Seeking the Divine: A Proposed Methodology of Religion to Resolve Adjudications Over the Nexus Inquiry in Religious Asylum Claims

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ABSTRACT

What is religion, and should immigration courts seek to define religion in the context of asylum claims? Under the Immigration and Nationality Act (INA), individuals who have experienced past persecution or fear future persecution because of their religious beliefs can apply for asylum in the United States. Although individuals are afforded these protections under the statutory provisions of the INA, there is a fundamental problem in the way courts have treated religious asylum claims. Rather than holistically considering religion, courts have instead focused on religion's fragmentary aspects. This fragmentary understanding of religion has contributed to another legal problem among the courts: the interpretation of the one central reason standard under the INA.

This Comment explores the current circuit split between the Fourth Circuit and the Fifth, Tenth, and Eleventh Circuits. While the Fourth Circuit has found that religion can be one central reason for an individual's religious persecution even if their persecutor's ultimate goal was unrelated to religion, the Fifth, Tenth, and Eleventh Circuits have narrowly construed the standard, finding that religion or another protected ground in itself must have been the ultimate motivation for the persecutor to target the applicant. To resolve this circuit split, this Comment argues that courts must first adopt an understanding of religion in the context of religious asylum claims in order to determine what it means to be persecuted on account of religion under the INA. To avoid inconsistent reasoning among immigration and federal courts as it relates to the one central reason standard, this Comment proposes a four-part definitional methodology of religion and argues that a but-for causation standard as used in Title VII claims is sufficient in adjudicating religious asylum claims.

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I. INTRODUCTION

As it currently stands, religion is a protected category in asylum law.[1] Under the Immigration and Nationality Act (INA) of 1952,[2] individuals can apply for asylum under five protected grounds: race, religion, nationality, membership in a particular social group, and political opinion.[3] However, as this Comment will demonstrate, there is a fundamental problem in the way courts have adjudicated religious asylum claims. Specifically, courts have failed to holistically consider religion and have instead focused on fragmentary aspects of religion, with some judges focusing on an asylum applicant's level of religious knowledge while others look to church attendance, self-identification, or other features of religious identity, practice, and belief.

Rather, as this Comment seeks to demonstrate, religion—seen as a comprehensive and integrated way of life—is based on personal, idiosyncratic, and non-visible characteristics. In other words, religion is ultimately a spiritual, ethical, and moral praxis rooted in heterogeneous beliefs, practices, and worldviews. Therefore, when it comes to adjudicating the nexus inquiry in religious asylum claims—through which asylum applicants must argue that they are being persecuted *on account of* religion—a definitive understanding of religion as a protected ground is necessary to ultimately determine what it fundamentally means to be persecuted on account of religion. Not having such an understanding leads to inconsistent reasoning among the courts. This Comment thus proposes a definitional methodology of religion for the courts to use in the adjudication of religious asylum claims.

Asylum is a form of humanitarian relief granted to non-citizens who apply for it in accordance with the INA's requirements.[4] The burden of proof in asylum cases is on the non-citizen applicant to establish that their status as a 'refugee' within the meaning of U.S.C. § 1101(a)(42)(A), which defines 'refugee' as a person who is outside his or her country of nationality and is unable or unwilling to return to that country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[5]

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[1] *See* 8 U.S.C. § 1101(a)(42)(A).

[2] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA].

[3] *Id.* § 1101(a)(42)(A).

[4] *See* ANDORRA BRUNO, CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 1–2 (2019).

[5] *See* 8 U.S.C. § 1158(b)(1)(B)(i) ("The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of [8 U.S.C. § 1101(a)(42)(A)]"); § 1101(a)(42)(A) (The term 'refugee' includes "any person who [has] . . . a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.").

Individuals seeking asylum in the United States because of past persecution or the fear of future persecution must argue that this persecution is "on account of" one of five protected grounds, as listed in the Immigration and Nationality Act of 1952: race, religion, nationality, membership in a particular social group, or political opinion.[6] The words "on account of" constitute the nexus test, which requires a causal connection among the persecutor, the individual being persecuted, and the reason for the persecution.[7]

Asylum seekers routinely find it difficult to fulfill the nexus requirement in their cases, particularly when seeking asylum on account of religious persecution.[8] Under the present statutory burden, asylum applicants must prove that one of the five protected grounds constitutes "one central reason" for their persecution.[9] There is a circuit split among the federal U.S. Courts of Appeals regarding the nexus test in religious asylum claims. In particular, the courts disagree about whether the INA's 'on account of' nexus test requires asylum seekers to prove that their perpetrator's ultimate goal was to persecute them *because of* their protected ground, or whether it is sufficient for asylum seekers to prove that the protected ground was one of the reasons for, and thus *incidental to*, their past persecution or fear of future persecution.[10] This has ultimately led to confusion over what it means for an asylum seeker to definitively prove a nexus between their past persecution or fear of future persecution and one of the five protected grounds.

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[6] *Id.* § 1101(a)(42)(A).

[7] DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 107 (2007).

[8] *See* Brigette L. Frantz, *Proving Persecution: The Burdens of Establishing A Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499, 508 (2007); *see also* Lance Hampton, *Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the Primacy of Asylum Within Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 453, 470 (2002).

[9] 8 U.S.C. § 1158(b)(1)(B)(i) ("To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.").

[10] *Compare* Chicas-Machado v. Garland, 73 F.4th 261, 266 (4th Cir. 2023) ("Review of the record demonstrates that Chicas-Machado established that one central reason MS-13 chose to target her was her religion. Even the motive for the gang's persecution that the Board of Immigration Appeals (BIA) recognized—her use as a potential asset to the gang because 'no one would suspect [her]' given 'her activity and conduct with the church' — was inextricably intertwined with her religion.") *with* Shaikh v. Holder, 588 F.3d 861, 864 (5th Cir. 2009) (finding that the one central reason standard was not satisfied in the case of a Muslim man who was threatened by Hindu nationalists in India because, in agreement with the immigration judge, "any past incidents were business extortion rather than religious-based persecution"), *and* Orellana-Recinos v. Garland, 993 F.3d 851, 858 (10th Cir. 2021) (finding that mere membership in a particular social group did not necessarily satisfy the nexus requirement as the targeting of that particular social group was "a means to achieve an end that was unrelated to a protected ground").

Specifically, the Fourth Circuit in *Chicas-Machado v. Garland*[11] concluded that an asylum applicant need only prove that a protected ground—such as religion—was "at least one central reason" for their persecution, even if the persecutor's ultimate goal was unrelated to the asylum applicant's religious identity.[12] However, the Fifth, Tenth, and Eleventh Circuits have instead narrowly applied the nexus test—to establish a nexus, "the applicant must possess a protected characteristic and that protected characteristic must have motivated the persecutor to harm the applicant."[13] For these circuits, the protected characteristic, such as religion, must be the sole reason for an asylum applicant's persecution. In other words, the persecutor's sole and ultimate goal must have been to persecute the individual because of their religion.

Resolving the circuit split is critical. Should the nexus test be construed broadly, encompassing claims where religion is incidental to an individual's persecution, the number of cases of people seeking asylum on account of this particular ground would dramatically increase. In contrast, should the nexus test be construed narrowly, only those claims where religion is the sole reason of an individual's persecution would be considered. This means that cases where the persecutor had an ultimate motive that was unrelated to religion but their targeted individual was chosen because of their religious identity (and hence, their vulnerable position) would be excluded. Resolving the extent of the nexus inquiry has profound implications for national security as it ultimately determines the number of individuals who can successfully seek asylum on the basis of religion. As this Comment argues, what lies at the core of resolving the nexus inquiry is the adoption of a foundational methodology to determine what is religion—and what is not.

This Comment proposes a definitional methodology of religion, based on four elements, for the courts to apply to adjudicate religious asylum claims. First, an asylum seeker's religious belief must be sincerely held. Second, the perpetrator must view the asylum seeker on the basis of that sincerely held religious belief, or in other exceptional circumstances, on the basis of an imputed religious belief. Third, once these two elements are established, courts must assess whether the religion of the asylum seeker is sufficiently socially distinct within the

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[11] 73 F.4th at 261.

[12] *Id.* at 265.

[13] *Orellana-Recinos*, 993 F.3d at 855–56 (citing Li v. Ashcroft, 356 F.3d 1153, 1160 (9th Cir. 2004)); *see also* Berrios-Bruno v. Garland, No. 18-60276, 2021 WL 3624766, at *5 (5th Cir. Aug. 16, 2021) ("The INA . . . 'makes motive critical' to obtaining asylum, and that motive must be specifically tied to one of the five grounds enumerated in the statute."); Sanchez-Castro v. United States Att'y Gen., 998 F.3d 1281, 1287 (11th Cir. 2021) ("Where a gang targets a family only as a means to another end, the gang is not acting because of who the family is; the identity of the family is only incidentally relevant.").

society in question. Fourth and finally, courts must assess whether the asylum seeker's religion is defined with sufficient particularity with reference to features including belief, identity, membership in a faith-based organization, and practice.

Although asylum claims on account of religion are ultimately difficult to prove because of religion's indeterminate and unique nature, this Comment argues that a consistent understanding of religion based upon the aforementioned methodology is necessary to resolve issues regarding nexus and intent, issues at the core of the circuit split.[14] As this Comment explores, the courts' wavering understanding and interpretation of religion highlights the need for a clean and clear methodology of religion: both the constituent features of religion and its outer boundaries. In putting forth a methodology of religion, this Comment argues that a standard but-for causation analysis as articulated in Title VII caselaw, specifically adopted from *Bostock v. Clayton County.*,[15] is sufficient under the INA and paves the path towards resolving the current circuit split.

