that it was needed because "experience had shown that certain refugees had been persecuted because they belonged to particular social groups," and the proposal was adopted. Thus, neither the legislative history of the relevant United States statutes nor the negotiating history of the pertinent international agreements sheds much light on the meaning of the phrase "particular social group."[52]

Nevertheless, to apply to actual circumstances, the phrase needs definition of some sort. Accordingly, in *Acosta*, the BIA defined it as a "group of persons all of whom share a common, immutable characteristic."[53] Given examples of that characteristic are "sex, color, or kinship ties" and it can even include "past experience such as former military leadership or land ownership."[54] While the relevant characteristic will be determined "on a case-by-case basis," at its heart "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."[55] This standard has been more or less adopted by all the federal circuits,[56] and it has even been recognized by foreign courts.[57] Since *Acosta*, other refinements have also been added to the definition of "particular social group." For example, the Third and Sixth Circuits have noted that the *Acosta* characteristic must exist prior

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[52] Fatin v. INS, 12 F.3d 1233, 1239 (3d Cir. 1993) (citations omitted).

[53] *Acosta*, 19 I&N Dec. at 233.

[54] *Id.*

[55] *Id.*

[56] *See* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 53 (2008) (noting that the Ninth Circuit and Second Circuit have "minor differences" from the other circuits).

[57] *See id.* at 53–54.

to and independent of the persecution, and cannot be a result of the persecution.[58]

At this point in history, the understanding of "particular social group" faced a crossroads. Either it was expansive enough to include all persecution not otherwise motivated by race, religion, nationality, or political opinion, or it was a stand-alone category limited to a finite subset of persecution. The former interpretation would mean that the statute grants asylum to all who have suffered persecution, while the latter recognizes only certain types of treatment and opens the door for certain victims of persecution to be denied asylum.

Initially, the *Acosta* decision lent credibility to the catch-all understanding, suggesting that the United Nations added it "to stop a possible gap in the coverage."[59] In 1996, the BIA went even further and explicitly noted that "[t]he social group category within the refugee definition incorporated into the Act has been recognized as having deliberately been included as a 'catch-all' for individuals not falling into the first four specifically enumerated categories of political opinion, race, religion, or ethnicity."[60]

The United Nations, however, disagreed with such an expansive view, noting that "[c]onsistent with the language of the Convention, this category cannot be interpreted as a 'catch all' that applies to all persons fearing persecution."[61] In 2006, the BIA followed this recommendation and rejected the catch-all approach. In so doing, the BIA added an element of "visibility" to the particular social group category. The BIA explained:

> The recent *Guidelines* issued by the United Nations confirm that "visibility" is an important element in identifying the existence of a particular social group. The *Guidelines* explain that the social group category was not meant to be a "catch all" applicable to all persons fearing persecution. In this regard, the *Guidelines* state that "a social group cannot be defined *exclusively* by the fact that it is targeted for persecution." However, "persecutory action toward a group may be a

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[58] *See* Sarkisian v. Gonzales, 322 F. App'x 136, 141 (3d Cir. 2009) ("This is a matter of logic: motivation must precede action; and the social group must exist prior to the persecution if membership in the group is to motivate the persecution."); Rreshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005) ("[A] social group may not be circularly defined by the fact that it suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted.").

[59] *Acosta*, 19 I&N Dec. at 232.

[60] *In re* Kasinga, 21 I&N Dec. 357, 375 (BIA 1996).

[61] UNHCR, Guidelines on International Protection No. 2: "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, ¶ 2, HCR/GIP/02/02 (May 7, 2002).

> relevant factor in determining the *visibility* of a group in a particular society."[62]

The BIA has also considered the element of "particularity" in determining whether there is a particular social group. By this, it means examining whether the identified characteristic is "too amorphous to provide an adequate benchmark for determining group membership."[63] These additional standards reject the catch-all approach and instead restrict "particular social group" to its own limited type of persecution. The change, although subtle, established that the nexus clause was an additional criterion for showing eligibility rather than simply a method of classifying persecution.

