DEAD SILENT: HEURISTICS, SILENT MOTIVES, AND ASYLUM

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ABSTRACT

Pursuant to our obligations to the international community, the United States provides asylum to individuals fleeing persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." The "on account of" prong of the asylum determination is referred to as the nexus requirement. The paradigmatic asylum case features a man fleeing a dictatorial regime that has persecuted or would persecute him on account of his political dissidence or ethnicity. Absent credibility concerns, these cases are routinely granted, and immigration judges do not question whether the nexus requirement has been met.

In other cases, however, for example cases in which a woman is fleeing gender-based violence such as domestic violence, trafficking, or forced marriage, or cases in which a young man is fleeing retribution because he refused recruitment to a gang, the immigration agency has frequently denied relief. Often, even if the applicant has shown that she or he is a member of a cognizable particular social group or has another protected trait, immigration judges have held that the nexus requirement has not been met. Judges have reasoned that "personal" or "criminal" reasons motivated the persecution, as opposed to the protected ground. In the domestic violence context, for example, immigration judges have held that the abuse occurred because the abuser was a "despicable person" or due to his "inherent meanness," rather than on account of the victim's gender or social group. Similarly, in the gang context, immigration judges have held that the persecution occurred due to generalized

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violence or the gang members' desire for increased power, as opposed to the victim's gender or social group.

Yet, in the paradigmatic asylum case, immigration judges have not stopped to ask whether the dictator was a "despicable person" or in pursuit of more power. They have implicitly recognized that although these things may of course be true, it is also clear that the persecution occurred due to the victim's political opinion or ethnicity.

This article attempts to explain that discrepancy. I argue that, unlike the paradigmatic asylum case, where the persecutor's motives are overt and well-documented, some gender-based cases and cases based on gang violence feature "silent motives." In cases involving silent motives, it falls upon the immigration judge to fill in the nexus gap left by this silence. Accordingly, unlike in the paradigmatic asylum case, the nexus determination in such cases is susceptible to influence from the immigration judge's biases.

This article uses theories from cognitive science to posit that when immigration judges analyze silent motives cases, they use heuristics and other mental shortcuts, which often work against finding nexus on account of a protected ground.

In two prior articles—The New Nexus and Nexus Redux—I proposed a new standard for evaluating nexus in asylum cases. This article explains why such a standard is necessary.

INTRODUCTION

Judges are biased. Countless scholars have written about bias in the judiciary, and immigration court is no different. Yet the impact of immigration judges' biases—whether conscious or implicit—on the nexus, or causation, determination in asylum law has not been examined. This Article posits a new principle applicable to some asylum cases: the principle of "silent motives." The Article then argues that in cases involving silent motives, judges are forced to employ heuristics and other mental shortcuts that result in nexus determinations heavily influenced by bias.

Pursuant to our international obligations, the U.S. is obligated to offer asylum to individuals fleeing persecution in their home countries on account of race, religion, nationality, membership in a particular social group, or political opinion. The "on account of"

requirement—often referred to as the "nexus requirement"—is sometimes easy to meet. If, for example, a political dissident is fleeing a dictator who is vocal about his oppression of dissidence, the applicant will have little trouble proving he was persecuted on account of his political opinion. In some cases, on the other hand, proving nexus is not so simple. For example, in domestic violence cases, applicants rarely have direct evidence that their abusers targeted them because of their gender or opinions. Other cases involving gender-based harms, such as trafficking and forced marriage, involve similar difficulties proving nexus. In cases involving young men fearing retribution from gangs they refused to join, the nexus requirement has also posed problems.

In asylum cases based on fear of domestic violence, immigration judges have routinely refused to find nexus to a protected ground, finding instead that the abuse occurred because the abuser was a "despicable person," because of his "inherent meanness," because of his alcohol abuse, because of his jealousy, or because of other "personal" or "criminal" reasons. This is the case despite the fact that, in many countries, it is clear that the vast majority of victims of domestic violence are women. Nevertheless, immigration judges refuse to find nexus to gender, favoring instead these alternate causes for the abuse. Similarly, in gang cases, immigration judges have not found nexus to the applicant's protected trait, finding instead that the violence occurred because of the gang members' desire for increased power and control. Yet, in cases in which the applicant is fleeing a repressive dictatorship, immigration judges have no problem finding nexus, and they do not stop to ask whether the dictator is a "despicable person" or whether he is seeking increased power and control.

This Article attempts to explain that discrepancy. The article first argues that gender-based and gang-based cases, unlike the paradigmatic political repression case, involve "silent motives." There are no newspaper articles documenting the motives of the abusers or gang members, at least not with respect to protected grounds. Indeed, if an abuser were asked about the reason for the abuse, even if he were answering honestly, he might not answer that he committed abuse on account of the victim's gender. Yet, that gender is a cause-in-fact of the abuse in many cases is clear.

The Article then goes on to draw from principles of cognitive psychology to argue that when immigration judges are forced to fill in the nexus gaps in silent motives cases, they use heuristics and other mental shortcuts that allow for biases to have a significant impact on

their nexus analyses. The article ends with suggestions for reform, including the adoption of a new standard for analyzing nexus that I proposed in two previous articles.

Part I provides the background necessary for a full understanding of the argument set forth in this Article. It starts with an overview of international refugee law principles, as well as domestic asylum law. It then offers a more in depth look at the nexus requirement in asylum law. Part II distinguishes cases in which nexus has posed a problem—specifically cases involving gender-based harms or other private harms—from the paradigmatic asylum case. It offers a new theory for this difference: the theory of "silent motives." Part III examines the cognitive science behind bias, particularly bias in the courts. It describes some relevant theories of cognitive science, including heuristics, cold bias and hot bias, and satisficing. Part IV discusses bias in the immigration courts. Part V applies the cognitive science theories to the asylum adjudication context. It argues that those cognitive processes have a greater (and negative) impact on silent motives cases. The Part ends by suggesting some reforms to minimize the impact of these biases.

I. BACKGROUND

In order to fully understand the argument set forth in this Article, some background knowledge of U.S. asylum law, particularly with respect to the nexus requirement, is necessary. This Part begins by setting forth the relevant international refugee law and U.S. asylum law. This Part also describes the evolution of the nexus requirement in U.S. asylum law.

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

The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees (the "Protocol"),[1] which adopted by reference the provisions of the Convention Relating to the Status of Refugees (the "Convention"). The Convention obligates signatory states to offer protection to individuals fleeing their home countries due to a "well-founded fear of being persecuted for reasons

1. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 622-24, T.I.A.S. No. 6577, 606 U.N.T.S. 268, 267 (entered into force Oct. 4, 1967).

of race, religion, nationality, membership of a particular social group or political opinion."[2]

In 1980, the U.S. enacted the Refugee Act (the "Act"),[3] which defines a refugee as any person who is unwilling or unable to return to her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[4] If an individual proves that she is a refugee under the statutory definition and is not otherwise statutorily barred from receiving protection, the Secretary of Homeland Security or the Attorney General (acting through the immigration agency[5]) may, at his or her discretion, grant her asylum in the United States.[6] This form of relief allows the applicant to remain in the United States, as well as petition for her spouse and qualifying children to be granted derivative asylee status and thereby join her in the United States.[7] She will also be able to apply for permanent residence and, eventually, citizenship.[8]

The burden of proving that an applicant is a refugee rests on the applicant. An individual must show that she has suffered past persecution or has a well-founded fear of future persecution on account of one of the protected grounds.[9] The term "persecution" is not clearly defined in the Act or implementing regulations, but courts have interpreted the phrase to require a showing of something more

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2. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, art. 1, 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954).

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

4. 8 U.S.C. § 1101(a)(42) (2012).

5. Asylum cases are adjudicated by both the Asylum Office, part of the Department of Homeland Security, and the Executive Office for Immigration Review (EOIR), part of the Department of Justice. The EOIR is composed of immigration judges and the Board of Immigration Appeals (B.I.A. or "Board"). 8 C.F.R. § 208.2 (2014); *see also* U.S. Dep't of Justice, Exec. Office for Immigration Review, *About the Office*, JUSTICE.GOV (Feb. 2014), http://www.justice.gov/eoir/orginfo.htm (stating that the EOIR "was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization which combined the Board of Immigration Appeals . . . with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security)"). Because only the EOIR typically issues published decisions, all references to the "Agency" are to the EOIR.

6. *See* 8 U.S.C. § 1158(b)(1)(A) (2012).

7. *See Id.* § 1158(b)(3).

8. *See* 8 U.S.C. § 1159 (2012).

9. *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

than mere discrimination or harassment.[10] The persecution must occur at the hands of the government or due to forces the government is unwilling or unable to control.[11] Furthermore, the applicant must prove that she was persecuted "on account of" her race, religion, nationality, membership in a particular social group, or political opinion.[12]

If an applicant demonstrates past persecution, she is entitled to a presumption that she has a well-founded fear of persecution in the future.[13] The Department of Homeland Security (DHS) can rebut that presumption by showing that there has been a fundamental change in circumstances such that she no longer has a well-founded fear of future persecution, or that she could avoid persecution by relocating to a different part of her home country.[14] If the DHS successfully rebuts the presumption of a well-founded fear of future persecution, an applicant may still be eligible for asylum if she can show "compelling reasons for being unwilling or unable to return" to her home country due to the "severity of the past persecution" or "a reasonable possibility that . . . she may suffer other serious harm upon removal to that country."[15] If an applicant cannot establish that she experienced persecution in the past, she may still be eligible for asylum if she can show an independent well-founded fear of future persecution.[16] In such cases, it is the applicant's burden to prove that she could not reasonably relocate to another part of her home country to avoid persecution.[17] An applicant need not show that she would be singled out individually for persecution; instead, she may meet her burden by demonstrating that there is a "pattern or practice" in her home country of persecution against similarly-situated persons.[18]

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10. *See* Stanojkova v. Holder, 645 F.3d 943, 947–48 (7th Cir. 2011) (noting that the Board of Immigration Appeals has not defined persecution and applying its own definition, "the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force . . . , or nonphysical harm of equal gravity" (emphasis in original)); Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996) ("The Immigration Act does not, however, provide a statutory definition for the term 'persecution.'").

11. *See* Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled in part by* Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

12. 8 U.S.C. § 1101(a)(42)(A) (2012).

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

14. *Id.*

15. *Id.* § 208.13(b)(1)(iii).

16. *Id.* § 208.13(b)(2).

17. *Id.* § 208.13(b)(3)(i).

18. *Id.* § 208.13(b)(2)(iii).

While the statute and regulations do not set forth a definitive standard for the burden of proof in asylum claims, the Supreme Court has interpreted the term "well-founded fear" to require a low burden, hinting that even a one-in-ten chance of persecution might suffice.[19]

B. The Nexus Requirement

As set forth above, in order to make out a claim for asylum, an applicant must demonstrate not only that she is a member of a protected group and that she experienced (or fears) harm that rises to the level of persecution, but also that the persecution occurred (or would occur) "on account of" her protected status.[20] This requirement is often referred to as the "nexus" requirement.[21]

Of course, many cases involve mixed or multiple motives. The vast majority of the courts of appeals to confront the issue before 2005 recognized that the protected ground need not be the sole reason for the persecution; rather, a protected ground needed to be at least one

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

20. Although the U.S. government changed the Convention language from "for reasons of" to "on account of" when drafting the statute, there is no evidence suggesting that this change was deliberate or significant at the time it was made. *See* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.); S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.); Immigration and Nationality Act, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (codified as amended at 8 U.S.C. § 1151 (1965)); Brigette L. Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499, 526 & n.175–76 (2007) (explaining the original legislative purpose of the asylum system). It appears that the United States suggested the "on account of" language during the drafting stages of the Convention, but the "for reasons of" language was adopted instead. *See* Memorandum, U.N. Ad Hoc Comm. on Refugees and Stateless Pers., Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons), U.N. Memorandum E/AC.32/L.4 (Jan. 18, 1950), http://www.refworld.org/docid/3ae68c164.html; *see also Cardoza-Fonseca*, 480 U.S. at 437 (describing the Act's refugee definition as "virtually identical" to the Convention definition). Therefore there is no insight into the legislature's reasoning for this decision.

21. Frantz, *supra* note 20, at 502.

reason, or part of the reason, for the persecution.[22] Then, in 2005, Congress enacted the REAL ID Act, which required that the protected ground be "at least one central reason" for the persecution.[23] 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.[24]

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22. *See, e.g.*, Mustafa v. Holder, 707 F.3d 743, 751 (7th Cir. 2013) ("Under the mixed-motives doctrine applied by this circuit prior to the enactment of the REAL ID Act, which applies in this case, an applicant may qualify for asylum if his persecutors had more than one motive for their conduct so long as the applicant demonstrates by either direct or circumstantial evidence that his persecutors were 'motivated, at least in part, by one of the enumerated grounds.'") (footnote omitted); Menghesha v. Gonzales, 450 F.3d 142, 148 (4th Cir. 2006) ("Under the INA's 'mixed-motive' standard, an asylum applicant need only show that the alleged persecutor is motivated *in part* to persecute him on account of a protected trait. Recognizing that persecutors often have multiple motives for punishing an asylum applicant, the INA requires only that an applicant prove that one of those motives is prohibited under the INA.") (emphasis in original) (footnote omitted); Mohideen v. Gonzales, 416 F.3d 567, 570 (7th Cir. 2005) ("We agree with our sister circuits that the statute's reference to persecution 'on account of' one of the specified grounds does not mean persecution *solely* on account of one of those grounds.") (emphasis in original); Lukwago v. Ashcroft, 329 F.3d 157, 170 (3d Cir. 2003) ("A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds."); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) ("The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion.") (emphasis in original).