Part II dives into the historical background and evolution of U.S. asylum policy, with an exploration of relevant acts and international conventions such as the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol to the Refugee Convention, and the Refugee Act of 1980. Part III discusses the evolution and development of the nexus test in the context of asylum cases, particularly the Supreme Court's early attempts at demarcating the boundaries of the nexus test. It also examines the Real ID Act of 2005, which introduced the 'one central reason' standard as the basis for determining the nexus inquiry. Part IV highlights the relevant case law leading up to *Chicas-Machado*[16] and the resulting circuit split among the federal appellate courts.

Part V examines how the immigration courts have interpreted 'religion' in their litigation of religious asylum claims; it also provides an overview of how the U.S. Supreme Court has construed 'religion' as a concept in its Free Exercise Clause jurisprudence. It concludes with proposing a definitional methodology of religion for immigration courts to use based on four elements. As per this methodology, religion can be

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[14] By proposing a "definitional methodology" of religion rather than a strict definition, this Comment seeks to avoid the rigid and unyielding nature of definitions. Rather, this Comment broadly uses the term "definitional methodology," and in using the phrase, seeks to provide a set of principles, features, and distinguishing elements that can guide the courts in their analysis of what constitutes religion.

[15] 590 U.S. 644, 656 (2020) ("When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.").

[16] 73 F.4th 261 (4th Cir. 2023).

expansively construed yet delimited by the key features of particularity and perception, features adopted from the courts' adjudication of asylum claims based on membership in a particular social group. Part VI then proposes that based on this definitional methodology of religion, the courts should embrace a simple but-for causation analysis, as used in the Title VII context, in determining whether there is a nexus between persecution and the protected ground of religion. Part VII concludes by highlighting asylum law's inextricable entanglement with the language of liberalism and modernity.

II. HISTORICAL BACKGROUND AND EVOLUTION OF U.S. ASYLUM POLICY

Present-day asylum law in the United States has its roots in the years directly after World War II, primarily as a direct response to the European refugee crisis after World War II, and particularly the Jewish refugee crisis that emerged out of the Holocaust.[17] As an attempt to resolve the European refugee crisis, several countries came together to ratify the 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention").[18] Article I of the 1951 Refugee Convention defines 'refugee' as someone "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality" and is unable to return.[19] While the United States was not an original signatory to the 1951 Refugee Convention, it ultimately agreed to the Convention's terms when it ratified the 1967 Protocol to the Refugee Convention ("1967 Protocol"), which largely adopted the Convention's definition of 'refugee' but did not adopt the Convention's geographical and temporal restrictions.[20]

Although the United States ratified the 1967 Protocol, it did not enact specific statutory measures regarding asylum until 1980.[21] The Refugee Act of 1980 amended the INA to conform to the international standards for refugees under the 1967 Protocol and the 1951

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[17] *See* Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO IMMIGR. L.J. 313, 315 (2005) ("The U.N. Convention was a direct response to the Jewish refugee crisis created by the Holocaust and other refugee crises that emerged in the wake of World War II. . . ."); *see also* Aaditya P. Tolappa, *Asylum, Religion, and the Tests for Our Compassion*, 98 NYU L. REV. ONLINE 55, 62 (2023).

[18] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

[19] *Id.* art. 1(A)(2).

[20] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

[21] *See* BRUNO, *supra* note 4, at 9.

Convention.[22] In adopting the Refugee Act of 1980, Congress not only adopted the 1951 Convention's definition of 'refugee,' but it also adopted the non-refoulement provision—the Convention's fundamental obligation of protection against forcible return—which protects asylum seekers from being deported back to the country where they fear persecution.[23] Furthermore, while the 1951 Convention's definition of 'refugee' uses the phrase "for reasons of race, religion, nationality . . . ," the United States changed the language of "for reasons of" to "on account of" in its definition of refugee under 8 U.S.C. § 1101(a)(42)(A).[24] Ultimately, the phrase "on account of" has led to various interpretations among the immigration and federal courts.[25]

The statutory provisions enacted under the 1980 Refugee Act have established two paths of legal protection for asylum seekers.[26] First, the U.S. Attorney General and the Secretary of Homeland Security each have the discretion to grant asylum to non-citizen asylum seekers who have proven that they are 'refugees' within the meaning of U.S.C. § 1101(a)(42)(A).[27] Second, the U.S. Attorney General has the discretion to not remove a non-citizen to their home country if they determine that the non-citizen's "life or freedom would be threatened in that country because of the non-citizen's race, religion, nationality, membership in a particular social group, or political opinion."[28]

One point must be made clear. While seeking asylum in the United States hinges largely upon fitting into the criteria of 'refugee' as defined in the U.S. Code, there is a distinction between refugee status and asylum status. Individuals applying for refugee status are only able to do so if they are applying from *outside* the United States.[29] These individuals must qualify under the definition of refugee as per U.S.C. § 1101(a)(42)A) and must meet other statutory and non-statutory criteria.[30] In contrast, individuals applying for asylum are only able to do so if they are physically present in the United States or at its borders,

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[22] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42)).

[23] *See* BRUNO, *supra* note 4, at 8.

[24] *See* 8 U.S.C. § 1101(a)(42)(A) for the current definition of refugee.

[25] § 1101(a)(42)(A); *see also infra* discussion Part IV.

[26] *See* Tolappa, *supra* note 17, at 61.

[27] *See* 8 U.S.C. § 1158(b)(1)–(2).

[28] 8 U.S.C. § 1231(b)(3)(A); *see also* INS v. Stevic, 467 U.S. 407, 409 (1984) ("For over 30 years the Attorney General has possessed statutory authority to withhold the deportation of an alien upon a finding that the alien would be subject to persecution in the country to which he would be deported.").

[29] *See* 8 U.S.C. 1101(a)(42)(A) ("The term 'refugee' means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country . . . .").

[30] *See id.*; *see also* DEBORAH ANKER, THE LAW OF ASYLUM IN THE UNITED STATES § 1:2 n.1 (2023).

whether or not their point of entry is a designated port of arrival.[31] The asylum applicant must fulfill the following criteria in order to obtain asylum: (1) the applicant must fall within the definition of refugee;[32] (2) the applicant must sustain a burden of proof and determination of credibility;[33] and (3) the applicant must not fall within any of the statutory exceptions that may bar them from asylum status.[34] Like a refugee, an asylum applicant must prove that their persecution is "on account of" one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.

III. EVOLUTION AND DEVELOPMENT OF THE NEXUS TEST

The language of "on account of" in the INA constitutes the nexus test, through which an asylum applicant must prove that there is a 'nexus' between their past persecution or fear of future persecution and one of the protected grounds listed in the definition of refugee to be granted asylum.[35] This section seeks to explore the early evolution and development of the nexus test and the courts' interpretation of the nexus inquiry in asylum litigation.

In 1992, the Supreme Court attempted to demarcate the standard of the nexus test. In *INS v. Elias-Zacarias*,[36] a Guatemalan man sought asylum based on persecution on account of political opinion.[37] The Supreme Court sought to address whether a guerrilla organization's attempt to coerce him into performing military service necessarily constituted "persecution on account of . . . political opinion under § 101(a)(42)" of the INA.[38] In this case, the Guatemalan petitioner resisted conscription "because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas."[39] The Ninth Circuit found that the coercion constituted persecution on account of political opinion for two reasons: first, because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor," and second, "because the persecutors' motive in carrying out the kidnapping is political."[40]

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[31] *See* 8 U.S.C. § 1158(a)(1).

[32] *See id.* § 1101(a)(42)(A).

[33] See *id.* § 1158(b)(1)(B)(iii).

[34] *See id.* § 1158(b)(2)(A)(i)–(vi).

[35] *See id.* § 1101(a)(42)(A).

[36] *See* INS v. Elias-Zacarias, 502 U.S. 478, 479 (1992).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 480.

[40] *Id.* at 481; Elias-Zacarias v. U.S. INS, 921 F.2d 844, 850 (9th Cir. 1990), *rev'd sub nom*. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

However, the Supreme Court disagreed, with Justice Scalia writing for the majority that "the first half of [the Ninth Circuit's reasoning] seems to us untrue, and the second half irrelevant."[41]

In reversing the Ninth Circuit's holding, the Supreme Court noted that an individual could resist recruitment for a variety of non-political reasons, including "fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life."[42] Importantly, the Court's decision in *INS v. Elias-Zacarias* established that the "mere existence of a generalized 'political' motive" underlying the guerrillas' forced conscription was inadequate to establish persecution on account of political opinion.[43]

To clarify the nexus requirement, the Court in *INS v. Elias-Zacarias* established two distinct but related inquiries. First, an individual needed to show persecution on account of the victim's political opinion, rather than on account of the perpetrator's political opinion.[44] Second, the individual had to show "*some* evidence . . . direct or circumstantial" that the perpetrator was motivated *because of* the victim holding that political opinion.[45] The Supreme Court thus adopted a two-step inquiry in nexus cases: (1) whether the asylum applicant actually holds a political opinion, religious belief, etc.; and if so, (2) whether the persecutors were motivated to persecute the individual because of that opinion or belief, or in other circumstances, on the basis of an imputed opinion or belief.[46] In establishing the second requirement for nexus inquiries, the Supreme Court inserted the element of motive into asylum claims.