These additional requirements for social visibility and particularity have not been received as well as the original *Acosta* definition. Judge Posner of the Seventh Circuit harshly criticized the social visibility requirement, stating that "it makes no sense; nor has the Board [of Immigration Appeals] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility."[64] He also pointed out that the new understanding is inconsistent with prior grants of asylum:

> [R]egarding "social visibility" as a criterion for determining "particular social group," the Board has been inconsistent rather than silent. It has found groups to be "particular social groups" without reference to social visibility, *In re Kasinga,* (young women of a tribe that practices female genital mutilation but who have not been subjected to it); *In re Toboso–Alfonso* (homosexuals); *In re Fuentes, supra,* (former members of the national police); cf. *In re Acosta* (former military leaders or land owners), as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate. Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities.[65]

The Third Circuit followed the Seventh Circuit in determining that the new standard of "social visibility" was inconsistent with the BIA's prior holdings regarding particular social groups.[66] It also rejected the "particularity" requirement, noting that it saw little difference between it and the "social visibility" standard: "[i]ndeed, they appear to be different articulations of the same concept and the government's attempt

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62 *In re* C–A–, 23 I&N Dec. 951, 960 (BIA 2006) (citations omitted).

63 *In re* A–M–E–, 24 I&N Dec. 69, 76 (BIA 2007).

64 Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

65 *Id.* at 615–16 (citations omitted).

66 *See* Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582, 604 (3d Cir. 2011).

to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating."[67] While not rejecting it outright, the Ninth Circuit has narrowed "social visibility" to mean "perception by a society, not ocular recognition."[68] Other circuits, however, have adopted and applied these additional criteria.[69]

THE SHORTCOMINGS OF ASYLUM LAW

These two elements of today's asylum law—persecution and nexus to the five recognized motivations—create problems for applicants who are persecuted for reasons other than nexus reasons. Accepting such applicants makes the nexus requirement irrelevant, while rejecting them and sending them back to face more persecution seems arbitrary and a violation of asylum's humanitarian purpose.

Under the BIA's interpretation, showing persecution requires illegitimate action on behalf of the government: the treatment must be inflicted "in order to punish [the applicant] for possessing a belief or characteristic a persecutor sought to overcome."[70] Harm or suffering alone does not constitute persecution—it must be illegitimately motivated. This is the "illegitimate reasons"[71] element identified earlier by Price. But unlike the nexus clause analysis, the persecution analysis of the illegitimate motive is not confined to a pre-existing list. Instead, it can be identified on a case-by-case basis and adapted to whatever forms of illegitimate treatment persecutors may invent.

The nexus clause undoes that expansiveness by offering a finite list of five recognized illegitimate motives. Any motivation of the persecution beyond these five is not recognized and results in a denial of asylum. As the Sixth Circuit has explained, "[i]f the ill-treatment was motivated by something other than one of these five circumstances, then the applicant cannot be considered a refugee for purpose of asylum."[72] And Price notes, "[t]he list of grounds given by the nexus clause is an exclusive one. This

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[67] *Id.* at 608.

[68] Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013). It is significant to note that both the Third Circuit and Seventh Circuit considered and rejected this distinction. *See Valdiviezo-Galdamez*, 663 F.3d at 606; Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

[69] *See* Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); Zelaya v. Holder, 668 F.3d 159, 165 (4th Cir. 2012); Rivera-Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012); Constanza v. Holder, 647 F.3d 749, 753 (8th Cir. 2011); Bonilla-Morales v. Holder, 607 F.3d 1132, 1137 (6th Cir. 2010); Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009); Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007); Castillo-Arias v. Gonzales, 446 F.3d 1190, 1197 (11th Cir. 2006).

[70] *Acosta*, 19 I&N Dec. at 222.

[71] PRICE, *supra* note 2, at 106–07.

[72] Zoarab v. Mukasey, 524 F.3d 777, 780 (6th Cir. 2008).

has had unhappy consequences in many cases, most notoriously those involving police investigations."[73]

The result is that a sufficiently clever persecutor can ensure that the victims are not eligible for asylum. State sanctioned "random violence," for example, is not a basis for asylum since it is not motivated by any of the nexus reasons.[74] The consequence is that when an applicant shows he is persecuted for a non-nexus reason, a government action considered illegitimate by the first clause of asylum law may not be illegitimate enough to satisfy the second clause— and it is re-legitimized. As the following examples show, this is a very real problem that the BIA and courts have wrestled with in multiple areas, developing different and inconsistent standards along the way.

