

DECIPHERING MOTIVE: ESTABLISHING SEXUAL ORIENTATION AS THE “ONE CENTRAL REASON” FOR PERSECUTION IN ASYLUM CLAIMS

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And finally, to LGBT men and women worldwide, let me say this: Wherever you live and whatever the circumstances of your life, whether you are connected to a network of support or feel isolated and vulnerable, please know that you are not alone. People around the globe are working hard to support you and to bring an end to the injustices and dangers you face. That is certainly true for my country. And you have an ally in the United States of America and you have millions of friends among the American people.¹

I. INTRODUCTION

As of May 2011, seventy-six countries have prosecuted people on the basis of their sexual orientation.² Five of these countries—

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1. Hillary Rodham Clinton, U.S. Sec’y of State, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011), *available at* <http://www.state.gov/secretary/rm/2011/12/178368.htm>.

2. Eddie Bruce-Jones & Lucas Paoli Itaborahy, Int’l Lesbian, Gay, Bisexual, Trans & Intersex Ass’n, State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults 4 (2011), *available at* http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf.

Iran,³ Mauritania,⁴ Saudi Arabia,⁵ Sudan,⁶ and Yemen,⁷ as well as parts of Nigeria⁸ and Somalia⁹—impose the death penalty for engaging in homosexual acts.¹⁰ Other countries, such as Malaysia¹¹ and Tanzania,¹² inflict various punishments, including whipping and

3. Haads [Penal Code] [1991], art. 110 (Iran), *available at* <http://www.unhcr.org/refworld/pdfid/4d384ae32.pdf> (“Punishment for sodomy is killing; the Sharia judge decides on how to carry out the killing.”)

4. An English translation of the statute reads: “Any adult Muslim man who commits an impudent act against nature with an individual of his sex will face the penalty of death by public stoning.” Code Pénal [C. Pén] art 308 (Mauritania), *available at* <http://www.droit-afrique.com/images/textes/Mauritanie/Mauritanie%20-%20Code%20penal.pdf>.

5. Saudi Arabia has adopted Shari’a law, which punishes sodomy with death by stoning if committed by married men or between non-Muslims and Muslims. Bruce-Jones & Itaborahy, *supra* note 2, at 42.

6. Penal Code [1991], art. 148 (Sudan), *available at* http://www.ecoi.net/file_upload/1329_1202725629_sb106-sud-criminalact1991.pdf (“Whoever commits sodomy shall be punished with flogging one hundred lashes . . . If the offender is convicted for the third time he shall be punished with death or life imprisonment.”).

7. Republican Decree for Law No. 12 for the Year 1994 Concerning Crimes and Penalties, 11 Oct. 1994, art. 264 (Yemen), *available at* <http://www.unhcr.org/refworld/pdfid/3fec62f17.pdf> (“Homosexuality is the contact of one man to another through his posterior; both sodomites whether males or females are punished with whipping of one hundred strokes if not married. It is admissible to reprimand it by imprisonment for a period not exceeding one year punishment by stoning to death if married.”).

8. Most Nigerian states have their own penal codes in which homosexuality is not punishable by death. However, the penal codes of Kano and Zamfara have adopted the British colonial provisions for “carnal intercourse against the order of nature,” and the Shari’a penalties of 100 lashes for unmarried offenders and death by stoning for married ones. Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* 60 (2008), *available at* http://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf.

9. Although Somalia’s Penal Code does not punish homosexuality by death, Islamic courts in southern Somalia use Shari’a law, punishing homosexual acts with the death penalty or flogging. Bruce-Jones & Itaborahy, *supra* note 2, at 30.

10. *Id.* at 10.

11. Penal Code [2006], art. 377B (Malaysia), *available at* <http://www.agc.gov.my/Akta/Vol.%2012/Act%20574.pdf> (“Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.”).

12. The Sexual Offences Special Provisions Act (1998), § 154 (Tanzania), *available at* <http://www.parliament.go.tz/Polis/PAMS/Docs/4-1998.pdf> (“Any person who . . . has carnal knowledge of any person against the order of nature; or . . . permits a male person to have carnal knowledge of him or her . . . is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.”).

thirty years of imprisonment.¹³ This list only considers countries where homosexuality is illegal, but in various other countries, the government either persecutes unofficially or does not prevent other individuals from persecuting people on account of their sexual orientation.