Thirteen years later, Congress passed the REAL ID Act of 2005, which clarified—albeit only slightly—the interpretation of the nexus test.[47] Under the REAL ID Act of 2005, the asylum seeker must not only satisfy the definition of refugee under the INA § 101(a)(42)(A), but must also prove that the protected ground upon which the asylum seeker is relying is "one central reason" for which they have suffered past persecution or will suffer future persecution.[48] The REAL ID Act thus established a higher standard for asylum claims: the protected ground must

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[41] *Elias-Zacarias*, 502 U.S. at 481.

[42] *Id.* at 482.

[43] *Id.*

[44] *See id.*

[45] *Id.* at 483.

[46] *See id.* at 482; *see also* Shayna S. Cook, *Repairing the Legacy of* INS v. Elias-Zacarias, 23 MICH. J. INT'L L. 223, 228 (2002).

[47] REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)); *see also* Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465, 471 (2015) ("The Act gave no guidance as to the proper interpretation of the word 'central,' and circuit courts, the Agency, and scholars have struggled with the term ever since.").

[48] *See* REAL ID Act § 101(a)(3)(B)(i).

be a central motivation, as opposed to a partial motivation, for an asylum seeker's persecution.[49]

Following the passage of the REAL ID Act, an asylum applicant must now establish the following: (1) that he or she is a refugee under the definition in 8 U.S.C. § 1101(a)(42)(A); (2) that under *Elias-Zacarias*, he or she falls under one of the protected grounds and that the persecutor was motivated by that particular ground; and (3) that under the REAL ID Act, the persecutor's motivation qualifies as "one central reason" for the asylum applicant's persecution.[50] Even though the REAL ID Act attempted to clarify the contours of the nexus test, it did not clarify what it meant to inquire into a persecutor's subjective motivations. The current circuit split illustrates the need to clarify the interpretive boundaries of the nexus requirement in religious asylum claims.

IV. LITIGATING THE NEXUS INQUIRY IN THE COURTS

As is evident in the current circuit split, a key issue in litigating religious asylum claims is the problem of determining the ultimate motivation for the persecutor's action. Is there still a claim for religious asylum if a persecutor's ultimate motivation may have been unrelated to religion, even though they chose their target because of the target's religion? This is precisely the question that the Fourth Circuit attempted to resolve in *Chicas-Machado v. Garland*,[51] only to reach a drastically different conclusion from its sister circuits. In what follows, this Comment lays out the key asylum cases that illustrate the circuit split and addresses the interpretive problems of the nexus requirement, specifically as these interpretative problems relate to assessing the persecutor's ultimate motivation.

A. Litigation Prior to *Chicas-Machado*

Several cases leading up to *Chicas-Machado* examined the nexus requirement in relation to another one of the protected grounds under

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[49] *Compare* In re S-P-, 21 I.&N. Dec. 486, 494 (B.I.A. 1996) (applying the older standard of the nexus test and arguing that in order to prove past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed ground), *with* Parussimova v. Mukasey, 555 F.3d 734, 740–741 (9th Cir. 2009) (interpreting the REAL ID Act's "one central reason standard" and finding that the "plain meaning of the phrase 'one central reason' indicates that the Real ID Act places a more onerous burden on the asylum applicant than the 'at least in part' standard we previously applied . . . In other words, a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist. Likewise, a motive is a 'central reason' if that motive, standing alone, would have led the persecutor to harm the applicant.").

[50] *See* REAL ID Act § 101(a)(3)(B)(i).

[51] 73 F.4th 261 (4th Cir. 2023).

the INA. In *Orellana-Recinos v. Garland*, a non-citizen native of El Salvador sought asylum in the United States based on membership in a particular social group, defined as her son's immediate family.[52] The petitioner argued that she had been threatened by MS-13 gang members so that they could recruit her son for their gang activities, and that her resistance to her son's recruitment constituted a central reason of her persecution as a member of her son's immediate family.[53] The Tenth Circuit held that "even assuming that [the son's] immediate family qualifies as a particular social group," the Board of Immigration Appeals was correct to determine that the petitioners were not persecuted on account of their membership in that particular social group.[54] While *Orellana-Recinos* dealt with membership in a particular social group as a protected ground, it is nonetheless instructive in illustrating how the courts have adjudicated the nexus requirement.

In *Orellana-Recinos*, the Tenth Circuit relied on *Matter of L-E-A-,*[55] which found that "membership in a particular social group should not be considered a *motive* for persecution if the persecutors are simply pursuing their distinct objectives and a victim's membership in the group is relevant only as a means to end—that is the membership enables the persecutors to effectuate their objectives."[56] In *Orellana-Recinos*, the court similarly held that mere membership in a particular social group—along with threats to that particular social group—did not fulfill the nexus requirement, as the targeting of that particular social group was "a means to achieve an end that was unrelated to a protected ground."[57]

In *Sanchez-Castro v. United States Attorney General*, the Eleventh Circuit faced a similar set of facts as those in *Orellana-Recinos* and held that the petitioner's membership in a particular social group (defined as "single family unit" targeted by MS-13) did not fulfill the nexus requirement because her family was targeted as a means to another end (i.e., the gang's pecuniary motives).[58] In reaching its conclusion, the Eleventh Circuit also relied on *Matter of L-E-A-* and distinguished between a persecutor targeting a particular social group as a means to achieve an unrelated end from a persecutor actually targeting the particular social group because its goal is to target the group itself (and

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[52] *Orellana-Recinos v. Garland*, 993 F.3d 851, 853–54 (10th Cir. 2021).

[53] *Id.* at 853–55.

[54] *Id.* at 853.

[55] 27 I.&N. Dec. 40 (B.I.A. 2017).

[56] *Orellana-Recinos*, 993 F.3d at 856 (citing *Matter of L-E-A-*, 27 I.&N. Dec. at 40) (emphasis in original).

[57] *Id.* at 858.

[58] Sanchez-Castro v. United States Att'y Gen., 998 F.3d 1281, 1283–84 (11th Cir. 2021).

therefore, not to achieve another end).[59] When the persecutor targets the particular social group as a means to another end, the Eleventh Circuit reasoned that "the [persecutor] is not acting because of who the family is; the identity of the family is only incidentally relevant."[60] Therefore, the Eleventh Circuit found that there was no animus against the petitioner's family, and the petitioner's persecution did not occur *because of* the status of her single family unit.[61]

The Fifth Circuit in *Berrios-Bruno v. Garland*[62] reached a similar result, stating that if the protected ground was simply a means to another, ultimate end, then the protected ground could not support an asylum claim.[63] As in the previous cases, the petitioner in *Berrios-Bruno* argued that her membership in a particular social group—her nuclear family—constituted a valid claim for asylum. However, the Fifth Circuit stated that "[w]hat matters is the relative weight of the protected ground," which can be gauged through the court's application of the sequential two-step test as articulated in *Matter of L-E-A-*.[64]

Under the sequential two-step test, to articulate a nexus, first "the applicant must demonstrate that the protected ground was a but-for cause of the persecution," and second, the applicant must demonstrate that the protected ground "played more than a minor role in motivating the persecution."[65] While the *Berrios-Bruno* court suggested that the petitioner succeeded on the but-for causation requirement, it found that she failed on the second prong because the protected ground—her family status—"played no more than a minor role" in the gang's motivation to persecute her, and that it was "entirely subordinate" to the primary motivation (i.e., the facilitation of criminal activities) of the gang.[66]

These cases reveal the wavering interpretation of the nexus requirement. This is particularly salient in the Eleventh Circuit's discussion in *Sanchez-Castro* of the applicable case law in the court's interpretation of the nexus requirement. For instance, the court noted that the one central reason standard could be satisfied if it could be proven that the protected ground was "essential" to the motivation of the persecutor, citing the Ninth Circuit's decision in *Parussimova v.*

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[59] *Id.* at 1287.

[60] *Id.*

[61] *Id.*

[62] Berrios-Bruno v. Garland, No. 18-60276, 2021 WL 3624766 (5th Cir. Aug. 16, 2021).

[63] *Id.* at *6 ("The gang's only motivation was extortion, not animus against Berrios based on her family status. Because Berrios' relationship to Rodriguez was subordinate and tangential to the gang's illicit financial motives, the relationship was not a central reason for the gang's demands.").

[64] *Id.* at *4.

[65] *Matter of L-E-A-*, 27 I. & N. Dec. at 43–44.

[66] *Berrios-Bruno*, No. 18-60276, 2021 WL 3624766, at *4.

Mukasey.[67] In *Parussimova*, the Ninth Circuit also reasoned that the protected ground "cannot play a *minor role* in the alien's past mistreatment or fears of future mistreatment," and that the protected ground cannot be "incidental, tangential, superficial, or subordinate to another reason for harm."[68]

Furthermore, the Eleventh Circuit in *Sanchez-Castro* relied on an earlier case in the same circuit, *Rodriguez Morales v. United States Attorney General*,[69] to claim that "[a]ny past or feared future persecution must be at least in significant part 'because of' the protected ground."[70] And in *Berrios-Bruno*, the Fifth Circuit reiterated *Matter of L-E-A-*'s sequential two-step test, particularly the but-for causation requirement.[71]

Overall, the interpretive problems of the nexus requirement essentially boil down to the problem (and extent) of causation. What, if any, is the difference between 'essential', 'minor role', 'incidental', and 'at least in significant part' when it comes to interpreting nexus inquiries?