(1) Gender

Gender is one of the most noticeable omissions from the nexus clause. Although ostensibly gender-neutral, the definition of persecution tends to not protect women as much as men:

> [H]arms inflicted on women were often not considered to be persecution because they were condoned or required by culture or religion (e.g., female genital mutilation (FGM), repressive social norms), disproportionately inflicted on women (e.g., domestic violence), or simply different from the harms suffered by men under similar circumstances (i.e., men may be beaten while women may be raped).[75]

This sort of treatment is difficult to fit under our asylum laws because of the nexus requirement.[76] Since gender persecution is not legally recognized, applicants must find a way to fit their story into another category. For example, a sexual assault victim may gain asylum if she can show her treatment was motivated by her race[77] or political opinion,[78] although the latter is not always successful.[79] But persecution for "feminism" or disagreement with gender restrictive laws is not considered a sufficient political opinion to satisfy the nexus requirement.[80]

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[73] PRICE, *supra* note 2, at 111.

[74] *See* Melgar de Torres v. Reno, 191 F.3d 307, 313 (2d Cir. 1999).

[75] Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 781–82 (2003).

[76] *See id.* at 783.

[77] *See* Shoafera v. INS, 228 F.3d 1070, 1074–75 (9th Cir. 2000).

[78] *See* Angoucheva v. INS, 106 F.3d 781, 790 (7th Cir. 1997); Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987).

[79] *See Melgar de Torres*, 191 F.3d at 313; Klawitter v. INS, 970 F.2d 149, 150–51 (6th Cir. 1992); Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir. 1987).

[80] *See Fatin*, 12 F.3d at 1242–43.

The most common argument for nexus qualification in gender cases, consequently, appears to be that it fits under "particular social group." While one would think that gender meets *Acosta*'s standard of "a common, immutable characteristic," especially since "sex" is specifically given as an example,[81] courts have not taken that route. Instead, they have looked for a characteristic beyond sex or gender. This "gender plus" analysis was adopted by the Second Circuit when it explained that the term "'particular social group' is broad enough to encompass groups whose main shared trait is a common one, such as gender, *at least so long as the group shares a further characteristic* that is identifiable to would-be persecutors *and is immutable or fundamental*."[82] Of course, if a further qualifying immutable or fundamental characteristic is shared, then the group is a particular social group regardless of and not because of gender.

The result of this standard is creative litigating and inconsistent results. For battered women, "'[g]ood lawyering' in these cases has been a game of trying to shoehorn women's claims into the categories established by the nexus clause to establish a link between the husband's violence and a Convention reason."[83] The results have been mixed. "[W]omen who have been sold into marriage"[84] are a particular social group, but not "women who have been previously battered and raped by Salvadoran guerillas."[85] And the social group of "Mexican women who have suffered domestic violence"[86] has been recognized, while "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" was not.[87]

Particularly instructive is the plight of Iranian women, who are not recognized as a social group merely because they are discriminated against by harsh gender restrictions[88] or because they "find their country's gender-specific laws offensive and do not wish to comply with them."[89] Instead, they have to show additional characteristics, such as being "Iranian women who advocate women's rights or who oppose

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[81] *Acosta*, 19 I&N Dec. at 233.

[82] Gao v. Gonzales, 440 F.3d 62, 64 (2d Cir. 2006) *cert. granted, judgment vacated sub nom.* Keisler v. Hong Yin Gao, 552 U.S. 801 (2007) (emphasis added).

[83] PRICE, *supra* note 2, at 156.

[84] *Gao*, 440 F.3d at 70.

[85] Gomez v. INS, 947 F.2d 660, 663–64 (2d Cir. 1991).

[86] Gonzalez v. Gutierrez, No. D040063, 2003 WL 22236051, at *4 (Cal. Ct. App. Sept. 30, 2003) (noting that the plaintiff had been previously granted asylum).

[87] *In re* R–A–, 22 I&N Dec. 906, 917 (BIA 2001).