23. REAL ID Act of 2005, Pub. L. No. 109–13, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(i) (2012)); *see also* H.R. REP. NO. 109–72, at 163 (2005) (Conf. Rep.) (stating that "under this definition it clearly would not be sufficient if the protected characteristic was incidental or tangential to the persecutor's motivation") (quoting Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (Dec. 7, 2000)).

24. *See* Shaikh v. Holder, 702 F.3d 897, 901–02 (7th Cir. 2012) (simultaneously embracing the Ninth Circuit's analysis of "one central reason" as well as the Third Circuit's rejection of the term "subordinate"); Ndayshimiye v. Att'y Gen. of U.S., 557 F.3d 124, 129–31 (3d Cir. 2009) (partially rejecting the BIA's interpretation but holding that when "the term 'subordinate' is removed, the BIA's interpretation constitutes a reasonable, valid construction of § 208's 'one central reason' standard"); Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009) (analyzing the statutory interpretation to hold that "a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist"); Shaikh v. Holder, 588 F.3d 861, 864 (5th Cir. 2009) (joining the BIA, First, Fourth, and Ninth Circuits in the interpretation of "one central reason"); Matter of J-B-N-, 24 I. & N. Dec. 208, 212–14 (B.I.A. 2007) (holding that, after consulting the dictionary for the suitable meaning of the word "central" and applying "common sense" to statutory interpretation, "one central ground" needs

In a previous article, *The New Nexus*, I argued that this lack of a uniform standard has led to inconsistent application of the rule, largely to the detriment of applicants fleeing gender-based persecution or other private harms.[25] I made this argument by examining in depth the treatment of the nexus requirement in nine contexts—forced sterilization, female genital mutilation, domestic violence, trafficking, forced marriage, religion, homosexuality, gangs, and membership in a family.

For example, in the forced sterilization context, the Agency initially held that applicants who feared sterilization or forced abortion due to China's "one-child" policy could not establish a nexus to a protected ground because the policy was not instituted on account of any Convention ground; rather, it was put into place due to the government's desire to control the population.[26] Congress was so troubled by this nexus holding that it amended the refugee definition with respect to forced sterilization and forced abortion cases.[27] In the

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to be more than "incidental, tangential, superficial, or subordinate to another reason for harm"); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 118 (2006) (explaining that "the REAL ID Act does not define 'centrality,' but it appears to have adopted the term 'central' from proposed INS regulations issued in December 2000 in which centrality was a major theme. In those regulations, the INS proposed that '[i]n cases involving a persecutor with mixed motivations, the applicant must establish that the applicant's protected characteristic is central to the persecutor's motivation to act against the applicant'") (alteration in original) (citing Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598 (Dec. 7, 2000)); James Feroli, *Credibility, Burden of Proof, and Corroboration Under the REAL Id Act*, 09-06 IMMIGR. BRIEFINGS 1 (2009) (demonstrating that REAL ID did not drastically alter the previous standard and that the Act was implemented to encourage the circuits to apply the same standards, particularly relating to mixed motive cases).

25. Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 457 (2014) [hereinafter Gupta, *New Nexus*].

26. *See* Matter of Chang, 20 I. & N. Dec. 38, 39–40, 45 (B.I.A. 1989) (denying asylum to a man fleeing China's one-child policy and the threat of sterilization because the one-child policy "is solely tied to controlling population, rather than . . . a guise for acting against people for reasons protected by the Act"); *see also* Gupta, *New Nexus*, *supra* note 25, at 390–92 (describing the Board's finding that "the nexus requirement had not been met" because the "forced sterilization does not occur on account of any of the Convention grounds; rather, the sterilization policy 'is solely tied to controlling population'").

27. 8 U.S.C. § 1101(a)(42)(B) (2014). The statute added the following language to the refugee definition:

> For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or

female genital mutilation context, the Agency has found a nexus to a protected ground, but, as I argued, its reasoning with respect to the nexus requirement appears to be out of line with its nexus reasoning in other gender-based cases.[28] For instance, in cases based on fear of domestic violence, trafficking, and forced marriage, the Agency has refused to find a nexus, reasoning that the persecution occurred (or would occur) on account of personal or criminal reasons, rather than on a protected ground.[29] In the domestic violence context, the Agency initially held in a published decision that the nexus requirement had not been met because the abuse occurred or would occur because of jealousy, frustration, the "inherent meanness"[30] of the abuser's personality, or simply because the abuser was a "despicable person,"[31] rather than on account of the victim's gender, political opinion, or social group.[32] But, as I pointed out elsewhere, the Agency routinely grants claims alleging fear of persecution from a dictator without

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> for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

See also Gupta, *New Nexus*, *supra* note 25, at 392 (describing how Congress "chose to address the nexus issue in coercive population control cases specifically" by amending the refugee definition to state that individuals who were forced to undergo, or persecuted for refusing to undergo, mandatory sterilization or abortion have a "well founded fear of persecution on account of political opinion").

28. Gupta, *New Nexus*, *supra* note 25, at 394.

29. See *Id.* at 395.

30. Matter of R-A-, 22 I. & N. Dec. 906, 926 (B.I.A. 1999) (en banc), *vacated*, (A.G., Jan. 19, 2001). This case was subsequently vacated by the Attorney General pending the issuance of defining regulations, which were never issued. For a detailed description of the procedural history of the case, *see* Gupta, *New Nexus*, *supra* note 25, at 396-403.

31. *R-A-*, 22 I. & N. Dec. at 926.

32. *See* Shannon Catalano, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 239203, INTIMATE PARTNER VIOLENCE, 1993–2010 3 (2012), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (finding that about four in five victims of domestic violence were women from 1994 to 2010); Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 343 (2010) (explaining that domestic violence is not random but a calculated pattern for an intimate partner to exert power and control); *see generally* Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361 (2012) (arguing that gender persecution should be a basis for asylum under the particular social group category).

stopping to ask whether the persecution occurred because the dictator was a "despicable person."[33] The fact that a dictator, like an abuser, may be a despicable person or may be seeking increased power and control does not negate the fact that the dictator is also targeting his victims due to their ethnicity or political opinion. Similarly, while it is true that an abuser may be a despicable person or acting out of jealousy or a desire for increased power and control, the abuse may nonetheless also be occurring on account of gender or other protected grounds. Whereas the agency's nexus determinations in the dictatorship context appear to recognize this axiom, the agency's nexus determinations in the domestic violence context have failed to do so.

Although the Agency recently held in a domestic violence case that the particular social group of "married women in Guatemala who are unable to leave their relationship" is cognizable under the Act, it did not address the issue of whether domestic violence occurs on account of that particular social group, because the DHS conceded the point.[34] Accordingly, immigration judges are still free to find—and have found—that although the applicant is a member of a cognizable social group, the abuse did not take place on account of her membership in that group; rather, it took place for criminal or personal reasons.[35]

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33. *See, e.g.*, Karijomenggolo v. Gonzales, 173 F. App'x 34, 36–37 (2d Cir. 2006) (holding that the applicant was persecuted on account of an imputed political opinion by a former military dictator who had close ties to the military); Gui v. INS, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and being targeted by the government for his political beliefs); *see also* Gupta, *New Nexus*, *supra* note 25, at 402 ("[T]he agency and courts routinely have granted asylum to political dissidents fleeing dictatorial regimes, without any regard to whether the dictator was seeking power and control or whether he was a 'despicable person.'").

34. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 392-395 (B.I.A. 2014).

35. *See, e.g.*, D-M-, A# redacted (B.I.A. Dec. 9, 2014) at 2 (unpublished memorandum decision) (assuming "the validity of the [applicant's] proposed particular social group in light of *Matter of A-R-C-G-*," but denying asylum based in part on the immigration judge's finding that "the actions against taken [sic] the [applicant] were not the result of her proposed social group but because her partner was abusive and criminally motivated to harm her") (decision on file with author); *see also* Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 17 (2016) (noting that in a post-*A-R-C-G-* domestic violence case, "the judge found that the abuse was 'related to his own criminal tendencies and jealousy'") (citation omitted).

In cases based on fear of trafficking or forced marriage, the Agency has found that the persecution was tied to economic enrichment or other criminal or personal aims, rather than to gender or social group.[36]

In the religious context, the Agency and courts of appeals have found a lack of nexus, reasoning that there is a distinction between religion (a Convention ground) and religious activity (a nonprotected ground).[37] In some cases based on fear of persecution on account of homosexuality, the Agency has denied asylum, finding that the persecution occurred because of "personal problems" between the victim and the persecutor as opposed to a Convention ground.[38] It has done so despite having held, decades earlier, that homosexuality constitutes membership in a particular social group for asylum purposes.[39]

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36. *See, e.g.*, Burbiene v. Holder, 568 F.3d 251, 254 (1st Cir. 2009) (affirming the Agency's denial of an asylum claim based on fear of trafficking because trafficking is a "criminal, not governmental, activity"); Gao v. Gonzales, 440 F.3d 62, 70 (2d Cir. 2006) (determining that because the persecution occurred on account of "a dispute between two families," the Immigration Court denied asylum and the Agency affirmed); Anon., A# redacted (New York, N.Y., Immigration Ct., Feb. 4, 2004), at 19–20 (CGRS Case #1034) (referring to her trafficker as a "spurned lover," the Immigration Court denied asylum); P-H-, A# redacted (Falls Church, Va., B.I.A., Nov. 21, 2005) at 2 (CGRS Case #3695) (denying applicant's asylum claim based on fear of trafficking on nexus grounds because her fear was based on "the outstanding debt she continues to have stemming from the illegal smuggling into United States, and as a result of international criminal conduct"); *see also* Gupta, *New Nexus*, *supra* note 25, at 403–07 (discussing trafficking victims' difficulty in satisfying the nexus requirement because of the Agency's focus on personal motivations rather than the gender or age of trafficking victims).

37. *See, e.g.*, Li v. Gonzales, 420 F.3d 500, 510 (5th Cir. 2005) (affirming the denial of asylum to a man who was persecuted on account of his affiliation with an illegal church, reasoning, "it is axiomatic that Li was punished because of religious activities, nonetheless, it does not necessarily follow that Li was punished because of his religion"), *review dismissed and opinion vacated*, 429 F.3d 1153 (5th Cir. 2005); *see* Gupta, *New Nexus*, *supra* note 25, at 407–08.

38. *See, e.g.*, Ayala v. U.S. Att'y Gen., 605 F.3d 941, 947 (11th Cir. 2010) (holding that the immigration judge denied asylum because the sexual assault that the applicant was a victim of was a "criminal act[] perpetrated by individuals") (alteration in original); Boer-Sedano v. Gonzales, 418 F.3d 1082, 1087 (9th Cir. 2005) ("The IJ concluded that the sex acts that Boer-Sedano was forced to perform by the police officer were simply 'a personal problem' he had with this officer."); *see also* Gupta, *New Nexus*, *supra* note 25, at 411–14 (examining the *Ayala* and *Boer-Sedano* decisions).

39. Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); *see also* Gupta, *New Nexus*, *supra* note 25, at 411–13 (noting that "claims

With respect to cases involving fear of persecution from gangs, typically in retaliation for refusal to join a gang, courts have routinely denied relief, reasoning that the persecution occurred due to the gangs' desire to increase their numbers or to gain more influence and power, as opposed to a protected ground.[40] As in the domestic violence context, this holding stands in stark contrast to the Agency's treatment of dictatorship cases, where it has not stopped to ask whether the dictator was motivated for a desire for more influence and power.[41]

It is well recognized that membership in a family constitutes membership in a particular social group for asylum purposes.[42] Nevertheless, with respect to claims involving fear of persecution on

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involving persecution on account of homosexuality have generally been recognized as cognizable claims on the basis of particular social group").

40. *See, e.g.*, Rivera Barrientos v. Holder, 658 F.3d 1222, 1228, 1235 (10th Cir. 2011) (rejecting the applicant's asylum claim on the basis that she was attacked by gang members not for her political opinion or particular social group, but because she refused to join the gang); Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010) ("[T]he IJ determined that if Larios was indeed targeted by gangs, the motivation would not be on account of his membership in a particular social group but would rather be an attempt to increase the gang's numbers."); Bartolo-Diego v. Gonzales, 490 F.3d 1024, 1027–28 (8th Cir. 2007) (affirming the Agency's finding that "the guerillas did not identify the [petitioner] or seek to recruit him because of any political opinion . . . . To the contrary, by [petitioner's] testimony, it appears to be clear that [he] was simply targeted as a young man who might be sympathetic to the guerilla cause.") (alteration in original) (citations omitted) (internal quotation marks omitted); Matter of E-A-G-, 24 I. & N. Dec. 591, 596 (B.I.A. 2008) (denying asylum because neither of the applicant's gang-related particular social groups met the social visibility and particularity tests); *see also* Gupta, *New Nexus*, *supra* note 25, at 416–19 (examining recent judicial denials of applications for asylum that were predicated on gang recruitment-based persecution).