B. *Chicas-Machado* and the Resulting Circuit Split

Unlike the narrow interpretations of the nexus requirement by the Fifth, Tenth, and Eleventh Circuits, the Fourth Circuit in 2023 expansively construed the nexus requirement in *Chicas-Machado v. Garland*.[72] There, the court held that the Board of Immigration Appeals had improperly required the applicant to demonstrate that her persecution was solely due to her religion.[73] The court found that the asylum applicant, a Salvadoran Christian native who was threatened by MS-13, had established that "*one* central reason MS-13 chose to target her was her religion," and that the gang's motive—to use her as a "potential asset to the gang"—was "inextricably intertwined" with religion.[74]

In its reasoning, the Fourth Circuit iterated that an asylum application "need not demonstrate that a protected ground, like religion, is the sole reason for persecution but only that it is 'at least one central reason' for the persecution."[75] The petitioner's religious identity,

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[67] Sanchez-Castro v. U.S. Att'y Gen., 998 F.3d 1281, 1286 (11th Cir. 2021); *see also* Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009).

[68] *Parussimova*, 555 F.3d at 741 (emphasis added).

[69] 488 F.3d 884, 891 (11th Cir. 2007).

[70] *Sanchez-Castro*, 998 F.3d at 1286 (citing *Rodriguez Morales*, 488 F.3d at 891).

[71] *Berrios-Bruno*, No. 18-60276, 2021 WL 3624766, at *4 (citing *Matter of L-E-A-*, 27 I.&N. Dec. at 43–44).

[72] 73 F.4th 261 (4th Cir. 2023).

[73] *Id.* at 265–66.

[74] *Id.* at 266 (emphasis in original).

[75] *Id.* at 265.

specifically "her position in, work for, and attendance at church" constituted at least one central reason for her persecution.[76] The Fourth Circuit additionally clarified, in distinction to the other circuits, that the nexus standard "does not depend on the *ultimate* goal of the persecutors or on *why* the protected ground led them to persecute an applicant."[77]

In particular, Judge Agee in his partial concurrence noted that the Fourth Circuit's decision in *Chicas-Machado* created a circuit split in the lower courts' interpretation of the nexus inquiry.[78] Echoing the arguments made by the other circuits regarding the application of the 'one central reason' standard,[79] Judge Agee departed from the majority's expansive nexus interpretation and found that religion was tangential to the petitioner's claim of persecution, and thus did not constitute a central reason for the petitioner's religious persecution.[80] Instead, as Judge Agee noted, the record revealed that "the gang was not motivated to stop or hinder her from practicing her religion" but rather saw the petitioner "as an asset they could exploit to further their criminal enterprise."[81] In other words, religion was "not a central reason for her persecution;" rather, the central reason was the petitioner's refusal to assist MS-13.[82]

V. DEFINING 'RELIGION' IN THE COURTS

A. Defining Religion in the Immigration Courts

As a general matter, though religion is one of the five protected grounds under the INA, immigration courts have avoided defining religion. This is likely because of how religious issues are treated in the federal courts. As will be explored later in this Comment, federal courts have avoided defining religion altogether because this would raise concerns under the Free Exercise Clause and the Establishment Clause of the First Amendment.[83] Legal scholars, too, have remarked on the

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[76] *Id.* at 269.

[77] *Id.* (emphasis in original).

[78] *Id.* at 286 (Agee, J., concurring in part and dissenting in part).

[79] *Id.* at 277.

[80] *Id.* at 281.

[81] *Id.* at 274.

[82] *Id.* at 277.

[83] Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."); Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30, 31 (D.D.C. 1990) ("A civil court presiding over church disputes must be particularly careful not to violate the Free Exercise and Establishment Clauses by ruling against one party and for the other party based on the court's resolution of the underlying controversy over religious doctrine and practice."); Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich, 426 U.S. 696, 724–25 (1976) (holding that civil courts have no authority to review church judgments about religious doctrine).

consistency of federal courts in avoiding adjudicating issues regarding religion altogether.[84] Formulating a precise definition of religion could lead to federal courts favoring one religion over another, favoring religion over non-religion, or favoring non-religion over religion. Litigating claims regarding religion is extremely difficult as federal courts invoke the religious question doctrine, which prohibits courts from adjudicating questions regarding religious practice and belief on First Amendment grounds.[85]

Yet immigration courts do not face the same issues as federal courts. In fact, an immigration judge is allowed to ask an asylum seeker questions regarding their religious practice and belief in their credibility determinations.[86] The very nature of asylum law demands the immigration judges make credibility determinations of individuals who seek asylum because of purported persecution on account of a protected category like religion. This, in turn, demands that immigration judges ask questions about religion in order to avoid noncitizens falsifying their applications, thus contributing to the "religious imposter" problem.[87] Immigration judges are afforded this privilege—unlike federal

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[84] *See* Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 532 (1989) ("Most courts have approached the question with caution, recognizing that a very rigid judicial definition of religion would implicate the concerns underlying the religion causes."); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009) ("By its very definition, disestablishment requires the government to abstain from promulgating official versions of religious doctrine. If courts were to resolve controversies about religious doctrine, they would be doing exactly what disestablishment proscribes—identifying one or another version of religious truth as the government's preferred or official view.").

[85] For scholarship on the religious question doctrine, see generally Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) (arguing that "secular courts must not determine questions of religious doctrine and practice"); Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 PEPP. L. REV. 1013, 1013 (2014) ("The 'religious-question' doctrine is a well-known and commonly accepted notion about the First Amendment's Religion Clauses. The general idea is that, in our system of separated church and state, courts do not decide religious questions. And from this premise, many things flow—including the idea that courts should dismiss otherwise justiciable controversies when they would require courts to decide religious questions."); Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Questions in the Era of COVID-19 and Beyond*, 24 U. PA. J. CONST. L. 276, 276 (2022) ("For decades, scholars have documented the United States Supreme Court's 'hands-off approach' to questions of religious practice and belief, pursuant to which the Court has repeatedly declared that judges are precluded from making decisions that require evaluating and determining the substance of religious doctrine.").

[86] See Tolappa, *supra* note 17, at 58 ("Asylum law protects immigrants who face religious persecution in their countries of origin, but Congress and the courts fear allowing 'religious imposters,' or noncitizens lying about religious affiliation to bolster their asylum applications, into the United States. As a result, immigration judges ('IJs') are allowed to screen for religious imposters by asking asylum seekers doctrinal questions about their purported religion and using applicants' religious knowledge (or lack thereof) as part of the IJs' overall assessment of applicants' credibility.").

[87] Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179, 1182–84 (2010) (describing the "religious imposter" problem and the state's interest in screening for

court judges—under the broad statutory authority of 8 U.S.C. § 1158(b)(1)(B)(iii), which enables immigration judges to consider various factors in the court's credibility determination, including an asylum applicant's demeanor and responsiveness, as well as inconsistencies and inaccuracies in the asylum applicant's written and oral statements.[88] In fact, various circuit courts have affirmed the immigration judges' use of "religious tests" to judge whether an asylum seeker is credible based on the asylum seeker's knowledge of religious tenets.[89] Religious tests, however, are not used in federal courts to adjudicate questions *not* related to immigration.[90]

An immigration judge's use of a religious test in their credibility determinations is problematic because these tests are largely used to assess an asylum applicant's level of religious knowledge rather than other aspects of a person's religious identity, such as the conviction of their beliefs, their membership in a religious organization, and their self-identification as an adherent to a particular religious group.[91] The immigration courts' focus on religious knowledge rather than other aspects of religion reveals the courts' fundamental misunderstanding of what 'religion' even is in the first place. For one individual, religion could be restricted to religious practice; for another, religion could be restricted to belief; for another, religion could be about acquiring a certain level of religious knowledge, whether at a monastery or a madrassa; and for yet another, religion could be solely a matter of

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fraudulent asylum applicants).

[88] *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (explaining that an IJ "may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.").

[89] Cosa v. Mukasey, 543 F.3d 1066, 1070 (9th Cir. 2008) ("[I]t is not unfair to test the scope of a petitioner's understanding of her religion or even to challenge a preposterous claim, but to do so . . . without a benchmark other than the IJ's views is unacceptable."); Huang v. Holder, 360 F. App'x 632, 641 (6th Cir. 2010) (affirming the IJ's use of a religious test because the applicant "did not demonstrate the level of knowledge that one reasonably might expect of an allegedly long-term Zhong Gong practitioner and teacher").

[90] *See* Tolappa *supra* note 17, at 58 ("These kinds of religious tests would be strictly forbidden if judges were to administer them to religious claimants in federal court because of the so-called 'religious question doctrine,' an Establishment Clause principle that prohibits courts from resolving questions of religious doctrine or holding religious claimants' beliefs and practices to judicial standards of orthodoxy.").

[91] Hedayat Selim, Julia Korkman, Peter Nynäs, Elina Pirjatanniemi & Jan Antfolk, *A Review of Psycho-Legal Issues in Credibility Assessments of Asylum Claims Based on Religion*, 2022 PSYCHIATRY, PSYCH. & L. 760, 770 (finding in a survey of twenty-one religious asylum credibility assessments that "[a] common but highly contested strategy [wa]s to assess the credibility of asylum-seekers' religion through the extent of their religious knowledge").

identification. For any one individual, religion could comprise all of the aforementioned characteristics.

This therefore poses a problem—how can a court determine that an individual is being persecuted *on account of* a protected ground without first determining what that protected ground even entails? In the context of religious asylum claims, this question is fundamental, and courts do not agree on the answer. As this section will illustrate, this fragmented understanding of religion is reflected in the courts, with some courts focusing on the suppression of practice and others focusing on religious self-identification and external perception.