[88] Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994).

[89] *Fatin*, 12 F.3d at 1241.

Iranian customs relating to dress and behavior"[90] or being "Iranian women who *refuse to conform* to the government's gender-specific laws and social norms."[91] Subtle wording differences in the description of a social group or identifiable characteristic, rather than the merits of the argument or the fact of illegitimate harsh treatment, can make the difference in a grant or denial of asylum.

As a result of these cases, the nexus clause confronts women claiming asylum with a paradox. If they show that the ill treatment is culturally widespread, the category is too large to be considered a social group under *Fatin* and *Safie*. Yet if they show that it is particular to them, it becomes simply a personal domestic matter under *In re R–A–*. They must show that it is targeted under the nexus clause without it being personal. "These conflicting restrictions on gender-based asylum claims have created a troubling paradox: a tension between competing demands on gender-based claims which leaves women with only narrow opportunities to gain refuge."[92] Women, even when persecution is shown, may be arbitrarily denied asylum because their persecutor's motivation was insufficiently illegitimate.

(2) Female Genital Mutilation

Although it probably should be included in the discussion of gender, FGM is treated differently in practice. Like gender, FGM applicants apply under the social group category.[93]

The BIA first recognized FGM as a basis for asylum in 1996.[94] After determining that it was persecution,[95] the BIA then had to satisfy the nexus clause. One might conclude that, when combined with gender, FGM could constitute the "plus" discussed above and satisfy the social group criteria in gender cases. However, such was not the case. Instead, the BIA looked for *yet additional* characteristics, finally settling on "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[96] Under this ruling, gender and targeting for FGM combined are still insufficient to be recognized as a social group and some third "immutable

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90 *Safaie*, 25 F.3d at 640.

91 *Fatin*, 12 F.3d at 1241.

92 Jenny-Brooke Condon, Comment, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 252 (2002).

93 *See* Stacey Kounelias, Comment, *Asylum Law and Female Genital Mutilation:"Membership in a Particular Social Group" Inadequately Protecting Persecuted Women*, 11 SCHOLAR 577, 582 (2009) ("Women and children regularly use the 'membership in a particular social group' ground when seeking asylum for gender-based claims.").

94 *Kasinga*, 21 I&N Dec. at 358.

95 *Id.* at 365.

96 *Id.*

characteristic" such as cultural beliefs or demonstrated opposition is necessary. Since the social group must exist prior to the persecution, not merely as a result of it,[97] women already subjected to FGM have an even harder argument to make since their persecution was completed at the moment they joined the group.[98]

This standard was tested the very next year, when an immigration judge denied asylum to a woman who had fled Ghana because (among other reasons), she failed to show the social group "plus" characteristic to her FGM claim.[99] The judge determined that her situation was "a 'personal problem' rather than a 'matter of general practice imposed upon a particular social group.'"[100] Although affirming the denial on other grounds, the BIA did recognize that "women of the Nkumssa tribe who did not remain virgins until marriage"[101] were a particular social group.[102]

This requirement to find a "characteristic" beyond FGM did not last. In 2005, the Ninth Circuit classified former victims of FGM as belonging to the social group of "young girls in the Benadiri clan" or "Somalian females" and identified no further necessary characteristics such as opposition to the practice.[103] The BIA has since cited this without analysis while granting asylum for other FGM victims with the strong implication that showing fear of FGM alone was sufficient to show a particular social group.[104]

Other courts have followed this example. The Sixth Circuit held that "[f]orced female genital mutilation involves the infliction of grave harm constituting persecution on account of membership in a particular social group"[105] with no discussion of the previously required social group analysis. Ultimately, the court ruled that the applicant—who had undergone FGM herself—could be granted asylum based on the fear of

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[97] *See* cases cited *supra* note 58.

[98] *See* Valena Elizabeth Beety, *Reframing Asylum Standards for Mutilated Women*, 11 J. GENDER RACE & JUST. 239, 257 (2008).

[99] Abankwah v. INS, 185 F.3d 18, 21 (2d Cir. 1999).

[100] *Id.*

[101] *Id.* (internal quotation marks omitted).