41. *See* Gupta, *New Nexus*, *supra* note 25, at 418.

42. *See, e.g.*, Torres v. Mukasey, 551 F.3d 616, 629 (7th Cir. 2008) ("Our prior opinions make it clear that we consider family to be a cognizable social group within the meaning of the immigration law."); Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (recognizing applicant's family as a "particular social group"); Matter of C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."); *see also* Gupta, *New Nexus*, *supra* note 25, at 419–22 ("It is well recognized by both the agency and courts that membership in one's family (or association with a family member) can constitute membership in a particular social group for asylum purposes."). *But see* Demiraj v. Holder, 631 F.3d 194, 199 (5th Cir. 2011), *vacated*, No. 08-60991, 09-60585, 2012 WL 2051799 (5th Cir. May 31, 2012) ("The record here discloses a quintessentially personal motivation, not one based on a prohibited reason under the INA.").

account of membership in a family, the Agency has sometimes denied claims, finding that the persecution would occur not because of the applicant's relationship to his or her family member, but because of the persecutor's desire for revenge or retribution against the family member.[43]

It is clear that a standard for evaluating nexus in asylum claims is needed.[44] I argued in *The New Nexus* that the standard that should be used in most asylum claims is the but-for standard of causation commonly used in U.S. tort law and sometimes used in antidiscrimination law.[45] If an applicant can show that, but for the protected characteristic, it is more likely than not that the persecution would not have occurred, nexus is established. I further stated that while meeting the but-for test for nexus would be a *sufficient* way of establishing nexus, it might not be the *only* way.[46] I acknowledged that a more nuanced approach to evaluating nexus might be necessary in some cases where the but-for test would not apply.

In a second article, *Nexus Redux*, I laid out a proposal for such an approach. That article borrowed from principles of antidiscrimination and tort law to propose a rule for demonstrating causation in asylum cases where the but-for test would not be sufficient. This rule may be relevant in cases involving mixed or multiple motives. Under the framework set forth in that article, an applicant could make out a prima facie case for nexus by showing (through direct or circumstantial evidence) that the protected trait played a role in the persecution. At that point, the burden would shift to the DHS to show that the persecution would have occurred

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43. *See, e.g.*, *Demiraj*, 631 F.3d at 199 (finding that the applicants were harmed as retribution and that "[t]he record here discloses a quintessentially personal motivation" despite the acknowledgement that the applicants were harmed because they were members of a particular family unit and therefore targeted); Bhasin v. Gonzales, 423 F.3d 977, 982 (9th Cir. 2005) (recalling that the Agency had concluded that the applicant was persecuted for retaliation purposes not on account of membership in a particular social group); *see also* Gupta, *New Nexus*, *supra* note 25, at 419–22 ("Nevertheless, nexus has sometimes posed a problem for claims based on membership in a family.").

44. *See generally* Gupta, *New Nexus*, *supra* note 25 (finding that the lack of a uniform standard for evaluating nexus leads to unequal and inadequate application for refugees seeking asylum for gender-based or private harm).

45. *Id.* at 428; *see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 985–90 (5th ed. 2009) (arguing for the use of the but-for standard in asylum cases).

46. Gupta, *New Nexus*, *supra* note 25, at 443.

(or would occur in the future) for some other non-protected reason, even absent the protected trait. If the DHS is unable to make this showing, nexus is established. If the DHS successfully makes this showing, the burden would shift back to the applicant to show one of three things: (1) that even absent the DHS's proffered reason for the persecution, the persecution would have occurred; (2) that the likelihood of the persecution increased because of the protected trait; or (3) that the severity of the persecution increased because of the protected trait. If the applicant is able to show any of these three things, nexus should be considered established.[47]

It is important to note that the analyses proposed in both articles apply only to the nexus requirement of asylum law. Under either approach, as is currently the case, an asylum applicant would first have to show, *inter alia*, that she formerly experienced or presently fears harm that rises to the level of persecution,[48] and she would then have to show that she possesses a trait that the Act protects.[49] Much has been written on these subjects, particularly the latter,[50] and the proposals set forth in my previous articles would do

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47. Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465, 503–09 (2015) [hereinafter Gupta, *Nexus Redux*].

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

49. 8 U.S.C. § 1101(a)(42)(A) (2012) (defining a refugee as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

50. *See, e.g.*, Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe*

nothing to change these burdens. My articles set forth a framework for establishing a link between the two—a framework, in other words, for determining whether the persecution occurred "on account of" the protected trait.

In this Article, I examine the preliminary question of why this problem exists. I introduce the concept of "silent motives" in refugee law and explain the difficulty of establishing nexus in silent motives cases. I argue that when motives are silent, judges are called upon to fill in the gaps created by such silence, and often their biases work against a finding that nexus has been established.

II. WHEN MOTIVES ARE SILENT

This Article posits a framework for understanding the reasoning behind the nexus problem. Specifically, I argue that certain asylum cases feature persecutory motives that are not overt (neither from the persecutor's perspective nor in the country conditions

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Free of Sexual Persecution . . . ", 35 WM. MITCHELL L. REV. 197, 206–208 (2008) (arguing for a reconceptualization of the refugee definition to include a clear definition of persecution to better aid those seeking asylum based on sexual persecution); Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 85 (2000) (examining how the federal circuit courts have defined persecution and applied the definition while denying asylum to certain asylum seekers); Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133, 141 (2005) (noting that the Supreme Court of the United States reframed the asylum analysis in Elias-Zacaraias, particularly pertaining to the applicant's political beliefs or those imputed to her); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 379 (2007) ("[T]here has never been a succinct, definitive definition of 'persecution,' because the nature of persecution and our understanding of it keep changing."). *See generally* Lobo, *supra* note 32 (arguing for the inclusion of women in the enumerated particular social group); Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47 (2008) (rejecting the BIA's "social visibility" requirement of the particular social group protected ground); Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002) (arguing that the particular social group analysis should encompass gender-based claims); Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283 (arguing for a comprehensive definition of persecution).

literature), and that those are the cases in which this nexus problem exists. This Part begins by describing prototypical asylum cases—cases in which establishing nexus historically has not been problematic. It then describes the relevant differences between those prototypical cases and cases based on gender and other private harms—cases in which proving nexus often poses a challenge. This Part then introduces the concept of silent motives in refugee law. The literature and case law in antidiscrimination law provides an analogy for understanding this concept. This Part ends with an examination of the difficulties in proving intent or motive.

A. The Paradigmatic Asylum Case

The Refugee Convention was passed in the wake of the persecution of millions of Jews at the hands of the Nazis. The five protected grounds—race, religion, nationality, membership in a particular social group, and political opinion—were drafted in this context.[51] Notably, gender is not one of the five protected grounds. Accordingly, applicants and attorneys asserting claims based on gender are forced to couch their claims as political opinion or social group claims. Many formulations of the particular social group ground accepted by courts include gender as a component.[52] Moreover, many scholars have argued that gender should be made a protected ground.[53]

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51. *See* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 766–67 (1998) ("The primary event in the minds of the Refugee Convention's authors was, of course, the Nazi persecutions of 1933-1945. The Convention's inclusion of persecution for reasons of race, religion, and nationality speaks most directly to that experience. The treatment of Jews on account of their religion, perceived "race," and "nationality" was the archtypical condition the drafters meant to encompass."); David A. Martin, *Large Scale Migrations of Asylum Seekers,* 76 AM. J. INT'L L. 598, 598 (1982) ("The basic charter of modern refugee law, the United Nations Convention relating to the Status of Refugees, was meant in significant measure to deal with the large-scale movements of World War II.").

52. *See, e.g.*, Cece v. Holder, 733 F.3d 662, 667 (7th Cir. 2013) ("young women who are targeted for prostitution by traffickers in Albania") (internal quotation marks omitted); Matter of Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) ("[T]he applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.").

53. *See, e.g.*, Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207, 250 (2002) (calling for a sixth category of protected grounds for women facing gendered persecution). *See generally* Lobo, *supra* note 32 (advocating for United States asylum law to recognize gender as a protected

Further, the drafters of the Convention aimed to protect victims of the type of large scale persecution suffered by individuals at the hands of the Nazis.[54] To this day, the prototypical asylum claim involves an individual seeking protection from large scale persecution. More specifically, the typical case involves a male political dissident seeking protection from a dictatorial regime on account of his political opinion[55] or ethnicity.[56]

Like other asylum cases, these prototypical cases face obstacles to be sure. For example, they are often denied on credibility

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ground); Randall, *supra* note 50 (arguing that the particular social group analysis should encompass gender based claims). Whether or not gender should be a protected ground is beyond the scope of this Article. As I argued in the previous articles, however, even if gender were accepted as a protected ground, in many cases, claims based on gender would nevertheless fail on nexus grounds. *See* Gupta, *Nexus Redux*, *supra* note 47, at 447.

54. Matthew E. Price, *Article: Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 280-81 (2004) ("The refugee regime created in response to these large-scale population flows was primarily concerned with providing protection to *groups* of people from whom state protection had been withdrawn . . . .").

55. *See, e.g.*, Victoria Neilson, *Homosexual or Female? Applying Gender-based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 427 (2005) ("The paradigmatic asylum case is that of a male political dissident targeted for his public activities, such as attending political demonstrations or organizing dissidents, who then suffers harm in a public sphere at the hands of the police or military."); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 627 (1993) ("The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men . . .").

56. Although ethnicity is not explicitly listed as one of the protected grounds, it is well established that the race and nationality grounds encompass ethnicity. *See* U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶¶ 68, 74, 77 (1992), www.unhcr.org/pub/PUBL/3d58e13b4.pdf ("Race . . . has to be understood in its widest sense to include all kinds of ethnic groups . . . . [Nationality] refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race' . . . ."). *See also* Durate de Guinac v. INS, 179 F.3d 1156, 1159 n.5 (9th Cir. 1999) ("More precisely, he was persecuted on account of his 'ethnicity,' a category which falls somewhere between and within the protected grounds of 'race' and 'nationality'."); Baballah v. Ashcroft, 367 F.3d 1067, 1077 n. 10 (9th Cir. 2004) ("'[E]thnicity describes a category which falls somewhere between and within the protected grounds of race and nationality.'"); Brima Bah v. Gonzales, 448 F.3d 1019, 1024 (8th Cir. 2006) (finding that membership in a tribal group was a protected ground); Malonga v. Mukasey, 546 F.3d 546, 554 (8th Cir. 2008) (concluding that the Lari ethnic group of the Kongo tribe was a particular social group).

grounds [57] or because of criminal or terrorism-related bars to asylum. [58] But barring credibility concerns or issues involving statutory bars, these cases are routinely granted, and nexus generally has not served as an obstacle in such cases.[59]

B. Cases that Pose Nexus Problems

Applicants whose cases fall outside of this prototype often face hurdles proving nexus, even when their cases otherwise meet the requirements for asylum. For example, as set forth in more detail in my previous articles, judges have refused to find that domestic violence occurs on account of a victim's particular social group; rather, they have found that the abuser had personal or criminal

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57. *See, e.g.*, Aliyev v. Mukasey, 549 F.3d 111, 113–14 (2d Cir. 2008) (applicant who claimed he had been persecuted on account of his Uyghur ethnic background and political opinions was denied asylum on credibility grounds by agency; the Court of Appeals remanded); Myat Thu v. Attorney Gen. USA, 510 F.3d 405, 407–11 (3d Cir. 2007) (Burmese applicant who claimed persecution based on political opinion was denied asylum by the IJ on credibility grounds; the Court of Appeals remanded); Dankam v. Gonzales, 495 F.3d 113, 116–18 (4th Cir. 2007) (Cameroonian applicant who claimed persecution based on political opinion was denied asylum by the IJ on credibility grounds; the Court of Appeals affirmed); Gjyzi v. Ashcroft, 386 F.3d 710, 711–18 (6th Cir. 2004) (Albanian applicant who claimed persecution on account of political opinion was denied asylum by the agency for credibility reasons; the Court of Appeals remanded).

58. *See, e.g.*, Bojnoordi v. Holder, 757 F.3d 1075, 1076–77 (9th Cir. 2014) (agreeing with the BIA's determination that the applicant provided material support in the 1970s to a Tier III terrorist organization, Mojahedin-e Khalq, making him statutorily ineligible for immigration relief); Haile v. Holder, 658 F.3d 1122, 1123 (9th Cir. 2011) (explaining that the BIA found the applicant ineligible for relief for engaging in terrorist activities); Bellout v. Ashcroft, 363 F.3d 975, 976 (9th Cir. 2004) ("The IJ found Bellout statutorily ineligible for relief from deportation because he engaged in terrorist activity when he joined 'Armed Islamic Group (GIA),' a State Department-recognized terrorist organization, in 1995 and lived in GIA camps in Algeria for three years.").