Unsurprisingly, many people whose sexual orientation puts them in grave danger in their home countries seek to start a new, safer life in the United States. Secretary of State Hillary Clinton's statement reaffirms America's commitment to assist these people. Although the number of asylum claims made annually on account of sexual orientation in the United States is unknown, anecdotal evidence suggests that the numbers are steadily increasing.¹⁴ The number of successful applications, however, may be affected by the new standards imposed by the REAL ID Act of 2005.¹⁵

The Immigration and Nationality Act lists three key elements that are required for a successful asylum application: (1) a well-founded fear of persecution; (2) identification with one of the enumerated protected grounds (race, religion, nationality, membership in a particular social group, or political opinion); and (3) a causal nexus between the persecution and protected ground,¹⁶ which requires that the persecution the applicant experienced was "on account of" one of the enumerated grounds.¹⁷ This third element—the causal nexus—has been the focus of recent legislation. The REAL ID Act established a new standard for demonstrating a nexus, requiring that the enumerated ground serve as "one central reason" for the persecution.¹⁸ However, the Board of Immigration Appeals, the Third Circuit, and the Ninth Circuit have all interpreted this standard differently. The discrepancy in interpretations has produced

13. Bruce-Jones & Itaborahy, *supra* note 2, at 31, 40.

14. The U.S. Citizenship and Immigration Services (USCIS) does not separate its figures by protected ground. Krista Gesaman, *Desperately Seeking Freedom: Are the number of immigrants seeking asylum over sexual-orientation discrimination increasing?*, Daily Beast (Nov. 29, 2009, 7:00 PM EST), <http://www.thedailybeast.com/newsweek/2009/11/29/desperately-seeking-freedom.html>. The Department of Homeland Security's data also indicates that refugee arrivals have increased steadily over the last five years, from 41,094 in 2006 to 73,293 in 2010. *Refugee Arrivals: Fiscal Years 1980 to 2010*, U.S. Dep't of Homeland Security, <http://www.dhs.gov/files/statistics/publications/YrBk10RA.shtm> (last visited Mar. 24, 2012) [hereinafter "Refugee Arrivals"].

15. REAL ID Act of 2005 § 101(a)(3), 8 U.S.C. § 1158(b)(1)(B) (2006).

16. 8 U.S.C. § 1101(a)(42) (2006).

17. *Id.*

18. 8 U.S.C. § 1158(b)(1) (2006).

inconsistencies across cases, emphasizing the need to adopt a uniform standard.

This Note argues that adopting a uniform standard is essential in order to maintain fairness and consistency for asylum applicants across all the U.S. circuits and to uphold the value of equal protection, which is fundamental to the American justice system. It also argues that all circuits should adopt the Third Circuit's interpretation, as it is the most faithful to the language and congressional intent of the statute. This standard will not detract from the congressional intent of preventing terrorists from taking advantage of the asylum system. Moreover, it will prevent individuals seeking asylum on account of their sexual orientation from being impacted inadvertently by national security concerns.

Part II will provide a background on asylum procedures in the United States, the development of sexual orientation as a "particular social group," and the definition of a well-founded fear of persecution. Part III will discuss the REAL ID Act's new standard for the causal nexus between the applicant's persecution and "particular social group" as well as the various interpretations of this standard. Part IV will apply these interpretations to previously decided sexual orientation cases to illustrate the concrete outcomes of various interpretations. Finally, Part V will argue that the Third Circuit's approach best interprets the language of the statute and prevents inconsistencies in the outcomes of equally strong asylum applications.

II. SEXUAL ORIENTATION AS A BASIS FOR SEEKING ASYLUM

A. Seeking Asylum in the United States

Asylum seekers are individuals who have fled to the United States from their country of origin due to a fear of persecution. They may seek refugee status—technically, a temporary status—in order to remain in the United States, and eventually may become permanent residents.¹⁹ Under the Immigration and Nationality Act (INA), individuals may seek refugee status in three different ways: (1) through an affirmative application for asylum²⁰; (2) through a defensive application for withholding of removal if they are in

19. Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 828 (6th ed. 2008).

20. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A).

removal proceedings²¹; or (3) through an application for withholding of removal if they are in expedited removal proceedings.²² As discussed below, those seeking asylum apply first to administrative agencies. Only after the initial application is denied will an individual's asylum application be considered by a United States Court of Appeals.