[102] The Second Circuit subsequently reversed the denial. *Id.* at 20. However, it was later discovered that the applicant was using a fake identity and likely making up her story. *See* William Branigin & Douglas Farah, *Asylum Seeker Is Impostor, INS Says*, WASH. POST, Dec. 20, 2000, at A1.

[103] Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005); *but see* Rreshpja v. Gonzales, 420 F.3d 551, 555 (6th Cir. 2005) ("We do not necessarily agree with the Ninth Circuit's determination that virtually all of the women in Somalia are entitled to asylum in the United States.").

[104] *See In re* S–A–K–, 24 I&N Dec. 464, 465 (BIA 2008).

[105] Abay v. Ashcroft, 368 F.3d 634, 638 (6th Cir. 2004).

her daughters being subjected to FGM.[106] The Eighth Circuit and Ninth Circuit have also dropped the "plus" part of the social group analysis in FGM cases.[107]

The result is that unlike other gender claims, "for claimants who have been genitally mutilated, courts consider only the specific harm, not the basis for the harm."[108] For FGM cases, multiple courts are now getting around the nexus limitation by ignoring it altogether. It has been subsumed into the "persecution" requirement, leaving FGM clams with an analysis different than other gender claims.[109]

(3) Sexual Orientation

While the courts have declined to recognize gender as a social group, they have shown much less hesitation with regard to sexual orientation. In 1990, the BIA upheld the grant of asylum to a refugee from Cuba who was fleeing that country's uniform prohibition on homosexuality.[110] It affirmed the immigration judge's finding that the status of homosexuality, in light of the culture of Cuba, constituted a particular social group.[111] The Ninth Circuit followed in 2000, recognizing the social group of "gay men with female sexual identities in Mexico."[112] However, this country-by-country analysis was done away with when the same circuit held in 2005 that "*all* alien homosexuals are members of a 'particular social group.'"[113] As with FGM cases, the nexus requirement has virtually disappeared in sexual orientation cases since homosexuals are now recognized as a particular social group that transcends cultures, countries, and regions.

(4) Child Soldiers

Cases involving children who escaped recruitment as child soldiers expose yet another shortcoming of the nexus clause. As with women, children's best option is to use the particular social group category.[114]

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[106] *Id.* at 642.

[107] *See* Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that female Somali applicants could show a well-founded fear of persecution "based solely on gender given the prevalence of FGM"); *see also* Abebe v. Gonzales, 432 F.3d 1037, 1042 (9th Cir. 2005) ("It is well-settled that FGM constitutes persecution sufficient to warrant a grant of asylum.").

[108] Beety, *supra* note 98, at 240.

[109] *Id.* at 241.

[110] *In re* Toboso-Alfonso, 20 I&N Dec. 819, 822 (BIA1990).

[111] *Id.*

[112] Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000).

[113] Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005).

[114] The Supreme Court has rejected the argument that resisting recruitment is a political act. *See* INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) ("[T]he mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to

However, also similar to gender claims, children or youth are not a particular social group even when limited to specific countries or areas.[115] Adding the element that they are targeted for child soldier recruitment is likewise insufficient; the basis for a particular social group must be larger than the mere fact of persecution.[116]

The 2003 Third Circuit case of *Lukwago v. Ashcroft* reveals part of the dilemma for child soldiers.[117] In this case, the BIA denied Lukwago's argument that he qualified for asylum based on past persecution on account of the social group of "children from Northern Uganda who are abducted and enslaved by the LRA [Lord's Resistance Army] and oppose their involuntary servitude" because age is not a basis for a social group.[118] The BIA noted that even if age were sufficient to constitute a particular social group, the applicant was unable to show that he had been targeted for recruitment based on his age rather than his mere existence.[119] The Third Circuit affirmed this portion of the case.[120] However, Lukwago's argument that he feared future persecution based on membership in the social group of "former child soldiers who have escaped LRA enslavement" fared better because of "the shared experience of abduction, persecution and escape at a time when he was a child."[121] The Third Circuit accepted this argument and remanded the case for further consideration in light of finding that former child soldiers constituted a particular social group.[122]

Lukwago's case demonstrates the dilemma of child soldiers. While they may be granted asylum once they are recruited and escape,[123] they may not be granted asylum for escaping prior to being recruited. It is an inversion of the original FGM dilemma where, as was shown, the future fear argument was stronger than the past fact argument.