59. *See, e.g.*, Oryakhil v. Mukasey, 528 F.3d 993, 1000 (7th Cir. 2008) (holding that the applicant had a well-founded fear of future persecution and was unable to relocate within Afghanistan because of the Taliban's presence); Karapetyan v. Mukasey, 543 F.3d 1118, 1127–28 (9th Cir. 2008) ("[T]here is an undeniable connection between [the applicant's] political activities and his persecution . . . . The nexus between [the applicant's] political activism and the persecution is also established by the beatings he endured in his home just a few days after he criticized the government over the radio."); Gui v. INS, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and political beliefs).

motives, or that he was a "despicable" person.[60] Similarly, in trafficking cases, judges have found that the traffickers were motivated by economic reasons, rather than by the age or gender of the victims.[61] In forced marriage cases, courts have found that the persecutors were motivated by family disputes, rather than a protected ground.[62] Finally, in cases brought by applicants who experienced or feared retribution for refusing to join gangs, courts have found that the persecution occurred because of the gang members' desire for increased power and numbers, rather than for protected grounds such as the age or gender of the victims.[63]

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60. *See, e.g.*, R-A-, 22 I. & N. Dec. 906, 927 (A.G., Jan. 19, 2001) ("In sum, we find that the respondent has been the victim of tragic and severe spouse abuse. We further find that her husband's motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all."); Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends,* 77 NO. 42 INTERPRETER RELEASES 1533, 1535 (2000) (stating that in D-K-, A# redacted (B.I.A. Jan. 20, 2000), the immigration judge "denied asylum, ruling that Ms. Kuna had not been persecuted on account of her membership in either group, or for any political reason, but solely because her husband was 'a despicable person'"); Bookey, *supra* note 35, at 17 (noting that in a post-*A-R-C-G-* domestic violence case, "the judge found that the abuse was 'related to his own criminal tendencies and jealousy.'"); Gupta, *New Nexus*, *supra* note 25, at 382.

61. *See, e.g.*, Burbiene v. Holder, 568 F.3d 251, 254 (1st Cir. 2009) (affirming the agency's denial of an asylum claim based on fear of trafficking because trafficking is a "criminal, not governmental, activity"); P-H-, A# redacted (Falls Church, Va., B.I.A., Nov. 21, 2005) at 2 (denying applicant's asylum claim based on fear of trafficking on nexus grounds because her fear was based on "the outstanding debt she continues to have stemming from the illegal smuggling into United States, and as a result of international criminal conduct"); Gupta, *New Nexus*, *supra* note 25, at 404 ("[I]mmigration judges and the Board have denied asylum, reasoning that the traffickers were motivated by criminal or economic enrichment rather than a conventional ground.").

62. *See, e.g.*, Gao v. Gonzales, 440 F.3d 62, 65 (2d Cir. 2006) ("[T]he [immigration judge (IJ)] found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply 'a dispute between two families.'"), *vacated sub nom.* Keisler v. Hong Yin Gao, 552 U.S. 801 (2007); Matter of A-T-, 24 I. & N. Dec. 296, 303 (B.I.A 2007) (denying relief based on a forced marriage claim and reasoning that "respondent has expressed only a generalized fear of disobeying her authoritarian father" in refusing to consent to a marriage with her first cousin); Gupta, *New Nexus*, *supra* note 25, at 395 (discussing how forced marriages and domestic violence do not often meet the nexus requirement).

63. *See, e.g.*, Matter of S-E-G-, 24 I. & N. Dec. 579, 588 (B.I.A. 2008) (stating that the applicants had "not submitted evidence that persuades us that

C. Silent Motives

In the paradigmatic cases described in Part II.A., more often than not, the persecutor's motives are overt and known. Dictators and repressive governments are often vocal about their motives,[64] and even when they are not, their motives are well documented.[65] When large numbers of people are persecuted, newspaper articles frequently document the abuses and the reasons behind the abuses. Asylum seekers can present these articles as evidence of nexus. Moreover, the U.S. State Department compiles country reports detailing human rights violations in other countries, and most courts view these reports as highly probative.[66] Accordingly, applicants seeking protection from such large scale and public types of persecution often do not face barriers in proving nexus to a protected ground.

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gangs commit violent acts for reasons other than gaining more influence and power, and recruiting young males to fill their ranks").

64. *See* Micol Sirkin, *Expanding the Crime of Genocide to Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L. REV. 489, 506–07 (2010) ("For example, in Krstić, the ICTY trial chamber convicted the accused of genocide, using forcible displacement to support a finding of genocidal intent. The trial chamber held that the accused had the requisite genocidal intent because he sought to eliminate all of the Bosnian Muslims in Srebrenica as a community.").

65. *See* Ryan Park, *Proving Genocidal Intent: International Precedent and ECCC Case 002,* 63 RUTGERS L. REV. 129, 155 (2010) ("In this manner, the Tribunal implicitly found that that the distribution of machetes in Rwanda and Kibuye Province, actions to which no evidence linked the accused, supported an inference of Kayishema's individual genocidal intent.").

66. *See, e.g.*, Zheng v. Gonzales, 409 F.3d 804, 811 (7th Cir. 2005) ("State Department Country Reports are entitled to deference."); Chen v. U.S. I.N.S., 359 F.3d 121, 130 (2d Cir. 2004) ("State Department reports are usually the result of estimable expertise and earnestness of purpose, and they often provide a useful and informative overview of conditions in the applicant's home country."); Gonahasa v. INS, 181 F.3d 538, 542 (4th Cir. 1999) (describing State Department reports as "highly probative evidence in a well-founded fear case"); Marcu v. INS, 147 F.3d 1078, 1081 (9th Cir. 1998) (noting that reliance on these reports "makes sense because this inquiry is directly within the expertise of the Department of State"); Gailius v. INS, 147 F.3d 34, 46 (1st Cir. 1998) (noting that State Department opinions "receive considerable weight in the courts because of the State Department's expertise"); Rojas v. INS, 937 F.2d 186, 190 n.1 (5th Cir. 1991) (calling the State Department a "relatively impeccable source" for information in political conditions in foreign countries); Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209, 213 (B.I.A. 2010) ("State Department reports . . . are highly probative evidence and are usually the best source of information on conditions in foreign nations.").

In contrast, in the other cases described above, motive is not so overt. In domestic violence cases, for example, the persecutors most often are not political leaders or even political figures; they are private actors. There are unlikely to be newspaper articles or country reports detailing the persecutor's motives. While articles or reports might validate that most victims of domestic violence in the country are women, the articles or reports are unlikely to explicitly state that the domestic violence occurs on account of gender. Similarly, in trafficking or forced marriage cases, applicants are typically unable to provide documentation of their particular traffickers' or family members' motives. And while gang violence against failed recruits may be well documented, the reports and articles are more likely to point to non-protected reasons for the persecution (e.g. the gang members' desire to increase their ranks) than to protected reasons, such as age and gender. It is for this reason that I have proposed a but-for analysis of nexus.[67]

In such cases, the persecutors' motives are also silent in another sense. Some scholars have argued that the nexus determination in asylum law should be modeled after causation principles in antidiscrimination law.[68] In the antidiscrimination context, the Supreme Court has noted that it would consider gender as a "motivating factor" under the following circumstances: "[I]f we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."[69] However, as many scholars have noted, the Supreme Court's statement that a motivating factor would be identified by the persecutor in a "truthful response" is problematic because it ignores the concept of unconscious discrimination.[70]

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67. *See generally* Gupta, *New Nexus*, *supra* note 25 (arguing that asylum cases should "ask whether, but for the applicant's protected status, the persecution would have occurred").

68. *See* Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265, 338 (2002); James C. Hathaway & Michelle Foster, *The Causal Connection ("Nexus") to a Convention Ground*, 15 INT'L J. REFUGEE L. 461, 466 (2003).

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

70. *See, e.g.*, Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs,* 143 U. PA. L. REV. 267, 271 (1994) (noting that "discrimination that affects upper-level women is often unintentional and unconscious"); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making,* 61 LA. L. REV. 495, 509 (2001) ("That 'unconscious'

In the asylum context, the "truthful response" analysis would be similarly problematic. For example, an abuser, even one answering truthfully, might not list gender among the reasons for the abuse, favoring instead reasons such as jealousy or the victim's disobedience. Nevertheless, it is clear in most cases from the abuser's actions or the country conditions that gender played an important part in the abuser's motivation. The relationship between gender and domestic violence is well documented.[71] Moreover, as courts have noted, an abuser's knowledge that he can act with impunity—because the government fails to protect women from domestic violence—is often in and of itself motivation for the abuse.[72]

Similarly, traffickers, even if speaking honestly, might not list gender or age as motivation for the trafficking, citing economic gain instead, despite the well documented gender and age dimensions of human trafficking. [73] In cases involving forced marriage, the

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discrimination frequently occurs is well documented; many people are unaware that race or sex has influenced their assessment of an individual."). *See generally* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (arguing that courts should adopt doctrine that considers subtle or unconscious discrimination).

71. *See, e.g.*, U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, at 89, U.N. Doc. A/61/122/Add.1 (July 6, 2006) (citing the explicit link between gender and domestic violence in laws across the world); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture,* 25 COLUM. HUM. RTS. L. REV. 291, 303–05 ("Domestic violence is not gender-neutral . . . . Indeed, domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority, sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women.").

72. *See, e.g.*, Matter of R-A-, 22 I. & N. Dec. 906, 939 (B.I.A. 2001) (Guendelsberger, Board Member, dissenting) ("The respondent's husband was not a simple criminal, acting outside societal norms; rather, he knew that, as a woman subject to his subordination, the respondent would receive no protection from the authorities if she resisted his abuse and persecution."); Aguirre-Cervantes v. INS, 242 F.3d 1169, 1178 (9th Cir. 2001), *vacated on reh'g en banc*, 270 F.3d 794 (9th Cir. 2001), *vacated and remanded*, 273 F.3d 1220 (9th Cir. 2001) (finding that Aguirre-Cervantes was severely abused by her father because she was an immediate member of his family and that it was legal in Mexico "for husbands to use 'correction' discipline to handle wives and children").

73. *See, e.g.*, Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(4) (2012) ("Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies,

perpetrators might not list gender or age as among the reasons for the forcible marriage, instead citing culture, tradition, pecuniary gain, or other reasons. Yet, forced marriage overwhelmingly affects women and minors.[74] Finally, gang members, even if speaking truthfully, might not list gender or age as reasons for targeting their failed recruits, instead listing revenge or the desire for increased power, even though victims of such retaliation are overwhelmingly young and male.[75]

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maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor."); *Who Are The Victims And Culprits Of Human Trafficking?*, U.N. OFFICE ON DRUGS AND CRIMES, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#Who_are_the_victims_and_culprits_of_human_trafficking (stating that "a disproportionate number of women are involved in human trafficking both as victims and as culprits"); Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers,* 39 SETON HALL L. REV. 635, 638 (2009) ("Approximately 800,000 people are trafficked across national borders each year; the majority of these victims are female and approximately half are minors.").

74. *See, e.g.*, *Not a Single Girl Should Be Forced to Marry*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Oct. 12, 2012), http://www.ohchr.org/EN/NewsEvents/Pages/IntDayGirlChild.aspx ("Although boys and men can also be the victims of forced marriages, the overwhelming majority of those in servile marriages are girls and women."); Sauti Yetu, *Forced Early Marriage,* CENTER FOR AFRICAN WOMEN, http://www.sautiyetu.org/issues-early-forced-marriage ("Globally, it is estimated that approximately one-third of girls living in the developing world (excluding China) are married before age 18."); *Early Marriage: A Harmful Traditional Practice*, UNICEF 4 fig. 2, 7 fig. 5, 11 fig. 9, 18 fig. 18 (2005), http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf (explaining and depicting through graphs that early marriage, marriage before 18, is especially common in Niger, Chad, Mali, Bangladesh, and other poor mainly rural countries); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 21, ¶ 16, U.N. Doc. A/49/38(SUPP) (Apr. 12, 1994) (the Committee on the Elimination of Discrimination against Women considers eighteen to be the minimum age of marriage and thus early marriage is considered forced marriage).

75. *See, e.g.*, Matter of E-A-G-, 24 I. & N. Dec. 591, 593 (B.I.A. 2008) (using the social group formulation "young persons who are perceived to be affiliated with gangs"); Ramos-Lopez v. Holder, 563 F.3d 855, 856 (9th Cir. 2009) (describing the social group as "young Honduran men who have been recruited by the MS-13, but who refuse to join"); Orellana-Monson v. Holder, 685 F.3d 511, 516 (5th Cir. 2012) (describing victims as "Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to a principled opposition to gangs"); Zelaya v. Holder, 668 F.3d 159, 162 (4th Cir. 2012) (describing the social group of "young Honduran males who (1) refuse to join the Mara Salvatrucha 13 gang (MS-13), (2) have notified the authorities of MS-13's harassment tactics, and (3) have an identifiable tormentor within MS-13").

Accordingly, courts would have difficulty finding nexus to a protected ground in these cases even using the Supreme Court's "motivating factor" formulation. For this reason, I argued that the but-for analysis from tort law would be more appropriate for assessing causation in asylum cases.

D. Difficulty Proving Intent or Motive

Victims of persecution that occurred or will occur on account of silent motives bear a heavier burden in proving persecutory intent. In prototypical asylum cases based on political opinion or ethnicity, motive may be obvious. In cases involving silent motives, however, the applicant must prove that the persecution occurred on account of a protected ground. But, as scholars and courts have recognized, intent of another party is difficult to prove in any type of case, and it is particularly difficult to prove in asylum cases.[76] The events causing an asylum applicant to flee her home country have typically taken place thousands of miles away and often during times of social or civil strife.[77] Accordingly, asylum applicants may not have the time or wherewithal to gather evidence of their persecutors' motives before fleeing their home countries.[78] Unlike defendants in anti-

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76. *See* 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."); 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.").