What, then, does it mean for an asylum applicant to establish a well-founded fear of past or future persecution on account of 'religion'? This is precisely the question that the partial concurrence in *Chicas-Machado v. Garland*[92] aimed to clarify,[93] thus highlighting the inconsistency between the immigration and federal courts in adjudicating claims of religious persecution.

In *Chicas-Machado*, the majority looked into whether MS-13, in targeting the petitioner, "restricted or suppressed her ability to participate in . . . religious activities."[94] The partial concurrence, instead of looking to religious participation, instead looked at whether the petitioner was prevented from practicing her religion openly or altogether.[95] In fact, the partial concurrence even noted that while religious persecution could occur in various forms, a "core principle" is the "suppression of religious expression," wherein "the persecutor seeks to prevent the victim from 'practic[ing] his religion openly' or altogether."[96]

This focus on religious practice is also salient in cases such as *Ali v. United States Attorney General*[97] and *Kazemzadeh v. United States Attorney General*,[98] where the petitioners' inability to openly practice religion was used as evidence of religious persecution. Ultimately, the majority and partial concurrence in *Chicas-Machado* took varying approaches in determining how and in what ways the petitioner's religious

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[92] 73 F.4th 261.

[93] *Id.* at 274, 285 (4th Cir. 2023) (Agee, J., concurring in part and dissenting in part).

[94] *Id.* at 270.

[95] *Id.* at 278.

[96] *Id.* at 278; *see also* Shi v. United States Att'y Gen., 707 F.3d 1231, 1236 (11th Cir. 2013) ("[T]he suppression of religious practice is precisely the kind of persecution from which Congress sought to protect refugees."); Woldemichael v. Ashcroft, 448 F.3d 1000, 1003 (8th Cir. 2006) (noting that religious persecution occurs where religious adherents "are prevented from practicing their religion or deprived of their freedom").

[97] 931 F.3d 1327, 1334 (11th Cir. 2019) ("[A] core principle animates our religious-persecution cases: An applicant is a victim of religious persecution when he cannot practice his religion openly.").

[98] 577 F.3d 1341, 1354 (11th Cir. 2009) ("[H]aving to practice religion underground to avoid punishment is itself a form of persecution.").

practice was suppressed as a result of MS-13 targeting her. However, both the majority and partial concurrence emphasized religious practice—and not religious association, belief, identity, or any other feature of religion more broadly—as a constitutive aspect of the petitioner's claim of religious persecution.

Although there is a large emphasis on the suppression of religious practice, other cases suggest that courts have looked beyond religious practice when determining persecution on account of religion in religious asylum cases. For instance, in *Kasama v. Gonzalez*,[99] the Second Circuit determined that the nexus requirement was satisfied in a case where the petitioner, a citizen of Sierra Leone and a Christian, claimed that he was persecuted after refusing forced conscription because of his religious beliefs.[100] Though the Second Circuit imputed a "disproportionate punishment" reasoning in its analysis of the petitioner's claim regarding forced conscription, it did not look to see whether the petitioner's religious practice was hindered.[101] Rather, the Second Circuit in *Kasama* instead emphasized religious belief as constitutive of the petitioner's claim of religious persecution.[102]

Courts have looked to other aspects of religion—such as an applicant's self-identification in a particular religious community—as a basis for determining persecution on account of religion. For example, in *Rizal v. Gonzalez*,[103] the Second Circuit found that the Immigration Judge's emphasis on the petitioner's degree of religious doctrinal knowledge was not a prerequisite for asylum eligibility on grounds of religious persecution:

> To the extent that the IJ's conclusion stemmed from the rationale that a certain level of doctrinal knowledge is necessary in order to be eligible for asylum on grounds of religious persecution, we expressly reject this approach . . . Both history and common sense make amply clear that people can identify with a certain religion, notwithstanding their lack of detailed knowledge about that religion's doctrinal tenets, and that those same people can be persecuted for their religious affiliation.[104]

The Second Circuit ultimately found that the genuineness of petitioner's Christian self-identification and his claim that others perceived

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[99] 219 F. App'x 28 (2d Cir. 2007).

[100] *Id.* at 30–31.

[101] *Id.* at 30 ("Forced conscription can constitute persecution if the applicant is subjected to a disproportionate punishment for failing to serve, on account of a protected ground.").

[102] *See id.*

[103] 442 F.3d 84 (2d Cir. 2006).

[104] *Id.* at 90.

him as Christian were relevant in a religious asylum applicant's credibility determination.[105]

The Eighth Circuit similarly found in *Ahmadshah v. Ashcroft*[106] that an asylum applicant's "detailed knowledge" of theological doctrine was not relevant to the sincerity of his beliefs in his claim of religious persecution.[107] Likewise, the Seventh Circuit in *Iao v. Gonzales*[108] noted that one of the "disturbing features" in the handling of immigration cases was an "exaggerated notion of how much religious people know about their religion."[109]

The United Nations Handbook on Procedures and Criteria for Determining Refugee Status provides significant guidance in interpreting the provisions of the 1951 Refugee Convention, the 1967 Protocol, and the 1980 Refugee Act.[110] Specifically, the United Nations Handbook is useful for evaluating the meaning of religious persecution. As per the United Nations Handbook, persecution on account of religion can be construed broadly, even beyond religious practice.[111] Persecution on account of religion "may assume various forms," including "prohibition of membership in a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they [practice] their religion or belong to a particular religious community."[112]

Furthermore, though the United Nations Handbook does not provide a definition of religion, it recognizes that religion can encompass

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[105] *Id.* at 86.

[106] 396 F.3d 917 (8th Cir. 2005).

[107] *Id.* at 920 n.2 ("We are . . . not convinced that a detailed knowledge of Christian doctrine is relevant to the sincerity of an applicant's belief; a recent convert may well lack detailed knowledge of religious custom. Even if [petitioner] did not have a clear understanding of Christian doctrine, this is not relevant to his fear of persecution.").

[108] 400 F.3d 530 (7th Cir. 2005).

[109] *Id.* at 533–34 ("Of course a purported Christian who didn't know who Jesus Christ was, or a purported Jew who had never heard of Moses, would be instantly suspect; but many deeply religious people know very little about the origins, doctrines, or even observances of their faith.").

[110] *See* Office of U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, U.N. Doc HCR/1P/4/Eng/REV.2 (Feb. 2019) [hereinafter Handbook]; *see also M.A. A26851062 v. United States INS.*, 858 F.2d 210, 214 (4th Cir. 1988) ("Although the *Handbook* had not yet been published when Congress passed the Refugee Act of 1980, we follow the lead of other courts in recognizing that the *Handbook* provides significant guidance in interpreting the Refugee Act."); INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a) . . . Nonetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.").

[111] Handbook, *supra* note 110, at 23.

[112] *Id.*

many features, including belief, identity, way of life, and activity.[113] The United Nations Handbook provides a number of ways in which religious persecution can be understood, and it provides some semblance of what religion could consist of—but it still does not provide a definitive understanding of 'religion' as a concept. Furthermore, the aforementioned cases—with some courts focusing on the suppression of practice and others focusing on religious self-identification and external perception—also fail to provide a consistent interpretation of religion and religious persecution.

These cases highlight the need for consistency in determining what it means to be persecuted on account of religion. Although the courts' current adjudication of religious asylum claims is intentional—because it allows for a variegated interpretation of religion, on a case-by-case basis depending on the asylum seeker's individualized claims—it ultimately harms the asylum seeker. What some courts may consider to be a part of religion in some cases may not be considered as such in other cases by other courts, making it routinely difficult for an asylum seeker to not only prove that he or she has a sincerely held religious belief but also that he or she has been persecuted on account of that belief.

The question that then results from a survey of these cases is this: How can a court determine if an asylum applicant is being persecuted on account of his or her religion without understanding what 'religion' is in the first place? While the courts have not explicitly stated that the lack of agreement on the "definition" of religion—or more broadly, what religion could constitute—this Comment suggests that the abstract, fragmented understanding of religion that the courts currently employ obfuscates the adjudication of religious asylum claims. In a way, then, this Comment adopts an Aristotelian conception of what it means to understand something: in other words, to understand something, we should be able to define it. Similarly, this evokes one of the central questions discussed in *Meno*, where Socrates' interlocutor Meno asks him whether virtue can be taught, and Socrates responds in turn by asking, "What is virtue?" In the context of this Comment, then, if an asylum seeker claims to be persecuted on account of religion, the courts should, and must, ask: what is religion?

Because the 'one central reason' standard guides the nexus inquiry, this leaves the courts to determine whether the asylum seeker's persecutor necessarily persecuted the asylum seeker on account of their

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[113] *Id.* at 126 ("Relevant areas of enquiry include the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution.").

religion. To do so, it is imperative for the courts to holistically understand what 'religion' is. This understanding is critical to determine if the asylum seeker was targeted because of their religious practice, identity, belief, or membership in a religious community. In the aforementioned cases, courts have pointed to a number of features of religion to varying degrees, whether it is practice, self-identification, knowledge, or belief. However, many of these features are disregarded in the courts' analyses, leaving doubt as to whether the courts are fully considering all aspects of an asylum seeker's religious asylum claim.