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establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion.").

[115] *See* Contreras-Martinez v. Holder, 346 F. App'x 956, 958 (4th Cir. 2009); Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005); Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986); *In re* S–E–G–, 24 I&N Dec. 579, 583–84 (BIA 2008).

[116] *See* Tina Javaherian, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 425 (2011).

[117] 329 F.3d 157 (3d Cir. 2003).

[118] *Id.* at 171.

[119] *Id.* at 171–72.

[120] *Id.* at 173.

[121] *Id.* at 178.

[122] *Id.* at 183.

[123] Sometimes even this is insufficient. *See* Sackie v. Ashcroft, 270 F. Supp. 2d 596, 600–02 (E.D. Pa. 2003) (denying asylum but granting relief under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment).

Furthermore, while the fact of recruitment qualifies children for recognition as a social group, it may simultaneously disqualify them from receiving asylum, since the definition of refugee specifically excludes "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."[124] Consequently:

> [C]hild soldiers encounter two main obstacles when applying for asylum: establishing membership under one of the five protected grounds, and overcoming the persecutor's bar. Unless an applicant can show that he was targeted on the basis of race, religion, political opinion, or nationality, the likeliest ground for a child soldier to attain asylum is that of membership in a particular social group.[125]

Therefore, while both the persecution element and the nexus element are given equal weight in child soldier cases, meeting the affirmative burden to satisfy the latter has the significant possibility of disqualifying him or her entirely.

(5) Laws of General Applicability

The final category of nexus clause difficulties examined is laws of general applicability. This was briefly described above as the persecution/prosecution problem, but requires more analysis. When the treatment the applicant is fleeing is the enforcement of a persecutory law of their home country, it is difficult to show the individualized specific targeting required by the nexus clause. Some courts have even gone so far as to hold that "persecution does not exist where the law that the native country seeks to enforce in its criminal prosecution is 'generally applicable.'"[126]

To overcome this, the applicant must show that the prosecution "was actually pretext for persecution on account of one of the INA's enumerated grounds."[127] Going all the way back to *Acosta*, the BIA ruled that "[p]rosecution for violating . . . laws of general applicability did not constitute persecution, unless the punishment was imposed for invidious reasons."[128] To overcome this presumption legitimately, the applicant needs to show that the treatment was "on account of" one of the protected grounds and not simply an enforcement of the law. This analysis sidesteps the question of whether the law itself can be

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[124] 8 U.S.C. § 1101(a)(42)(B).

[125] *Javaherian*, *supra* note 116, at 452–53.

[126] Cruz-Samayoa v. Holder, 607 F.3d 1145, 1151 (6th Cir. 2010) (citing Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992); Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992)).

[127] *Id.* (internal quotation marks omitted).

[128] *Acosta*, 19 I&N Dec. at 222.

persecutory by seeking to "punish [the applicant] for possessing a belief or characteristic a persecutor sought to overcome."[129]

Consequently, when it comes to laws of generally applicability, whether asylum can be granted depends entirely on the motivation of the persecutor. This quickly blurs into a nexus analysis and ignores the persecution element entirely. The result is that governments may hide persecution behind generally applicable laws—even those which run directly counter to fundamental human rights norms that refugee law is designed to protect. For example, the Fifth Circuit affirmed the denial of an asylum claim from a Chinese man claiming religious persecution because he was not targeted, but rather "was punished for violating the law regarding unregistered churches and not because of his religion."[130] Likewise, the application of a German family that ran afoul of Germany's truancy laws while seeking to exercise their internationally recognized prior right to determine their children's education[131] was denied by the BIA because "[t]he record does not show that the compulsory school attendance law is selectively applied to homeschoolers like the applicants."[132] The reasoning of these cases is that as long as everyone in the country is treated the same—even if that uniform

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[129] *Id.*

[130] Xiaodong Li v. Gonzales, 420 F.3d 500, 509, 511 (5th Cir. 2005), *vacated*, 429 F.3d 1153 (5th Cir. 2005).