77. *See* U.N. High Comm'r for Refugees, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees—Some Basic Questions, U.N. Doc. EC/1992/SC.2/CRP.10 (June 15, 1992), http://www.unhcr.org/3ae68cca0.html. ("[UNHRC's] position on this matter is that refugees are refugees when they flee, or remain outside, a country for reasons pertinent to the 1951 Convention refugee definition, whether these arise in a civil war, in international armed conflict, or otherwise. There is nothing in the definition itself which would exclude its application to persons caught up in civil war who meet the definition."); Musalo, *supra* note 76, at 1193 ("Generally, the refugee is thousands of miles away from the place where the relevant events took place. The refugee does not have subpoena power over his or her persecutors, nor does the refugee have access to other instrumentalities available in normal civil or criminal proceedings in the United States.") (footnote omitted).

78. *See* Gafoor v. INS, 231 F.3d 645, 654 (9th Cir. 2000) ("[I]ndividuals fleeing persecution do not usually have the time or ability to gather evidence of their persecutors' motives."); Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987) ("In determining whether the alien has met his burden of proof, we

discrimination cases, for example, persecutors in asylum cases are not parties to the asylum claims and are typically not in the United States, much less in the courtroom.[79] Persecutors cannot be called to testify and are highly unlikely to be asked to supply an affidavit in support of the applicant's case.[80] In some cases, such as those in which soldiers or gang members who are unknown to the applicant are carrying out orders, the applicant may not even be able to identify the actual persecutor or persecutors.[81] Even when persecutors are known, they do not always inform their victims of the reasons for the persecution and, in some cases, may try to hide their motivation, making proving intent even more difficult. In many cases, there are no witnesses to the persecution (other than the applicant). In cases

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recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution."); U.N. High Comm'r for Refugees, Note on Burden and Standard of Proof in Refugee Claims 3 (Dec. 16, 1998), http://www.refworld.org/pdfid/3ae6b3338.pdf ("[I]t should be recognised that, often, asylum-seekers would have fled without their personal documents. Failure to produce documentary evidence to substantiate oral statements should, therefore, not prevent the claim from being accepted if such statements are consistent with known facts and the general credibility of the applicant is good.").

79. *See, e.g.*, Foster, *supra* note 68, at 288 (noting that the Federal Court of Canada has stated that "adjudicators should not 'base [their] determination as to whether or not a claimant has established a nexus to the Convention on the subjective belief of the alleged persecutors themselves, especially since these alleged persecutors are obviously not present . . . and cannot testify as to their own subjective state of mind . . . .'") (alteration in original) (quoting Shahiraj v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C. 453, para. 19 (Can. Ont.)).

80. *See, e.g.*, *Gafoor*, 231 F.3d at 654 (noting that persecutors are unlikely "to submit declarations explaining exactly what motivated them to act"); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."); Cianciarulo, *supra* note 24, at 122 (noting that most asylum seekers do not come to court with "affidavits from their persecutors stating, 'I, Joe Persecutor, beat and tortured your client on three occasions between December 1999 and August 2003 on account of her political opinion against our oppressive but beloved dictator. Her political opinion was foremost in my mind when this occurred.'").

81. *See* Eduard v. Ashcroft, 379 F.3d 182, 187–88 (5th Cir. 2004) (finding that, although the applicant did not know his persecutors, there was sufficient evidence to show that Christians are persecuted by Muslims in Indonesia); Agbuya v. INS, 241 F.3d 1224, 1227 (9th Cir. 2001) (discussing how the applicant was blindfolded for the duration of the torture inflicted on her by men who identified themselves as members of an armed communist guerilla group).

where there are witnesses, they often are still in the applicant's home country and cannot be reached because of safety concerns.[82]

As set forth in more detail below, victims of persecution that occurs on account of silent motives are at a further disadvantage because the nexus formulation in such cases is heavily influenced by the biases of adjudicators.

III. THE PSYCHOLOGY OF BIAS

Scholars have recognized the existence of explicit, or conscious, bias among judges and juries; however, significantly more has been written about implicit, or unconscious, bias and its impact. This Part begins with a brief examination of bias in the judiciary. It then turns to implicit bias and some theories from cognitive psychology that explain the impact of implicit biases. The Part ends by describing some of the recommendations that have been made to counteract bias in the judiciary.

A. Bias in the Courts, Generally

Judges are people. And as many have noted, just like other people, judges sometimes harbor biases that impact their decisions,[83]

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82. *See, e.g.*, Omondi v. Holder, 674 F.3d 793, 799–800 (8th Cir. 2012) (affirming the agency's determination that despite the applicant's credible testimony, his application lacked a credible witness since the affidavit sent by the sole witness, aside from the persecutors, was insufficiently detailed to support the applicant's assertion that police officers starved, abused, and raped him); Lin v. Holder, 565 F.3d 971, 977 (6th Cir. 2009) (finding that the applicant failed to obtain affidavits that substantiated that he practiced Fulan Gong in China and that he failed to prove that these affidavits were unavailable).

83. *See, e.g.,* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 842–43 (2012) ("Supreme Court Justices and scholars have acknowledged the risk of explicit bias being harbored by juries, affecting their assessment of evidence and their verdicts. They have also acknowledged the risk of explicit bias being harbored by judges and, of course, by attorneys: hence the need for the *Batson* doctrine.") (internal citations omitted); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009) ("Two potential sources of disparate treatment in court are *explicit* bias and *implicit* bias."); Honorable John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 6 (2010) ("Another study . . . suggests that judges, like any other group of people, carry implicit biases based on their various life experiences and that those

and while judges and juries are constitutionally bound to be fair and impartial, implicit (or explicit) biases often impact their decisions.[84]

Implicit biases may come in the form of feelings that the judge or juror harbors about a group or as stereotypes that the judge or juror attributes to a group.[85] "Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly in the relevant tests, that people have no time to deliberate."[86] Some biases are so subtle that judges and jurors may not even recognize that they hold them.[87] Yet the biases, subtle though they may be, have a real impact on decision making.[88] These biases can run along gender, race, ethnicity, and class lines.[89]

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implicit biases can affect judges' decisionmaking . . . ."); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013) (arguing that gaps between the experiences and realities of judges and those of poor people have contributed to "patterns of judicial decision-making that appear to be biased against poor people as compared to others"); Theresa M. Beiner, *The Trouble with* Torgerson*: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 693 (2014) ("[J]udges act as normal human beings. Social psychologists have studied the nature of how bias operates in human beings. This bias not only exists in employers who make decisions about their workers, but also in judges who are tasked with making decisions about motions for summary judgment.").

84. Roberts, *supra* note 83, at 829–30 ("[I]mplicit bias is pervasive, and . . . it affects the most important functions of jurors: evaluation of witnesses and evidence, evaluation of behavior, recall of facts, and judgment of guilt. Juries are generally told nothing about implicit bias, however, despite the constitutional requirement that they be fair and impartial.").

85. *Id.* at 833 ("'Implicit biases' are discriminatory biases based on either implicit *attitudes*—feelings that one has about a particular group—or implicit *stereotypes*—traits that one associates with a particular group.").

86. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 (2006).

87. Roberts, *supra* note 83, at 833 ("[Implicit biases] are so subtle yet those who hold them may not realize that they do."); Jolls & Sunstein, *supra* note 86, at 975 ("[P]eople are often surprised to find that they show implicit bias. Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.").

88. Roberts, *supra* note 83, at 836 ("Supreme Court opinions have acknowledged its presence in jurors, its potential to affect their assessments of evidence, and its potential to affect their verdicts.").

89. *Id.* at 833 ("Implicit bias operates in areas such as gender, nationality, and social status . . . .").

Bias in the judiciary along gender lines is well documented.[90] As the American Bar Association (ABA) has noted:

> Stereotyped thinking about the nature and roles of the sexes, devaluation of women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives are as prevalent in the justice system as in the other institutions of society. In the courts these three aspects of gender bias distort decision making and create a courtroom environment that undermines women's credibility.[91]

Gender bias impacts family law determinations, where both women and men are subject to harmful stereotypes that can affect determinations of property settlement, alimony, child support, and custody.[92] In making property settlement, alimony, and child support determinations, judges "overestimate the earning power of women who have been out of the job market for many years and . . . underestimate the value of a woman's work within the household in calculating marital earnings and assets."[93] In custody determinations, both men and women are subject to stereotyping. "Fathers tend to be perceived as less capable caretakers and must prove their ability to parent, whereas mothers are presumed to be capable."[94] On the other hand, a woman who works outside the home might be denied custody "on the theory that a career woman is a less competent parent."[95]

Historically, gender bias has also manifested when women are the victims of crime. In rape cases, women face presumptions that their sexuality is somehow tied to their credibility (or lack thereof) and have often been discouraged from pursuing charges.[96] "Victims of domestic violence are subject to similar biases that reflect the long

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90. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 34 (1994) ("Over the past several decades, the judicial system has been scrutinized for gender-discriminatory practices and policies.").

91. NATI'L CONFERENCE OF STATE TRIAL JUDGES, AM. BAR ASS'N, THE JUDGES' BOOK 66 (1989).

92. Nugent, *supra* note 90, at 35-41.

93. *Id.* at 37 (internal quotation marks and citations omitted).

94. *Id.* at 40 (internal quotation marks and citations omitted).

95. *Id.*

96. *Id.* at 41.

cultural and legal treatment of wives and women as property."[97] These implicit biases have practical consequences for victims of crimes seeking justice in the courts.

Courts also have been criticized for harboring implicit biases regarding race.[98] A recent study on implicit racial bias in the criminal justice system found that:

> (1) Judges hold implicit racial biases.
> (2) These biases can influence their judgment.
> (3) Judges can, at least in some instances, compensate for their implicit biases.[99]

Studies have shown that, even when federal sentencing guidelines are used, members of racial minority groups receive longer, harsher sentences than white defendants who were convicted of committing the same crime.[100]

Similarly, black defendants receive higher bail amounts than white defendants.[101] With respect to the death penalty, black defendants are more likely to be sentenced to death than white defendants, and killers of white victims are more likely to be sentenced to death than killers of black victims.[102] Scholars have also noted biases based on class or wealth, as well as on region.[103]

In addition to the biases that adjudicators may have about certain groups, adjudicators' own background, experiences, race,

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97. *Id.*

98. Rachlinski et al., *supra* note 83, at 1196–97 ("Implicit bias . . . also appears to be an important source of racial disparities in the criminal justice system."); Nugent, *supra* note 90, at 45 ("The operation of these biases may be less overt . . . but recent research clearly indicates that racial and ethnic bias in more subtle, covert forms exist.").

99. Rachlinski et al., *supra* note 83, at 1197.

100. Nugent, *supra* note 90, at 47.

101. Rachlinski et al., *supra* note 83, at 1196.

102. *Id.*

103. Nugent, *supra* note 90, at 48–49 ("Closely linked to ethnic bias is the category of regional bias . . . . Some researchers claim that wealth bias has a negative impact on criminal defendants and civil litigants. It is also suggested that there is a strong link between the operation of poverty bias and racial bias and that poverty bias is really just an indirect form of racial bias.") (internal citations omitted).

gender, and culture impact their decisions.[104] As stated by then-judge Sonia Sotomayor:

> Our gender and national origins may and will make a difference in our judging . . . . Personal experiences affect the facts that judges choose to see . . . . I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society.[105]

Justice Ruth Bader Ginsburg similarly has stated:

> Yes, women bring a different life experience to the table. All of our differences make the conference better. That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me.[106]

One scholar explains the impact of judges' backgrounds and past experiences on their decision-making as follows:

> Reviewing the psychological studies, Linda Krieger explains how the content of group stereotypes affects causal attribution. The empirical evidence indicates that in making causal judgments, people often ascribe the cause of an action either internally (to the actor herself) or externally (to forces outside the actor). There is a tendency, moreover, to attribute one's own behavior to external causes or situational factors. When evaluating another's action, however, one is more likely to attribute it to dispositional factors, such as the actor's personality, attitudes, or abilities. We

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104. *See, e.g.*, Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 278, 299–300 (2014) ("Judges, like everyone, are the result of their race, ethnic background, nationality, socioeconomic situation, gender, sexual orientation, religion, and ideology.") (internal citations omitted).

105. Amy Goldstein & Jerry Markon, *Heritage Shapes Judge's Perspective*, WASH. POST, May 27, 2009, at 1.

106. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009, §MM (Magazine), at 22.

> are thus more likely to blame the victim when we are not the victim.[107]

It is clear from the literature that judges are not immune to the types of biases that plague other individuals. What follows is a description of some of the cognitive processes at play when making decisions that are impacted by bias.