Ultimately, asylum claims are fact-specific inquiries based on the totality of the circumstances.[114] However, this Comment argues that the adoption of a definitional methodology based on broad characteristics and features of religion—rather than a strict functional and technical definition—has the potential to mitigate any inconsistencies and confusion surrounding what is (and is not) religious persecution, and therefore, the nexus requirement in asylum cases.

B. Debating and Defining Religion in the U.S. Supreme Court

Barraza Rivera v. INS,[115] a political asylum case, is one of the few federal court cases that makes any reference to defining religion. Though the court in *Barraza Rivera* did not itself attempt to define religion, it nonetheless cited prior Supreme Court precedent involving Free Exercise claims.[116] In *Barraza Rivera*, the Ninth Circuit cited to *Welsh v. United States*[117] and *United States v. Seeger*,[118] where the Supreme Court adopted a broad definition of 'religion' in the context of two conscientious objector cases.[119] In *Welsh*, the Supreme Court noted that an individual's sincerely held belief, even if it was "purely ethical or moral in source," was nevertheless a belief that "impose[d] upon him a duty of conscience" that corresponded to a type of religious belief. This

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[114] *See, e.g.*, Lopez de Hincapie v. Gonzales, 494 F.3d 213, 218 (1st Cir. 2007) ("Before we turn from the general to the specific, we think it wise to emphasize that the question of whether persecution is on account of one of the five statutorily protected grounds is fact-specific.").

[115] 913 F.2d 1443 (9th Cir. 1990).

[116] *Id.* at 1451–52.

[117] 398 U.S. 333 (1970).

[118] 380 U.S. 163 (1965).

[119] *Welsh*, 398 U.S. at 340 ("If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions."); *see also* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 258 (1989) ("The transformation of religion from a theistic conception to a sincere and meaningfully held belief system culminated with two conscientious objector cases, *Seeger* and *Welsh*.").

section discusses Supreme Court precedent involving free exercise claims, particularly in the context of defining 'religion.' What this section reveals is the Supreme Court's expansive understanding of religion as encompassing ethical, spiritual, and moral beliefs not traditionally associated with organized religion. For the Supreme Court, these beliefs are consequential only if they were sincerely held.

Early legal scholars and Supreme Court justices have raised concerns with providing a specific definition of 'religion' when litigating First Amendment Free Exercise and Establishment Clause claims involving religion. For instance, in *Thomas v. Rev. Bd.*,[120] Chief Justice Warren Burger stated that

> [T]he determination of what is a 'religious' belief or practice is more often than not a delicate task . . . the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[121]

Likewise, others argue that any definition of religion would be inadequate and even violate religious freedom itself:

> [A]ny definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be: inability to give an authoritative definition is justified by the conjunction of the first amendment's two religious clauses . . . Furthermore, an attempt to define religion, even for purposes of increasing freedom for religions, would run afoul of the 'establishment' clause, as excluding some religions, or even as establishing a notion respecting religion.[122]

However, given the specific statutory construction of the INA which requires a religious asylum applicant to prove persecution on account of religion, a working definition and conception of 'religion' is ultimately

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[120] 450 U.S. 707 (1981).

[121] *Id.* at 714; *see also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can [it] constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."); United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations.").

[122] Jonathan Weiss, *Privilege, Posture and Protection "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964).

necessary. An analysis of relevant Supreme Court precedent is therefore useful in considering how the courts have understood and attempted to define religion.

In the Court's 1890 decision *Davis v. Beason*,[123] Chief Justice Field discussed 'religion' as resembling the features of traditional Christianity, with adherence to a Supreme Being: "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[124] Just over seven decades later in *Seeger*, the previously-referenced conscientious objector case, the Court interpreted statutory language referring to religious training and belief in the Universal Military Training and Service Act, and espoused a broader view of religion that transgressed the boundaries of organized, traditional religions such as Christianity.[125] There, the Court found that the "test of belief" that applied was "whether a given belief that is sincere and meaningful occupies a place in life of its possessor parallel to that filled by orthodox belief in God."[126] Thus, a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed" with reference to philosophers such as Plato, Aristotle, and Spinoza could satisfy the test requiring a "belief in a relation to a Supreme Being" under the 1951 Act.[127]

Like in *Seeger*, Justice Harlan's concurrence in *Welsh* interpreted religion as being based on personal, atheistic concerns rooted in morality and ethics.[128] In *Welsh*, which also involved the conscientious objector exemption, Chief Justice Field held that:

> [A]n individual [who] deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by God' in traditionally religious persons.[129]

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[123] 133 U.S. 333 (1890).

[124] *Id.* at 342.

[125] United States v. Seeger, 380 U.S. 163, 165–66 (1965).

[126] *Id.*

[127] *Id.*

[128] *Welsh v. United States*, 398 U.S. 333, 366 (1970) (Harlan, J., concurring) ("That [the conscientious object exception] has been phrased in religious terms reflects, I assume, the fact that ethics and morals, while the concern of secular philosophy, have traditionally been matters taught by organized religion and that for most individuals spiritual and ethical nourishment is derived from that source. It further reflects, I would suppose, the assumption that beliefs emanating from a religious source are probably held with great intensity.").

[129] *Id.* at 340 (majority opinion).

Thus, such deeply and sincerely held beliefs that guide an individual to what is right and wrong could "function as a religion."[130]

Just seven years later, however, the Court narrowed its understanding of religion in *Wisconsin v. Yoder*.[131] In *Yoder*, the Court maintained that "secular considerations" rooted in philosophical and personal rather than religious concerns did not constitute a "religious belief" that "[rose] to the demands of the Religion Clauses."[132] Thus, the religious beliefs of the Amish, at issue in the case, deserved protection under the First Amendment's Free Exercise Clause because they were not based on "personal preference," but rather on "deep religious conviction, shared by an organized group, and intimately related to daily living."[133] One way to reconcile *Yoder* with *Seeger* and *Walsh* is to read the latter two cases in light of the former: personal, atheistic concerns rooted in ethics and morality are also held by people who are part of an organized group (like the Amish) and these concerns could also be related to their daily living. After all, Chief Justice Burger noted that religion is an "individual experience," going as far as to include the beliefs of individuals such as Thoreau who was guided by his own personal and philosophical beliefs.[134]

The seemingly narrow interpretation of religion in *Yoder* was short-lived. In *Thomas v. Review Board*[135] Chief Justice Burger wrote that while the determination of what constituted a religious belief or practice was a "delicate task," inquiries into such matters were not to be left to "judicial perception."[136] As he continued, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[137] Later, in *Frazee v. Illinois Department of Employment Secretary*,[138] the Court held that while membership in an organized religious denomination would facilitate the identification of sincerely held religious beliefs, it was not a necessary condition of availing First Amendment protection.[139] In other

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[130] *Id.*

[131] 406 U.S. 205 (1972).

[132] *Id.* at 215–16.

[133] *Id.* at 216.

[134] *Id.* at 243. The majority in *Yoder*, however, subscribes to the idea that Thoreau's beliefs, which were largely personal and philosophical, were not religious and therefore did not constitute a 'religious belief.' *See id.* at 216. While the Court might have come to this conclusion at the time, this Comment reinterprets *Yoder* to be inclusive of individualized, philosophical beliefs that nevertheless carry the features of organized religions such as the Amish.

[135] *Thomas v. Rev. Bd.*, 450 U.S. 707 (1981).

[136] *Id.* at 714.

[137] *Id.*

[138] 489 U.S. 829 (1989).

[139] *Id.* at 834 ("Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of

words, while membership in an organized religious denomination was a sufficient condition for First Amendment protection, one did not need to be a member of a particular religious organization to invoke First Amendment protection. Rather, one just needed to hold a sincerely held religious belief.

What the Supreme Court's free exercise jurisprudence from *Beason* to *Frazee* reveals is the increasingly expansive understanding of religion. However, the point that this section seeks to make is not that one could hold *any* type of religious belief based on ethical, moral, or spiritual concerns for that to count as a religious belief. Rather, the more important point is that the religious belief in question must be *sincerely held*. What these cases reveal is that there is a large emphasis on sincerely held religious beliefs that are not traditionally part of an organized religion. Furthermore, they also reveal a move to accept sincerely held beliefs that are part of more communal, organized forms of religion. Thus, what was once seen as a relationship between God and creation later became a more pluralistic relationship between an individual and his or her sincerely held beliefs, regardless of whether they were rooted in a more traditional, organized, and theistic conceptions of religion or in moral, ethical, and spiritual concerns that were atheistic, philosophical, and individually held.

Ultimately, the Supreme Court's expansive understanding of religion should not be limited to the federal courts. Rather, the broad authority afforded to immigration judges, who are provided much leeway in asking a range of questions in their credibility determinations, suggests that immigration courts, too, should adopt this expansive, all-inclusive understanding of religion. This expansive and all-inclusive understanding of religion should, however, primarily focus on whether the particular belief, practice, or identity in question is sincerely held.[140] Religion is ultimately a subjective, personalized, and idiosyncratic experience—no concrete definition adopted by the courts could do it justice. If immigration courts would place an increasing emphasis on whether an individual holds a sincerely-held religious belief—rather than an emphasis on whether an individual has achieved a requisite level of religious knowledge, as some immigration judges have done in

identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.").

[140] It should be noted that others make a similar argument—that immigration courts should align more closely with federal courts in cases involving religion. *See* Tolappa, *supra* note 17, at 55 ("To the extent that the government has a legitimate interest in preventing so-called 'religious imposters' from gaining asylum, immigration judges can further that interest by gauging the sincerity and not the orthodoxy of applicants' beliefs, just as federal judges do.").

their credibility determinations—this would be more aligned with the ways in which federal courts have considered religion to date.