[131] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 26(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Parents have a prior right to choose the kind of education that shall be given to their children."). This provision was adopted specifically in response to Hitler's use of compulsory school laws to control the German youth. *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 90 (1999). *See also* International Covenant on Civil and Political Rights, art. 18(4), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."); International Covenant on Economic, Social and Cultural Rights, art. 13(3), *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) ("The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions."); Convention on the Rights of the Child, art. 29(2) *opened for signature* Nov. 20, 1989, 1557 U.N.T.S. 3 (entered into force Sept. 2, 1990) ("No part of the present article . . . shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.").

[132] *In re* Romeike, Board of Immigration Appeals 3 (May 4, 2012), http://www.hslda.org/hs/ international/Germany/RomeikeBIAOpinion.pdf, *aff'd sub nom* Romeike v. Holder, 718 F.3d 528 (6th Cir. 2013).

treatment is illegitimate persecution—no one who escapes can be granted asylum.

Probably the most troubling part of the generally applicable laws analysis, and the most revealing, is the treatment of those who escaped China's coercive one-child policy. In the first case to address those fleeing the population control scheme, the BIA denied the applicant, who claimed he was fleeing forced sterilization, because he could not show that he had been singled out for harsh treatment.[133] Absent some sort of singling out, the BIA decided that it could not "find that implementation of the 'one couple, one child' policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[134]

Despite various administrative attempts over the next few years to correct this decision, it remained binding.[135] Finally, in 1996, Congress added the following explanation to the statutory definition of refugee:

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.[136]

This classifies those fleeing the policy as part of the political opinion category and has been recognized as overruling *Chang*.[137]

While further litigation has surrounded the meaning of this provision, that is beyond the scope of this article. The necessity for a statutory fix to the nexus requirement demonstrates the difficulty that the nexus requirement creates with regard to laws of general

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[133] *Chang*, 20 I&N Dec. at 44–45.

[134] *Id.* at 44.

[135] *See* Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1342 (4th Cir. 1995) ("Although Congress tried to overrule *Matter of Chang* by statute, and several former Attorney Generals [sic] by regulation, these attempts have all failed. Thus, we conclude that the Board's interpretation of the asylum statute in *Matter of Chang* is entitled to deference.").

[136] Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub.L. No. 104-208, § 601(a), 110 Stat. 3009-546, 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)).

[137] *See* Lin v. Ashcroft, 385 F.3d 748, 752 (7th Cir. 2004) (noting that "Congress finally succeeded in reversing the *Chang* decision"); *see also* Guan Shan Liao v. U.S. Dep't of Justice, 293 F.3d 61, 65 (2d Cir. 2002) ("When this review occurred, Congress had overruled *In re Chang* by amending the definition of the term 'refuge.'").

applicability. Because the analysis gets caught up in the nexus discussion, the question of whether the laws themselves are persecutory (i.e. seeking to "punish [the applicant] for possessing a belief or characteristic a persecutor sought to overcome"[138]) is sidestepped. The result is that as long as laws that violate peremptory human rights apply equally to everyone in the country, it is difficult for those who escape to be granted asylum.

To summarize, in some instances, such as gender claims and recruitment of child soldiers, the showings of persecution and the showing of nexus with particular social groups are applied with relatively equal weight. Applicants must meet both prongs, which causes problems when they fail to satisfy the second prong. Women walk a fine line between the disqualifying categories of personal violence and a non-targeted gender based cultural norm. And the military participation that the children escaped from, which they have to show to be recognized as a social group, may disqualify them if the military that they fled committed other human rights abuses.

A different standard applies to FGM and sexual orientation refugees. For them, the second prong social group requirement is virtually nonexistent, since all they have to show is that they were persecuted. In effect, FGM and sexual orientation have been arbitrarily de facto added to the other five recognized categories while equally compelling cases of gender or age persecution have not.

Yet a third type of analysis is used for those fleeing generally applicable laws. In an inversion of the FGM and sexual orientation analysis, here the second prong nexus analysis has subsumed the first prong persecution element. It largely does not matter how poorly or severely the applicant was treated, unless he can show that he was somehow singled out for this treatment on account of one of the five grounds his application is denied. The one exception is coercive population control policies, but since that needed Congressional action to be recognized, it remains the exception to the rule.