B. Heuristics and Biases

The term "heuristics" refers to a process by which people come to decisions, specifically by using "mental shortcuts" or "rules of thumb."[108] Heuristics are "cognitive simplifying strategies used to reduce the complexity of information that must be considered in making a decision."[109] A heuristic strategy is the opposite of an algorithm, which looks at every possible outcome and then makes the best decision. A heuristic strategy, on the other hand, involves focusing on the most important and relevant information and making a decision from there.[110] Heuristics, therefore, are useful. It is literally impossible for the human mind to consider every possible outcome of a decision, so these mental shortcuts are necessary.[111] "In many cases, these shortcuts yield very close approximations to the 'optimal' answers suggested by normative theories. In certain

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107. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 484–85 (1998) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1204–07 (1995)).

108. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 48 (2003); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 905 (2002) ("Although heuristics can be sophisticated, the purpose of a heuristic is to simplify the decision-making process. Heuristics, then, may function like 'rules of thumb.'").

109. David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125, 2164 (1994) (footnotes omitted).

110. Mullins, *supra* note 108, at 49.

111. Sale, *supra* note 108, at 906 ("Thus, a good heuristic allows the decision-maker to reduce the amount of time and effort necessary to make a reasonable judgment about an outcome."); Heather M. Kleider et al., *Deciding the Fate of Others: The Cognitive Underpinnings of Racially Biased Juror Decision Making*, 139 J. OF GEN. PSYCHOL. 175, 176 (2012) ("Heuristic strategies (e.g., using stereotypes) are cognitively efficient and thus are a useful alternative to more controlled resource-dependent strategies when the decision-making situation is complex or requires evaluation of multiple pieces of information.").

situations, though, *heuristics lead to predictable biases and inconsistencies*."[112]

Biases are inextricably linked to heuristics.[113] "To use imprecise 'rules of thumb' in making decisions under conditions of complexity and uncertainty is to invite biases and errors stemming from the decision makers' own psychological backgrounds and tendencies."[114] Scholars have described the relationship between heuristics and implicit bias as follows:

> [P]eople employ two cognitive systems. System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free. Much heuristic-based thinking is rooted in System I, but it may be overridden, under certain conditions, by System II . . . . We believe that the problem of implicit bias is best understood in light of existing analyses of System I processes. Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly, in the relevant tests, that people have no time to deliberate. It is for this reason that people are often surprised to find that they show implicit bias. Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.[115]

These biases extend to judges' assessment of motivation. In the antidiscrimination context, for example, "a variety of

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112. Mullins, *supra* note 108, at 50; *see also* Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1566 (2013) ("Psychology tells us that we form schemas, employ heuristics, and often err in forming judgments and in making decisions . . . . Errors in forming judgments and making decisions result from framing (the way an issue is posed or presented), cognitive illusions, the use and misuse of heuristics, and forms of bias, including stereotyping and prejudice, hindsight bias, and unconscious bias.") (internal citations omitted).

113. Mullins, *supra* note 108, at 50 ("Unfortunately, biases and errors are inseparable from heuristics.").

114. *Id.*

115. Jolls & Sunstein, *supra* note 86, at 974-75; *see also* Kleider et al., *supra* note 111, at 176 ("Racial stereotypes are known to affect quick decision making in speeded response paradigms, wherein people do not have the opportunity to contemplate their decision but rather make an automatic/reflective response indicative of heuristic processing (i.e., rule-of-thumb).").

psychological theories, including heuristics and cognitive biases, by way of example, suggest that judges might have difficulty assessing employer motivations on a motion for summary judgment. Indeed, there is reason to believe that the judges themselves may be biased."[116]

Another potential pitfall to the use of heuristics is the tendency to rely on stereotypes and commit logical fallacies.[117] In one well known study, participants learned about a thirty-one-year-old woman, Linda, who focused on social justice issues in college. Participants tended to state that Linda was more likely to be a "feminist bank teller" than a "bank teller."[118] Clearly, this statement is a logical fallacy as the subset of feminist bank tellers must be smaller than the set of bank tellers. "The source of the mistake is the representativeness heuristic, by which events are seen to be more likely if they 'look like' certain causes."[119] Relatedly, decision makers engage in a process called "attribute substitution," in which they work through a difficult question by substituting it with a simpler one.[120] "For instance, people might resolve a question of probability not by investigating statistics, but by asking whether a relevant incident comes easily to mind."[121]

C. Cold Bias / Hot Bias

Two other types of unintentional bias worth discussing are "cold bias" and "hot bias." Cold bias involves influences beyond the decision maker's control. The decision maker is subject to unconscious influences, even when she is striving for a just result. "This can occur, for example, when the judge reviews a sexual assault case involving crimes similar to ones that the judge experienced earlier in life and the judge experiences an emotional reaction without knowing why."[122] Another type of cold bias involves a judge's interpretation of ambiguous terms. The interpretation "can negatively influence judges

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116. Beiner, *supra* note 83, at 676.

117. *See generally* Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE, 1124, 1124–1131 (1974) (describing heuristics used and the biases to which they lead).

118. Jolls & Sunstein, *supra* note 86, at 974.

119. *Id.*

120. *Id.*

121. *Id.*

122. Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 25 (2006).

by causing them to interpret the law in a hasty manner without fully exploring alternative channels of interpretation."[123]

The second type of unintentional bias, "hot bias," occurs when decision makers steer their analyses toward their intended outcome. "[T]his natural tendency becomes problematic in judicial decision-making when the judge recognizes that he wants a case to end a certain way but fails to consider the opposite perspective in his analysis."[124]

D. Satisficing

A final theory of judicial bias worth mentioning is called satisficing. This theory recognizes that a decision maker could evaluate facts infinitely, but at some point must stop analyzing the data and come to a decision.[125] Of course, this is true of any decision; however, the peril with satisficing is stopping the analysis too soon, at the expense of considering valuable alternatives. "Most judges experience unhealthy satisficing as a result of (1) emotional reactions to aspects of cases that resemble their significant experiences or the experiences of loved ones, and (2) ambiguity relating to facts, the definition of words, or legal theories."[126]

Unhealthy satisficing, in other words, involves choosing a satisfactory solution among alternatives, rather than the optimal one.[127] It is axiomatic that a decision maker's biases will inform the correct stopping point as well as whether a certain outcome is satisfactory.

E. Minimizing the Impact of Bias in the Courts

Fortunately, many of the same studies that show that judges harbor implicit biases that impact their decision-making also show that the impact of these biases can be minimized. In order to minimize the effects of bias:

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123. Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1102 (2002).

124. Seamone, *supra* note 122, at 26.

125. *Id.* at 26–27.

126. *Id.* at 27.

127. *Id.* ("Essentially, when more than one theory applies to the circumstances of a case, unhealthy satisficing can cause judges to ignore other viable theories.").

> First, people must be aware of the unwanted mental process, which they can detect "directly" or "suspect" with awareness of an appropriate theory. Second, [p]eople must be motivated to correct the error. Although, [e]ven if motivated to correct the error, people must be aware of the magnitude of the bias. Finally, the individual must exhibit [c]ontrol over [personal] responses to be able to correct the unwanted mental processing.[128]

In one study, for example, when the race of the hypothetical defendant was stated in a prominent way, the white judges corrected any biases they might have had.[129] The authors of the study believe that the judges were motivated to avoid racial bias, and when they were conscious of potential biases, they made cognitive correction to avoid letting bias impact their decisions.[130]

Accordingly, the authors of the study, along with other scholars, recommend exposing judges to models that are incongruent with stereotypes.[131] The authors also recommend testing judges for bias or auditing them to determine the extent of their bias and then providing targeted training to judges based on the results.[132] They also suggest expanding the use of three-judge panels and increasing the diversity of the courts.[133] Finally, they recommend increasing the depth of review by an appellate court (for example, from clear error review to de novo review).[134]

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128. Seamone, *supra* note 122, at 1050 (internal quotation marks and citations omitted).

129. Rachlinski et al., *supra* note 83, at 1223 ("When the materials identified the race of the defendant in a prominent way, the white judges probably engaged in cognitive correction to avoid the appearance of bias.").

130. *Id. See also* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 86 (2015) ("Of significance, participants were able to moderate and overcome their biases if they were motivated to do so.").

131. Rachlinski et al., *supra* note 83, at 1226–27.

132. *Id.* at 1227–31.

133. *Id.* at 1231.

134. *Id.*

IV. BIAS IN IMMIGRATION COURTS

Like other judges, immigration judges harbor biases—whether conscious or implicit—that impact their decision-making. This Part first examines the case law and literature on bias in immigration courts. It then takes a look at the particular characteristics of the immigration court that allow for these biases to make a significant impact on immigrants' cases.

A. Conscious Bias and Implicit Bias

Several federal courts of appeals have found bias on the part of immigration judges, whether conscious or implicit. This section describes the types of biases prevalent in immigration proceedings.

Courts have found immigration judges to have exhibited racial bias. In one case, for example, the Second Circuit Court of Appeals remanded a case because the immigration judge displayed bias against Chinese applicants:

> The IJ . . . launched into a diatribe against Chinese immigrants lying on the witness stand, spanning 12 pages of transcript. At one point, he described how, in his view, Chinese applicants would say one thing to each other "in a restaurant in Chinatown," but when they sat in the "magic chair" in the witness box, they would say that they were persecuted under the family planning policy.[135]

Similarly, courts have remanded cases due to immigration judges' biases regarding class and level of education. In the case described above, the immigration judge referred to the applicant as an "uneducated villager."[136] In another case arising out of the Ninth Circuit, the court remanded because the immigration judge called the applicant a liar, focusing almost exclusively on the period during which she received public assistance, which the court of appeals found evidenced a bias toward single mothers.[137]

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135. Huang v. Gonzales, 453 F.3d 142, 149–50 (2d Cir. 2006) (remanding in part because the immigration judge's "hostility toward Huang and apparent bias against him and perhaps other Chinese asylum applicants is manifest on this record").

136. *Id.* at 147.

137. Sanchez-Cruz v. INS, 255 F.3d 775, 779–80 (9th Cir. 2001).

Courts have also admonished immigration judges for displaying bias on account of religion. The Seventh Circuit Court of Appeals remanded a case because:

> [T]he IJ labeled the Floroius as religious "zealots" whose exercise of religion was "offensive to a majority." Because there was no explanation for that conclusion, these words betray a predisposition against the petitioners based on their religious practices. The bias reflected in the use of this language of intolerance taints the proceedings, erodes the appearance of fairness and creates substantial uncertainty as to whether the record below was fairly and reliably developed. We find it ironic that the IJ—who is charged with protecting asylum applicants from religious persecution in their countries of origin—spoke in the unacceptable language of religious intolerance.[138]

In another case, a district court found bias due to the applicant's language skills. The court reversed the decision because the immigration judge stated that the applicant's testimony was "long and rambling."[139] The court found that there was a suggestion of an impermissible bias in the IJ because the petitioner's reliance on an interpreter and non-native English speaking status informed the adverse credibility determination.[140]

Immigration judges have also shown bias in the area of sexuality. In one Second Circuit case, a man applied for asylum because he feared that he would be tortured if returned to Guyana "(a) because he is a homosexual, and (b) because he is a criminal deportee, but also (c) because he is a homosexual criminal deportee."[141] The immigration judge denied relief, reasoning that "'violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people,' and therefore [the applicant] was less likely to be viewed in Guyana as a member of

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138. Floroiu v. Gonzales, 481 F.3d 970, 974 (7th Cir. 2007) (internal citations omitted).

139. Singh v. Ilchert, No. C–93–2086 MHP, slip op. at *4 n.6 (N.D. Cal. Nov. 12, 1993), *aff'd in part, rev'd in part*, 64 F.3d 666 (9th Cir. 1995)).

140. *Id.*

141. Ali v. Mukasey, 529 F.3d 478, 491 (2d Cir. 2008).

either disfavored group."[142] He also reasoned that the applicant would "'need a partner or cooperating person' in order to be recognized as a homosexual," but that he would be unlikely to be able to find such a partner, given his "mental problems" and "some problems with his personality."[143] The court of appeals remanded the case, finding that the judge's comments reflected an "impermissible reliance on preconceived assumptions about homosexuality and homosexuals, as well as a disrespect for the petitioner."[144]

In another case arising out of the Tenth Circuit, an applicant feared persecution in Morocco on account of his homosexuality.[145] The immigration judge denied relief, reasoning that the applicant's "appearance does not have anything about it that would designate [him] as being gay. [He] does not dress in an effeminate manner or affect any effeminate mannerisms."[146] The judge further found that the applicant had not "shown that it is more likely than not that he would be engaged in homosexuality in Morocco or, even if he was, that it would be the type of overt homosexuality that would bring him to the attention of the authorities or of the society in general."[147] The court of appeals granted the petition for review because the immigration judge's "reliance on his own views of the appearance, dress, and affect of a homosexual led to his conclusion that [the applicant] would not be identified as a homosexual."[148]

Finally, courts of appeals have remanded immigration judge decisions that evinced bias on the basis of gender, and more specifically stereotyping about domestic violence and sexual assault. The Ninth Circuit Court of Appeals remanded a domestic violence case in which the immigration judge engaged in impermissible stereotyping about domestic violence when he "doubted that Petitioner would stay with, or return to, [the abuser] if he were abusive; he doubted that [the abuser] would follow Petitioner if she did leave; and he doubted that [the abuser] could find Petitioner if he did wish to follow her."[149] In a Tenth Circuit case in which an applicant fled from Ghana due to sexual assault at the hands of her father, the immigration judge denied relief in part because the

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142. *Id.* at 487.
143. *Id.*
144. *Id.* at 492.
145. Razkane v. Holder, 562 F.3d 1283, 1286 (10th Cir. 2009).
146. *Id.* (alteration in original).
147. *Id.*
148. *Id.* at 1288.
149. Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005).

applicant had, at one point, returned to live with her father because she had nowhere else to go.[150] The IJ reasoned that "[t]his absolutely is totally implausible and totally nonsensical to the Court, insofar as the respondent was returning to a situation where she knew she was going to be raped and beaten."[151] The court of appeals granted the petition for review, holding that the immigration judge's adverse credibility determination was not supported by the evidence.[152]

B. The State of the Immigration Court System and the Practical Impact of Bias

It is clear from the above that immigration judges, like other judges, engage in decision-making that is influenced by their biases. There exists a tremendous amount of disparity in the grant rates between immigration courts and between immigration judges within the same court. For example, between 2000 and 2004, Chinese asylum seekers had a 7% chance of success before the Atlanta Immigration Court. During the same time period, Chinese applicants had a 76% chance of success in the Orlando Immigration Court. The national average for Chinese applicants during this time was 47%.[153] The disparities in grant rates within the same court are just as stark. For example, one judge in the New York Immigration Court granted just 6% of his cases, and another just 7%. On the other end of the spectrum, three judges in the New York Immigration Court during the same time period granted 80%, 89%, and 91% of their cases, respectively.[154] These extreme disparities in grant rate go to show the amount of leeway immigration judges have and the impact their biases can have if left unchecked.