C. The Way Forward: A Proposed Definitional Methodology of Religion for the Courts in Litigating Religious Asylum Cases

How, then, can the increasingly expansive view of 'religion' by the U.S. Supreme Court be introduced into the immigration courts and judges' understanding of religion in the context of present-day religious asylum claims? There are several difficulties in developing a workable and sustainable definition of religion for the courts, as is abundantly clear in the U.S. Supreme Court's adjudication of free exercise claims throughout history. A focus on the structural aspects of religion, such as membership in a church or belief in an ultimate Creator, excludes metaphysical, personal approaches to religion based on morality and ethics. Yet these metaphysical and personal approaches to religion, as evinced in *Seeger* and *Welsh*, may open the door much too wide for any individual to potentially claim—however obtuse the claim might be—that they have a well-founded fear of persecution on account of their religion. Furthermore, a strictly structural definition of religion would also be inconsistent with the constitutional guarantee of religious liberty.[141]

To combat this line-drawing problem, then, a workable solution that falls somewhere in the middle is needed. What this Comment recommends is that this solution must incorporate two elements. First, an asylum seeker's religious belief must be sincerely held; however, judicial inquiry into the degree of sincerity must be handled with caution.[142] Second, and especially relevant for religious asylum claims, the perpetrator must view the asylum seeker on the basis of that sincerely held religious belief, or in other exceptional circumstances, on the basis of an imputed religious belief.[143] This Comment therefore proposes that in their preliminary analyses, courts should assess whether these two elements exist before engaging in a determination of whether the asylum seeker's persecution is *on account of* religion.

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[141] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1180 (2d. ed. 1988) ("The idea of religious liberty—combined with the special place of religion in the constitutional order—demands a definition of 'religion' that goes beyond the closely bounded limits of theism, and accounts for the multiplying forms of recognizably legitimate religious exercise.").

[142] *See* Davis v. Fort Bend Cnty., 765 F.3d 480, 486 (5th Cir. 2014) ("This court has cautioned that judicial inquiry into the sincerity of a person's religious belief must be handled with a light touch, or judicial shyness.") (internal quotation omitted); Moussazadeh v. Tex. Dept. of Crim. Just., 703 F.3d 781, 792 (5th Cir. 2012) ("To examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread.").

[143] Quintero v. Gonzales, 187 F. App'x. 743, 746 (9th Cir. 2006) ("The persecution must be on account of the *victim's* actual or imputed religion, and not the persecutor's religion . . . .") (emphasis in original).

Once these first two elements are established, courts should then determine whether the asylum seeker's sincerely held religious belief is (1) socially distinct within the society in question and (2) defined with particularity with reference to features such as belief, identity, membership in a faith-based organization, or practice. These two additional elements largely draw upon the courts' adjudication of cases based on persecution on account of membership in a particular social group (PSG), another protected ground under the INA.

To determine whether an asylum applicant's sincerely held religion is socially distinct within the society in question, courts should determine whether that religion is perceived and recognized as a group in society. Here, this Comment draws upon the adjudication of asylum cases where membership in a particular social group (PSG) is the protected ground upon which an asylum seeker claims to be persecuted. For a religion to be socially distinctive does not mean it needs to carry "ocular" visibility.[144] Rather, it just means that the religion in question needs to be perceived as a group—whether that group has thousands or millions of adherents, or even two—by society at-large such that the group can be viewed distinctly as a group in a significant manner.[145] Generally, this distinction would occur if those characteristics of the group were known to others such that the group's characteristics can meaningfully distinguish the group from others who do not carry those characteristics.[146] In the context of religion, this may be harder to satisfy as an individual's idiosyncratic beliefs and practices are not necessarily visible to society at large. Nevertheless, those idiosyncratic beliefs and practices are *still* meaningful distinctions that set apart the individual's attested religion from society.

Next, to determine whether an asylum applicant's religion is defined with particularity, courts must examine distinguishing features of the applicant's religion in question. This Comment proposes that such features can include belief, identity, membership in an organization, and practice, though other features such as a highly particularized

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[144] Matter of M-E-V-G-, 26 I.&N. Dec. 227, 238 (B.I.A. 2014) ("Literal or 'ocular' visibility is not, and never has been, a prerequisite for a viable particular social group."); *see also* Umana-Ramos v. Holder, 724 F.3d 667, 672 (6th Cir. 2013) (interpreting social visibility "to refer to the social salience of the group in a society, or in other words, whether the set of individuals with the shared characteristic would be perceived as a group by society").

[145] *See Matter of M-E-V-G-*, 26 I.&N. Dec. at 238 ("A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.").

[146] *See id.* ("Thus, the 'social distinction' requirement considers whether 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.").

set of morals, ethics, and ways of life could also constitute distinguishing features of a religion. However, courts should not inquire as to whether an applicant's religious practice actually qualifies as a form or method of worship, for example. Rather, courts should determine whether the distinguishing features of an asylum seeker's religion are defined with enough particularity such that it circumscribes the outer boundaries of the individual's attested religion, setting it apart from the society at large. In other words, the particularity of these features must provide an "adequate benchmark" in determining the outer limits of the religion in question.[147] Furthermore, the particularity of the religion's features should not be so amorphous and overbroad such that individual adherents can claim to hold a religious belief that is only held by them and them alone in society at large.[148]

Overall, a workable definitional methodology of 'religion' for the courts to use in cases of asylum should be based on the four elements described above, with the first two elements being definitively established before proceeding to the latter two elements. First, an asylum seeker's religious belief must be a sincerely held belief. Second, the perpetrator must view the asylum seeker on the basis of that sincerely held religious belief, or in other exceptional circumstances, on the basis of an imputed religious belief. Once these two elements are established, courts must assess whether the religion of the asylum seeker is sufficiently socially distinct within the society in question and whether it is defined with sufficient particularity with reference to features including belief, identity, membership in a faith-based organization, and practice.

VI. RECONFIGURING NEXUS BASED ON THE PROPOSED DEFINITIONAL METHODOLOGY OF RELIGION

As discussed earlier, one of the primary issues in litigating any asylum claim is that the asylum applicant must prove that their persecutor was motivated to persecute them *on account of* their protected ground,

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[147] In Re A-M-E- & J-G-U-, 24 I.&N. Dec. 69, 76 (B.I.A. 2007); *see* also Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003) ("While it is apparent that the definition of a 'social group' is a flexible one, which encompasses a wide variety of groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion, it is also apparent that the term cannot be without some outer limit . . . ."); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) ("Consequently, our interpretation of the phrase 'particular social group' must be informed primarily through a careful evaluation of the statutory language, and a practical appreciation of the reasonably limited scope of the term 'refugee' as reflected in our previous decisions. We may agree that the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion. Still, the scope of the term cannot be without some outer limit.").

[148] *See Matter of M-E-V-G-*, 26 I.&N. Dec. at 239 ("The group must also be discrete and have definable boundaries–it must not be amorphous, overbroad, diffuse, or subjective.").

and not on account of an another, unprotected end that may be unrelated to their protected ground. This distinction is at the crux of the circuit split between the Fourth Circuit and the Fifth, Tenth, and Eleventh Circuits. However, scholars and courts have recognized time and time again that intent is difficult to prove in any case, and particularly in asylum cases.[149] How—and why—should an asylum seeker bear the burden of proving the mens rea of their perpetrator? And furthermore, is it possible to sharply divide a perpetrator's ultimate goal (such as funding a gang's criminal enterprise) from their intent to persecute someone *on account of* their religion? In the case law discussed so far, courts seem to rely upon a singular intent in asylum claims. Yet this disregards the fact that often multiple intents are at play, all of which may, under the totality of the circumstances, constitute persecution on account of a protected ground.

Furthermore, the inquiry into intent poses problems in establishing nexus in asylum claims. Over time, the standard for proving nexus has become increasingly burdensome based on judicial decisions such as *Elias-Zacarias*[150] and statutory changes such as the REAL ID Act of 2005. Although under the INA the language of 'on account of' requires that the asylum seeker's protected status be a but-for cause of the applicant's persecution, Congress' addition of the 'one central reason' standard into the REAL ID Act of 2005 poses issues regarding the extent of but-for causation inquiries.[151] How should the language of 'one central reason' be read in light of the but-for causation requirement under the INA? Should it be read as an additional requirement that requires both but-for causation *and* that the protected ground is not incidental or tangential to another, unprotected end? Or should the language of the 'one central reason' standard be read as reaffirming but-for causation? This Comment argues the latter: that under Supreme Court precedent such as *Bostock v. Clayton Cnty.*,[152] a simple but-for causation analysis is sufficient under the one central reason standard and relatedly, resolves the circuit split between the Fourth Circuit and the Fifth, Tenth, and Eleventh Circuits.

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[149] *See, e.g.*, Matter of S-P-, 21 I.&N. Dec. 486, 489 (B.I.A. 1996) ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases."); *see also* Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1193 (1994) ("Proof of intent, or state of mind, is difficult under any circumstances. In the case of refugees, it is exceedingly difficult.").

[150] 502 U.S. 478, 479 (1992).

[151] 8 U.S.C. § 1158(b)(1)(B)(i).

[152] 590 U.S. 644 (2020).