FIXING ASYLUM LAW

As has been shown, there is a gap between the persecution element and the nexus element, which appears when the primary basis for persecution is not on account of race, religion, nationality, or political opinion. In those instances, the only remaining option is the ill-defined but limited category of membership in a particular social group. And the limits on that category only imperfectly—and unpredictably—help the applicant.

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[138] *Acosta*, 19 I&N Dec. at 222.

This is due to a conceptual clash between the two elements. The persecution element focuses on all illegitimate treatment and is expansive and adaptable. It does not claim to define or limit what specific treatments are or are not persecution, but rather leaves it up to a case-by-case determination. The nexus element, in contrast, is inherently restrictive, and consequently, cannot adapt to changing circumstances. It only recognizes five types of bad motives, and anything outside of those, regardless of how bad the treatment was, is not a basis for claiming asylum.

While the particular social group category had the potential to alleviate this by acting as a catch-all for persecution not included in the other four nexus categories, this is not the approach the courts or the BIA has taken. Instead, it is a limited category just like the other four. The uncomfortable consequence of this approach, which the courts have been working through and arriving at different outcomes depending on the type of claim, is the existence of cases where persecution is shown but because of a lack of nexus, asylum is denied.

The nexus element is an attempt to add a motivation factor to the persecution standard. However, as interpreted by the BIA and confirmed by the courts, the definition of persecution already includes an illegitimate motive standard apart from the nexus element. The BIA defined it, in part, as action taken against "those who differ in a way regarded as offensive . . . . [I]n order to punish him for possessing a belief or characteristic a persecutor sought to overcome."[139] This expansive illegitimate motive requirement would be sufficient were it not arbitrarily curtailed by the nexus requirement.

Instead, rather than helping modify the persecution element, the nexus requirement as applied cuts against the persecution standard. It has added an additional burden on the applicant to fit his persecutor's motivation into a pre-defined list. This detracts from the actual issue at stake in asylum claims, which is whether the applicant faced persecution defined as "(1) serious harm that is (2) inflicted or tolerated by official agents (3) for illegitimate reasons."[140] In short, the primary contribution of the nexus element is already contained in our understanding of persecution, making it at best a redundancy and at worst an arbitrary ground for denial. It serves no legitimate purpose either conceptually or practically and should be either removed or reinterpreted to have a catch-all feature.

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[139] *Id.*; *See also* Ljuljdjurovic v. Gonzales, 132 F. App'x. 607, 611 (6th Cir. 2005) (adopting *Acosta*'s definition of persecution).

[140] PRICE, *supra* note 2, at 107.

CONCLUSION

American asylum policy, to its credit, has recognized in recent years the need to provide protection to those fleeing oppressive governments. In the Refugee Act of 1980, the arbitrary geographical and ideological limitations were removed. Yet the presence of the nexus requirement, especially once the catch-all nature of the particular social group category was rejected, still retains a level of arbitrariness. It limits persecution to the type that the UN drafters foresaw in 1967. Since then, the issues of gender persecution, sexual orientation, child soldiers, and oppressive laws passed by otherwise legitimate governments have become much more visible. Those fleeing these new types of persecution should be given the same protections as those who escape more traditional racial, religious, or political persecution. Asylum policy, however, has had difficulty adapting to these challenges, and alternatively vacillates between either explaining away or ignoring the nexus requirement or denying asylum to claimants who otherwise meet their burden of showing persecution. Neither is a sound approach.

While one could try to fix this by adding to the list of nexus reasons, that can only be a short-term fix. No one knows what types of motivations persecutors will use in the future, and any list will inevitably overlook something. The root of the problem is not the contents of the list, but the idea of having a limited list of recognized illegitimate motivations. Just as the ideological and geographical requirements arbitrarily limited asylum in the wake of World War II, so now today's motivation limitations are a hindrance to having a robust asylum policy. Removing or reinterpreting the nexus requirement would result in a policy that is both more politically useful and more humane.