There are several other characteristics particular to the immigration court system that may serve to magnify the impact of these biases in immigration cases. These include: the makeup of the immigration judiciary, a lack of meaningful appellate review of immigration judge decision, a lack of independence of immigration judges, and the heavy caseloads of immigration judges. These characteristics are examined, in turn, in this Part.

First, as described in Part III above, judges' biases are impacted by their own identities and experiences. As in other courts,

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150. Fiadjoe v. Attorney Gen. of U.S., 411 F.3d 135, 146–47 (3d Cir. 2005).
151. *Id.* at 156.
152. *Id.* at 163.
153. Jaya Ramji-Nogales et al., *supra* note 50, at 329–30.
154. *Id.* at 334.

white males are overrepresented in immigration courts.[155] And one study found that the grant rate for female immigration judges is 44% higher than that of their male counterparts,[156] suggesting that immigration judges' backgrounds heavily impact their decision-making. Similarly, many immigration judges come from other government positions, and the same study found that "[t]he grant rate of judges who once worked for the Department of Homeland Security (or its predecessor, the Immigration and Naturalization Service) drops largely in proportion to the length of such prior service."[157] Relatedly, grant rates are higher for immigration judges who "once practiced immigration law in a private firm, served on the staff of a nonprofit organization, or had experience as a full-time law teacher."[158]

Another factor that increases the impact of bias in the immigration court system is the lack of meaningful appellate review. First, applicants appeal only about 8% of immigration judge decisions to the Board of Immigration Appeals (BIA) and only 25% of BIA decisions to the federal courts of appeals.[159] Moreover, because of reforms instituted by then-Attorney General John Ashcroft, BIA members are incentivized to write short, summary affirmances or even affirmances without opinion when reviewing immigration judge decisions. As a result, three-member BIA decisions have largely been replaced with one-member summary affirmances.[160] Moreover, the majority of immigrants in proceedings are unrepresented, removing yet another possible check on immigration judge bias.[161]

Immigration judges' assessments of credibility, particularly those that rely on an applicant's demeanor, are treated with

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155. Ava Moregenstern, *Judicial Diversity in North American and European Asylum Court Systems: A Literature Review*, HUMANITY IN ACTION PRESS (2005), http://www.humanityinaction.org/knowledgebase/577-judicial-diversity-in-north-american-and-european-asylum-court-systems-a-literature-review.

156. Ramji-Nogales et al., *supra* note 50, at 377.

157. *Id.*

158. *Id.*

159. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 440 (2011).

160. Ramji-Nogales et al., *supra* note 50, at 377.

161. *See* Exec. Office for Immigr. Review, U.S. Dep't of Justice, FY 2010 STATISTICAL YEAR BOOK G1 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf.

deference by reviewing courts. [162] Yet an immigration judge's background and culture could infuse biases into this analysis that could impact the credibility determination. "[P]articipants in immigration proceedings have distinctive cultural, ethnic, and linguistic backgrounds that may make generalizations about the significance of demeanor attributes from an American vantage point much harder to extend to those coming from other countries."[163] For example, "[a]n immigration judge might consider an applicant's failure to maintain eye contact a sign of deception even though the applicant may simply be adhering to a cultural background that views direct eye contact as abrasive or disrespectful in certain instances." [164] Moreover, studies outside the immigration context show that "implicit attitudes lead individuals to read unfriendliness or hostility into the facial expressions of blacks but not whites."[165]

Another characteristic of the immigration court system that leads to increased impact of bias on decision-making is the lack of independence of immigration judges. Immigration judges are not Article III judges; they operate within the U.S. Department of Justice (DOJ).[166] The Board of Immigration Appeals, the body that directly

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162. *See* Chen v. Holder, 579 F.3d 73, 79 (1st Cir. 2009); Diallo v. Holder, 312 F. App'x 790, 801 (6th Cir. 2009) (per curiam) ("The IJ is in the best position to determine credibility based on the demeanor of the witness and the presentation of testimony."); Zhong v. U.S. Dep't of Justice, 480 F.3d 104, 116–17 (2d Cir. 2007); Jibril v. Gonzales, 423 F.3d 1129, 1137 (9th Cir. 2005); Chen v. U.S. Dep't of Justice, 426 F.3d 104, 113 (2d Cir. 2005) ("We give particular deference to credibility determinations that are based on the adjudicator's observation of the applicant's demeanor, in recognition of the fact that the IJ's ability to observe the witness's demeanor places her in the best position to evaluate [credibility]."); Paramasamy v. Ashcroft, 295 F.3d 1047, 1050 (9th Cir. 2002) (noting that courts "accord credibility findings, and particularly the IJ's demeanor findings, substantial deference"); *see also* Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) ("Immigration judges conducting the hearings are aware of variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

163. Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 403 (2011).

164. *Id.*

165. Marouf, *supra* note 159, at 439 (citing Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640–42 (2003)).

166. 8 U.S.C. § 1101(b)(4) (2012) (stating that an immigration judge is "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review").

reviews most immigration judge decisions, operates within the same department, and attorneys from the DOJ represent the government in appeals from BIA decisions to the federal circuit courts.[167] Immigration judges' lack of independence is all the more troubling given their role in immigration proceedings. Not only do they adjudicate, but they have the power (and in pro se cases, the duty) to develop the record, including by examining and cross-examining the witnesses.[168] "The lack of genuine independence of [immigration judges], coupled with their inquisitorial role, creates a situation where 'the guidelines for appropriate behavior are unclear,' which allows implicit bias to go unchecked and contributes to discrimination in deciding cases."[169]

Another factor that possibly leads to an increased influence of bias in immigration decisions is the immigration judges' extremely heavy caseloads. Immigration judges handle approximately 1300 cases per year, a number that far exceeds the caseload of other types of judges.[170] At the same time, immigration and asylum cases are factually and legally complex.[171] Immigration judges simply do not have the time that such cases require. As stated by the president of the National Association of Immigration Judges, "I adjudicate what in effect can be death penalty cases (when I may have to deport someone to a country so violent and/or poverty stricken that they may die) in a setting that most closely resembles traffic court in volume of cases and lack of resources."[172] As a result, immigration judges often issue oral decisions at the end of a hearing, without time to deliberate on the case.[173] This type of rushed deliberation leads to an increased reliance on heuristics. Judges may engage in satisficing to save time, and they may be stopping their analyses too early. As described in Part III above, judges are often able to correct for their biases, but they must do so consciously. Immigration judges simply may not have the time to do so.

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167. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, §§ 3.02[3], 3.05[2], [4] (Matthew Bender, Rev. Ed.) (2016).

168. 8 U.S.C. § 1229a(b)(1) (2006).

169. Marouf, *supra* note 159, at 430.

170. *Id.* at 432.

171. *Id.* at 437.

172. Judge Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 JUDGES' J. 21, 21 (2015).

173. Marouf, *supra* note 159, at 433.

V. SILENT MOTIVES AND BIAS

As argued in Part II, unlike the prototypical asylum case where the motives of the persecutor are clear, cases involving gender-based harms or other private harms often involve silent motives. Immigration judges have often determined that the nexus requirement has not been met in such cases, and this article attempts to explain why. I argue that in cases involving silent motives, the immigration judge must fill the gap left by the silence. Because this extra analysis is required in silent motives cases, there is an increased likelihood that an immigration judge's biases—whether conscious or implicit—will impact the determination.

This Part highlights some immigration judge biases that may be relevant to the nexus determination. It then applies the cognitive science theories discussed above to the nexus determination context. Finally, it offers some suggestions for minimizing the effects of biases on the nexus analysis.

A. Biases Relevant to the Nexus Analysis

As set forth in Part II above, the typical asylum case involves a male political dissident seeking protection from a dictatorial regime on account of his political opinion or ethnicity.[174] Barring credibility concerns or issues with statutory bars, these cases are routinely granted, and nexus generally has not served as an obstacle in such cases.[175] Cases based on domestic violence, trafficking, forced

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174. *See, e.g.*, Neilson, *supra* note 55, at 427 ("The paradigmatic asylum case is that of a male political dissident targeted for his public activities, such as attending political demonstrations or organizing dissidents, who then suffers harm in a public sphere at the hands of the police or military."). Ethnicity and political opinion often go hand in hand in asylum cases. *See, e.g.*, Ustyan v. Ashcroft, 367 F.3d 1215, 1217 (10th Cir. 2004) (arguing for asylum because "Abkhazians targeted [applicant] because of his ethnic heritage (or, what amounts to the same thing, a political allegiance to the Georgians imputed to him on account of that heritage)"); Krouchevski v. Ashcroft, 344 F.3d 670, 671 (7th Cir. 2003) (applicant claimed "to belong to . . . a political party that seeks greater rights for ethnic Macedonians in Bulgaria, but which is banned under a provision of the current Bulgarian constitution prohibiting political groups organized along ethnic lines").

175. *See, e.g.*, Oryakhil v. Mukasey, 528 F.3d 993, 1000 (7th Cir. 2008) (holding that the applicant had a well-founded fear of future persecution and was unable to relocate within Afghanistan because of the Taliban's presence); Karijomenggolo v. Gonzales, 173 F. App'x 34, 36–37 (2nd Cir. 2006) (holding that the applicant was persecuted on account of an imputed political opinion by a

marriage, or gang violence, then, are not viewed as the "typical" asylum case. As explained in more detail below, this bias may have a psychological impact on the immigration judge carrying out the nexus determination.

The typical case described above also involves a public type of persecution (usually at the hands of government actors) on account of the victim's public actions or opinions.[176] On the other hand, private (non-governmental) actors typically carry out cases based on fear of domestic violence, trafficking, forced marriage, or gang violence.[177] This public/private distinction not only results in the silent motive phenomenon discussed above, but also potentially plays into immigration judge bias regarding the purpose of asylum. Since the prototypical asylum case involves public actors persecuting individuals for public acts and opinions, applicants fleeing private harms are more frequently denied asylum.[178]

As mentioned earlier in this Article, gender is not explicitly listed as one of the five protected grounds in asylum law. Accordingly, applicants fleeing gender-based violence must couch their claims in terms of the political opinion or particular social group categories. But immigration judges determining nexus in cases involving private harms may have a difficult time finding that the abuse occurred on account of the victim's political opinion, despite the fact that many instances of domestic violence do occur when the victim is asserting her rights as a woman.[179] Similarly, given the private nature of domestic violence, immigration judges may have difficulty finding that the abuse took place on account of the victim's particular *social*

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former military dictator who had close ties to the military); Gui v. INS, 280 F.3d 1217, 1228–30 (9th Cir. 2002) (finding that the applicant was eligible for asylum based on his political dissidence and political beliefs).

176. Kelly, *supra* note 55, at 627 ("The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men . . .").

177. Neilson, *supra* note 55, at 433 ("Examples of persecution that women may suffer within the private sphere of the home and family include, among other things: 'honor' crimes, domestic violence, incest, and forced marriage. In many instances, women are unable to demonstrate persecution at the hands of the state because they literally have no legal relationship with the state.").

178. *Id.* ("The most difficult cases under asylum law precedent remain those in which both the targeted activities and the persecution take place within the private realm.").

179. *See, e.g.*, Matter of R-A-, 22 I. & N. Dec. 906, 917 (B.I.A. 1999) (en banc), *vacated*, (A.G., Jan. 19, 2001).

group, despite the fact that the Agency has defined a cognizable social group for victims of domestic violence.[180]

As also described above, immigration judges have shown bias on account of race/ethnicity and class.[181] These biases may be at play in nexus determinations in gang-related cases. Many of the individuals seeking asylum from gang violence are young men from Latin American countries.[182] Though these individuals are often not gang members themselves but are fleeing because they refused recruitment and the gang retaliated against them, immigration judges may harbor biases about such individuals, particularly given the nature of their claims.[183]

B. Cognitive Psychology and Silent Motives

Given the potential existence of these biases, it is important to explore how the biases might translate into adverse nexus determinations in cases involving silent motives. The cognitive science theories described in Part III provide some insight.