As per the Supreme Court in *Univ. of Texas Southwest Med. Ctr. v. Nassar*[153] and *Bostock v. Clayton Cnty.*, statutory phrases such as 'on account of,' 'because of,' and 'results from' all require the simple and traditional but-for causation analysis.[154] Although these cases are both Title VII cases, they are nevertheless useful in interpreting the extent of the 'on account of' language in the INA. In the context of Title VII, the but-for causation standard, incorporated in the language of 'on account of' or 'because of' or 'by reason of', means that a defendant cannot avoid liability by citing some *other* factor that contributed to its challenged employment action.[155] And in *Bostock*, the Supreme Court adopted a "sweeping" interpretation of but-for causation, stating that under the test, courts must "change one thing at a time and see if the outcome changes," and "[i]f it does, we have found a but-for cause."[156]

In the context of *Chicas-Machado*,[157] the application of *Bostock*'s expansive but-for causation analysis comes down to this: if the Fourth Circuit were to remove the petitioner's religion from the equation—which would ideally be expansively construed to include such features such as belief, faith, practice, self-identification, and beyond—would MS-13 still have targeted her in order to further their criminal enterprise? Likely not. In this case, it was the petitioner's religious affiliation that made her a vulnerable target that MS-13 could exploit to ultimately achieve their end goals.[158] Applying Justice Gorsuch's analysis from *Bostock*, the Fourth Circuit in *Chicas-Machado* cannot adduce that some other factor ultimately led to the petitioner's persecution. In other words, the gang's criminal and pecuniary motives do not negate the causal relationship between the petitioner's religion and the persecution.

Under a simple and traditional but-for causation analysis, the petitioner in *Chicas-Machado* would not have been persecuted but-for her religious affiliation. It should not matter to the court if she could have continued to practice her religion openly, or that she could continue to self-identify as a Christian, or that she could continue to attend her church activities. All that matters is whether the petitioner in *Chicas-*

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[153] 570 U.S. 338 (2013).

[154] *Id.* at 350 (2013) (determining, in the Title VII of Civil Rights Act of 1964 context, "the requirement that an employer took adverse action 'because of' age meant that age was the reason that the employer decided to act, or, in other words, that age was the 'but-for' cause of the employer's adverse decision") (internal quotation marks omitted).

[155] *Bostock*, 590 U.S. at 656.

[156] *Id.*

[157] 73 F.4th 261 (4th Cir. 2023).

[158] *See id.* at 264 ("[MS-13 gang members] confronted Chicas-Machado at one of her neighbors' stores near her home. There they ordered her to 'collaborate with them . . . [to] tell them every time that a police car went there . . . [since] because [she] was Christian . . . no one will suspect . . . [her].'").

Machado was persecuted 'on account of' her religion, even if religion was unrelated, tangential, and incidental to MS-13's ultimate goals. And the answer under a traditional and simple but-for causation analysis—which this Comment endorses—is an emphatic yes.

The same conclusion would result should the but-for causation standard be applied to the analyses of the Fifth, Tenth, and Eleventh Circuits. In *Berrios Bruno v. Garland*,[159] *Orellana-Recinos*,[160] and *Sanchez-Castro*,[161] the Fifth, Tenth, and Eleventh Circuits all affirmed the idea that if a protected ground was merely a means to another, ultimate end, then the protected ground could not support an asylum claim. Though the Fifth Circuit argued that the "relative weight of the protected ground" matters in that the protected ground cannot play a minor role, for the purposes of asylum, the weighing of motives by the courts is insignificant if an individual is targeted because of their religious belief, conduct, activity, identity, and beyond.

Under a but-for causation standard, "there is simply no escaping the role intent plays" in religious asylum claims.[162] Just as "[i]ntentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view," intentionally attacking or threatening an individual can still be persecution on account of religion, even if the perpetrator's ultimate aim was to benefit financially or attain some other goal.[163] If an individual's religion is a but-for cause of their persecution, then this necessarily means that their persecutor intended to rely on their religion in their decision to target person A (who is an easier, more vulnerable target because of their religion) versus person B (who is not of person A's religion). Of course, the calculus changes if both person A and person B belong to same or different religions, but nevertheless, the targeting of the individual is still *because of* their religion and the same but-for causation analysis would still apply.

The methodology of religion proposed earlier is relevant to the argument for returning to a strict and simple but-for causation analysis because courts emphasize different aspects of religion in their analyses. For instance, in *Chicas-Machado*, the partial concurrence emphasized

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[159] *Berrios-Bruno*, No. 18-60276, 2021 WL 3624766, at *4 (5th Cir. Aug. 16, 2021).

[160] Orellana-Recinos v. Garland, 993 F.3d 851, 858 (10th Cir. 2021).

[161] Sanchez-Castro v. United States Att'y Gen., 998 F.3d 1281, 1283–84 (11th Cir. 2021).

[162] *Bostock*, 590 U.S. at 661 ("Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view . . . There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking.") (emphasis in original).

[163] *Id.*

religious practice, while the majority emphasized religious activities more generally and church membership.[164] In relying on these different understandings of religion, the majority and the partial concurrence reached drastically different conclusions.

While the partial concurrence argued that the petitioner was not completely restricted or hindered from practicing her religion, the majority found this to be irrelevant. It did not matter to the majority if the petitioner's religious practice was completely suppressed. All that was considered in the court's analysis was that the petitioner's religious affiliation, conduct, and activities provided a legitimate and sufficient means to the gang's ultimate end. Under a but-for analysis, it can be argued that but-for the petitioner's religious affiliation, conduct, and activities, the achievement of those ends would not have occurred.

This Comment's proposed methodology of religion attempts to achieve a complete understanding of religion such that it encapsulates its nuances and fluidities. An individual can still be targeted on account of their religion even if their religious practice is not fully suppressed. And likewise, an individual can still be targeted on account of their religion even if their way of life does not conform to orthodox and traditional forms of religious organization. Ultimately, this proposed methodology of religion seeks to provide a holistic view of religion that better facilitates the adjudication of nexus inquiries and the analysis of intent in religious asylum claims.

VII. CONCLUSION

Proposing a definitional methodology of religion presumes that religion is an analytically identifiable phenomenon that can be observed and anatomized much like a multicellular organism under a microscope. This is an unfortunate assumption that motivates this Comment's argument and proposed methodology, but this assumption is one that has been produced and reproduced by the law itself. In requiring asylum seekers to prove that they are being persecuted on account of religion, the courts are indirectly engaging in an analysis and interpretation of what is religion—and what is not.

Yet religion, as a historical and modern category, is a construction of European modernity that has been applied as a universal concept, as anthropologist Talal Asad has argued in his influential series of essays

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[164] *Compare* Chicas-Machado v. Garland, 73 F.4th 261, 278 (4th Cir. 2023) (Agee, J., concurring in part and dissenting in part) ("Religious persecution can take many forms, but 'a core principle' is the suppression of religious expression: the persecutor seeks to prevent the victim from 'practic[ing] his religion openly' or altogether."), *with id.* at 266 (majority opinion) ("Chicas-Machado offered evidence that clearly established that she was persecuted *on account of* her membership in, service for, and ties to the church.") (emphasis in original).

in *Genealogies of Religion*. As Asad writes, "My argument is that there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes."[165] These discursive processes are necessarily Eurocentric—an odd reality to grapple with considering that the majority of asylum seekers today originate from countries that were once colonized by European nations.

The current asylum framework requires asylum seekers to essentially tick a box and attempt to make a successful claim to the IJ that they are being persecuted on account of one of five grounds. Again, however, this forces asylum seekers to categorically define their experiences of persecution, and argue that they *are*, in fact, being persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group, thus necessitating that both the asylum seeker as well as the court operate under some understanding of what these grounds even entail. And in the case of religion, this Comment argues that this problem is heightened to even a greater extent. The very category of religion emerged out of the secularizing processes of liberalism and modernity, coupled with the particular processes of knowledge and power through which the modern world has emerged.[166] Asylum law, then, is rooted in an exclusionary and constraining notion of humanity: it compels asylum seekers to categorically define and constrain their experiences in the language of liberalism and modernity.

Ultimately, it is no doubt that such a definitional methodology could have profound consequences for national security. Immigration, including asylum, has always been and is inextricably tangled with national security concerns. It is too preliminary and even too easy to argue that the proposed definitional methodology will necessarily increase (or even decrease) the amount of successful asylum applications; the results of such a methodology are simply unknown. Yet what this Comment seeks to also contend with is this: in requiring asylum seekers to categorize their experiences as *religious* persecution—through modernity's narrow and compressed understanding of religion—the national security state continues to perpetuate political, legal, cultural, and linguistic domination upon asylum seekers who largely come from formerly colonized countries.

Why, then, given all of these concerns, might a definitional methodology *still* be useful? Why does this Comment *still* put forth such a proposal, even amongst the concerns (or to put it more bluntly, the realities) discussed in this conclusion? Asylum applicants must still work

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[165] TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 29 (1993).

[166] *Id.* at 54.

within the framework of asylum law as it exists today and render their experiences of persecution legible to the IJ—this is uncontested. Considerable reform of the asylum system is a solution that is altogether too far into the future. But in the present, one point is clear: as of now, the immigration courts have very little to no conception of what religion is, adjudicating religious asylum claims on fragmentary aspects such as practice, belief, knowledge, or attendance in a house of worship. As this Comment has sought to demonstrate, this has led to inconsistent reasoning with regards to the nexus inquiry. A definitional methodology serves as a practical next step for the adjudication of religious asylum claims. Furthermore, a methodology evades the universalizing nature of definitions, as Asad points out. Should such a methodology be adopted, only time will tell how it is utilized and experimented with in the courts.