As set forth in Part IV, immigration judges are overburdened with cases and do not have nearly the time required to carefully adjudicate each case. Because immigration judges must dispose of cases with relative speed, they are forced to overly rely on heuristics in making their determinations, including the nexus determination, and their biases may impact those determinations more than they would if they had more time to adjudicate the cases. As explained in Part III, mental shortcuts are inextricably linked to bias. As the bank teller example described above demonstrates, overreliance on

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180. *See, e.g.*, D-M-, A# redacted (B.I.A. 2014) at 2 (unpublished memorandum decision) (assuming "the validity of the [applicant's] proposed particular social group" but denying asylum based in part on the immigration judge's finding that "the actions against taken [sic] the [applicant] were not the result of her proposed social group but because her partner was abusive and criminally motivated to harm her").

181. *See infra* Part IV.A.

182. *See, e.g.*, Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 195, 219 (2007) ("In the past year, asylum applications by people from El Salvador, Honduras, and Guatemala have almost doubled, primarily due to fear of gang violence.").

183. *See, e.g.*, Diane Uchimiya, *Article: Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 BERKELEY LA RAZA L.J. 109, 113 (2013) ("[I]mmigration judges rarely grant asylum or withholding of removal to victims of gang persecution . . .").

heuristics can lead to logical fallacies. In the context of nexus determinations, immigration judges will often identify a reason for the persecution (for example, in a domestic violence case, the fact that the abuser was inherently mean or a "despicable person"[184]), and the immigration judge will stop there, without considering all of the other reasons for the abuse. Because the identified reason is not a protected ground, the immigration judge will rule that the nexus requirement has not been satisfied. Yet, it is a logical fallacy to assume that there is only one reason for the abuse and that because one reason has been identified, there can be no others. In the paradigmatic asylum case, for example, immigration judges have routinely found nexus to a protected ground (such as political opinion or ethnicity) without asking whether the dictator was inherently mean or a despicable person. If they made such an inquiry, they would likely find that indeed the dictator was inherently mean or a despicable person, and that the dictator's meanness was a reason for the persecution. That finding would not lead to a conclusion, however, that the persecution did not also occur on account of the victim's political opinion or ethnicity.

As also described in Part III, decision-makers engage in a process called "attribute substitution," in which they work through a difficult question by substituting it with a simpler one.[185] In the nexus context, perhaps immigration judges are substituting the more difficult question of whether the abuse occurred on account of the victim's gender or other protected ground with the easier question of whether the abuse occurred because the abuser is a mean or despicable person. Similarly, in the forced marriage or trafficking contexts, it is easier to ask whether the persecution occurred on account of economic gain than to ask whether it occurred on account of gender, age, or another protected characteristic. Finally, in gang cases, it is easier to answer whether the gang violence occurred because of the gang members' desire for increased power or influence than it is to answer whether the violence occurred on account of the

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184. *See, e.g.*, Matter of R-A-, 22 I. & N. Dec. 906, 927 (B.I.A. 1999) (en banc), vacated (A.G. 2001) ("We . . . find that . . . some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all."); Musalo & Knight, *supra* note 60, at 1535 (2000) (stating that in D-K-, A# redacted (B.I.A. Jan. 20, 2000), the immigration judge "denied asylum, ruling that Ms. Kuna had not been persecuted on account of her membership in either group, or for any political reason, but solely because her husband was 'a despicable person'"); Gupta, *New Nexus*, *supra* note 25, at 382.

185. Jolls & Sunstein, *supra* note 86, at 974.

applicant's age, gender, or other protected trait. However, just because these questions are more difficult, it does not follow that they need not be asked. To the contrary, an effective and accurate analysis of the claim requires that these questions be asked and answered.

The silent motive in domestic violence, trafficking, forced marriage, and gang cases requires immigration judges to perform an analysis of nexus that they need not carry out in cases where motives are overt or well-documented. And this additional analytical step is necessarily and negatively impacted by heuristics.

Nexus analysis may also be impacted by cold and hot bias. Cold bias occurs because of influences beyond a judge's control. [186] A judge may experience cold bias when he experiences an emotional reaction without knowing why. [187] Accordingly, a judge who has had experience with domestic violence, or who subconsciously harbors views about domestic violence based on popular notions or portrayals of domestic violence, might be more prone to find that the violence occurred not because of gender or political opinion, but because of other, non-protected reasons (such as alcohol abuse or jealousy on the part of the abuser). Similarly, a judge's unconscious bias about certain countries might lead a judge to conclude that the gang violence an applicant fears is due to generalized conditions of violence in the home country, rather than the applicant's membership in any social group. [188]

Hot bias occurs when a judge uses the nexus analysis to steer toward a desired outcome. [189] Because domestic violence, trafficking, forced marriage, and gang cases are not viewed as the prototypical asylum cases, judges may go into such cases feeling (whether consciously or unconsciously) that they do not merit a grant of asylum. Accordingly, their nexus analysis is steered toward a denial. For example, a judge's biases about young, Central American men (some of whom may be ex-gang members) might lead a judge to analyze the nexus requirement in gang cases in such a way as to deny asylum.

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186. Seamone, *supra* note 122, at 25.

187. *Id.*

188. *See, e.g.*, Velasquez-Garcia v. Holder, No. 08-4610, slip op. at 521 (6th Cir. Jul. 9, 2009) ("Regarding fear of future persecution, the BIA noted that 'the widespread violence by [criminal] gangs does not provide a basis for asylum' and that 'the law does not authorize asylum for someone who may be subject to such generalized violence.'").

189. Seamone, *supra* note 122, at 25–26.

Moreover, many individuals are concerned that granting certain types of asylum cases will open the floodgates to scores of individuals seeking the same type of relief.[190] Granting asylum based on fear of gender-based harm, it is feared, would open up asylum to half the world's population. Similarly, the recent influx of young people from Central America has heightened floodgate fears. Immigration judges who are (consciously or not) concerned about opening floodgates might analyze nexus in such cases in a way that steers away from granting asylum. Yet, nothing in the U.S. asylum analysis or in our international obligations allows for a denial of asylum based on a floodgates concern. It is also worth noting that floodgates concerns, at least in the gender context, are generally unfounded.[191] Compared to men, many women live in countries where they possess limited rights, thus hindering their ability to flee their home country and escape to the U.S.[192] Moreover, many women have children, and seeking protection in another country forces them to either leave their families behind or to take their children on an often perilous journey abroad.[193] Finally, women often lack access to the resources necessary to travel to another country, particularly as far as the United States.[194] Nevertheless, unfounded though they may be, floodgate concerns have the potential to impact nexus determinations in gender- and gang-based cases.

Finally, the theory of satisficing might also explain the nexus analysis in silent motives cases. As set forth in Part III above, this theory recognizes that a decision maker could evaluate facts infinitely, but at some point must stop analyzing the data and come

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190. *See, e.g.*, Jesse Imbriano, *Opening the Floodgates or Filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 350 (2011) ("Reluctance by the United States to recognize gender-based asylum claims is largely a result of the unfounded fear that allowing eligibility for women persecuted as women will immediately inundate the United States with asylees.").

191. *See, e.g.*, Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 133 (2007) (noting that when Canada began accepting women fleeing gender-related persecution, it did not experience an increase in gender asylum claims).

192. *See, e.g.*, Anjum Gupta, *Doctrinal Mutilation: The Board of Immigration Appeals' Flawed Analysis of the "Continuing Persecution" Doctrine in Claims Based on Past Female Genital Mutilation*, 23 GEO. IMMIGR. L.J. 53–54 (2008).

193. *Id.* at 54.

194. *Id.*

to a decision.[195] The danger with satisficing is stopping the analysis too soon, at the expense of considering valuable alternatives. "Unhealthy satisficing," in other words, involves choosing a satisfactory solution among alternatives, rather than the optimal one.[196]

This type of unhealthy satisficing may occur "as a result of emotional reactions to aspects of cases that resemble [the judges'] significant experiences or the experiences of loved ones . . . ."[197] Judges who have had experiences involving domestic violence (either personally or through close family members or friends), for example, might find it easy and satisfying to find that the abuse took place because the abuser is an inherently mean or despicable person, and as a result, the nexus analysis might stop there. This type of satisficing fails to take into account that there may be (indeed, there always are) multiple reasons for the abuse, and only one of them need be a protected ground.[198]

Unhealthy satisficing also may occur because of "ambiguity relating to facts, the definition of words, or legal theories."[199] As I have argued previously, the nexus requirement has not been clearly defined in domestic asylum law, and there is scant guidance as to what test to use when determining nexus. This lack of clarity further leads to unhealthy satisficing when it comes to the nexus determination in silent motives cases.

Thus, because silent motive cases require immigration judges to carry out nexus analyses not required in cases involving overt or well-documented motives, they are more susceptible to the impact of heuristics and biases.

C. Minimizing the Impact of Bias on Nexus Analysis

Although my prior two articles set forth proposals for fixing the nexus problem in asylum law, it is worth briefly mentioning how the impact of bias in nexus determinations might be reduced. Scholars have made proposals aimed at minimizing the impact of bias in immigration proceedings generally, and many of those proposals

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195. Seamone, *supra* note 122, at 26–27.

196. *Id.* at 27 ("Essentially, when more than one theory applies to the circumstances of a case, unhealthy satisficing can cause judges to ignore other viable theories.").

197. *Id.*

198. Gupta, *New Nexus*, *supra* note 25, at 383.

199. Seamone, *supra* note 122, at 27.

would also aid in minimizing the impact of bias on nexus determinations.

For example, scholars have proposed allocating more resources to the immigration agency, in order to reduce caseload and allow immigration judges to engage in more deliberative thinking about cases. [200] Scholars have also suggested separating the immigration courts from the Department of Justice and making review more meaningful by instituting a single level of review by an Article III court. [201] Scholars also propose the reinstitution of three-member panels to allow for more meaningful review even if the Board of Immigration Appeals is retained.[202] Finally, scholars have proposed training immigration judges on the impact of bias on their decision-making. [203] This type of training, if implemented, could encourage immigration judges to consciously acknowledge and reject those biases.

These reforms would certainly go a long way toward minimizing the impact of bias in the immigration court system. With respect to the impact of bias on the nexus determination, however, a much less drastic approach is possible. In a previous article, I argued for a but-for approach to nexus determination. [204] Under this approach, immigration judges would ask "whether, but for the applicant's protected status, the persecution would have occurred. If not, nexus is established."[205] The approach dispenses with the need

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200. Marouf, *supra* note 159, at 434. *See also* Marks, *supra* note 172 ("Judges need the structural support, which only their court managers and administrators can provide, to ensure that they have sufficient time on their dockets to address the constant fight against implicit bias.").

201. Marouf, *supra* note 159, at 446. *See also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678–87 (2009) ("I propose (a) converting the immigration judges into . . . [Administrative Law Judges] housed in an independent executive branch tribunal and (b) replacing both the . . . [Board of Immigration Appeals] and review by the regional courts of appeals with an Article III immigration appellate court staffed by generalist judges.").

202. Marouf, *supra* note 159, at 446–47 .

203. *Id.* at 447–48 .

204. *See generally* Gupta, *New Nexus*, *supra* note 25 (asserting that the use of a but-for standard would lead to fairer results and would vindicate the goals of refugee law). *See also* LEGOMSKY & RODRÍGUEZ, *supra* note 45, at 985–90 (arguing for the use of the but-for standard in asylum cases).

205. Gupta, *New Nexus*, *supra* note 25, at 383.

for immigration judges to come up with their own reasons for the persecution in order to fill the nexus gap in silent motive cases.[206]

Moreover, the current focus on persecutor motives, as opposed to the status of the victim, has required immigration judges to speculate about the persecutor, particularly in cases with silent motives. This speculation inherently comes with biases. The but-for approach I proposed would shift the focus from the persecutor's motives to the status of the victim—a shift that is more in line with the aims of refugee law. Furthermore, the but-for analysis recognizes that there are always multiple necessary causes of an event, but this does not mean that any one single cause is not the actual cause—rather they are all actual causes.[207] Accordingly, the but-for analysis would dispense with the logical fallacy that if one non-protected reason for the persecution is identified, it follows that the persecution did not occur on account of a protected ground.

CONCLUSION

The analysis of the nexus requirement in asylum cases has been inconsistent, largely to the detriment of applicants seeking asylum from gender-based harms or other private harms. In this article, I have argued that the reason for this disparity is the silent nature of motives in such cases, which requires immigration judges to engage in nexus analysis that is then susceptible to unhealthy heuristics and biases. The nexus analysis I proposed in my *New Nexus* and *Nexus Redux* articles would minimize the impact of bias on the nexus determination in asylum cases.

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206. *See generally* Gupta, *Nexus Redux*, *supra* note 47 (proposing a burden-shifting approach that would address cases with mixed or multiple motives by removing the need for judges to fill in the nexus gap independently in cases involving silent motives).

207. Gupta, *New Nexus*, *supra* note 25, at 436–37.