An affirmative application for asylum begins with the completion and filing of Form I-589 with the regional service center (RSC), a branch of the Bureau of Citizenship and Immigration Services (USCIS).²³ The form asks whether the applicant, his family, or his close friends have experienced harm, mistreatment, or threats by anyone and if he fears harm and mistreatment if he returns to his country of origin.²⁴ The RSC schedules a non-adversarial interview for the applicant with an asylum officer,²⁵ which must be conducted within forty-five days of the filing of the application, absent exceptional circumstances.²⁶

The asylum officer will find the applicant eligible for an affirmative grant of asylum under section 101(a)(42)(A) of the INA when she concludes that the applicant "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."²⁷ In order to be granted asylum, the applicant must fulfill this statutory requirement, and the Attorney General, via the asylum officer or the Immigration Judge (IJ), must additionally exercise his discretion in favor of the applicant.²⁸ If the applicant's presence in the United States is unlawful at the time of the interview, rather than denying the application, the asylum officer will typically refer the applicant to immigration court where the asylum claim will be considered as a defensive application in the course of removal proceedings.²⁹ If the

21. 8 U.S.C. § 1231(b)(3) (2006).

22. 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

23. Aleinikoff et al., *supra* note 19, at 850.

24. *Id.*

25. *See id.* at 850; 8 C.F.R. § 208.9 (2010).

26. *See* Aleinikoff et al., *supra* note 19, at 850; 8 U.S.C. § 1158(d) (2006).

27. 8 U.S.C. § 1101(a)(42) (2006).

28. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987); *see also* 8 U.S.C. § 1158 (b)(1) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum . . .") (emphasis added).

29. Aleinikoff et al., *supra* note 19, at 851.

applicant has a lawful status at the time of the interview, the asylum officer will issue a denial of the asylum application, and the applicant may renew the claim later when he is in removal proceedings.³⁰

If an alien is in removal proceedings for being present in the United States unlawfully, he can apply for asylum using a defensive application, which will only be heard by the IJ.³¹ The applicant may make his wish to seek asylum known at his first appearance in immigration court during his removal proceedings, and the IJ will grant a period of time within which the I-589 must be filed.³² An alien is eligible for withholding of removal under section 241(b)(3)(A) of the INA when “the Attorney General decides that the alien’s life or freedom would be threatened in [the] country [to which he would be returned] because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”³³ Unlike an affirmative application for asylum, an application for withholding of removal is not subject to the discretion of the Attorney General: once the statutory criteria are met, withholding of removal is granted.³⁴

Finally, an alien is subject to expedited removal proceedings if he is stopped at the port of entry, interdicted at sea, or falls in a specified class of entrants without inspection who are inadmissible for particular reasons, including having false or inadequate documents or for other fraud or misrepresentation.³⁵ If the alien expresses a fear of return to his country of origin or asks to seek asylum, he is referred to an asylum officer. The officer then must interview the applicant no less than forty-eight hours later to determine whether the applicant has a “credible fear of persecution.”³⁶ This phrase is defined in the INA as a “significant possibility . . . that the alien could establish eligibility for asylum.”³⁷ If the asylum officer believes that the applicant does have a credible fear, his asylum claim is heard in immigration court as a defensive

30. *Id.*

31. *Id.*; 8 C.F.R. § 208.2(b).

32. Aleinikoff et al., *supra* note 19, at 851.

33. 8 U.S.C. § 1231(b)(3)(A) (2006).

34. *See id.* (“the Attorney General may not remove an alien to a country if . . . ”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (determining that the INA “removed the Attorney General’s discretion” to withhold an application of removal).

35. Aleinikoff et al., *supra* note 19, at 852.

36. *See id.*; 8 U.S.C. § 1225(b)(1)(B) (2006).

37. 8 U.S.C. § 1225(b)(1)(B)(ii).

application for asylum.³⁸ If the court does not confirm the officer's finding that the applicant has a credible fear of persecution, the court will order that the applicant be removed. However, the applicant may request that an IJ review the decision, in which case the IJ will consider the officer's report and conduct a review within seven days and within twenty-four hours if possible.³⁹

The IJ's decision on either a defensive asylum claim or a referred affirmative claim may be appealed to the Board of Immigration Appeals (BIA).⁴⁰ The BIA is a multi-member review body directly accountable to the Attorney General.⁴¹ Certain BIA determinations, called precedential decisions, are binding on all other agencies under section 103(a)(1) of the INA, which states that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."⁴²

The denial of an asylum application by the BIA may be appealed directly to a United States Court of Appeals with jurisdiction over the area in which the proceeding was held.⁴³ However, the court of appeals will review the BIA determination under a deferential standard, which mandates that the Attorney General's judgment whether to grant asylum "shall be conclusive unless contrary to the law and an abuse of discretion."⁴⁴ Nonetheless, the circuit courts' decisions are binding on the immigration courts and on BIA proceedings in that circuit.⁴⁵ Therefore, because of the differing interpretations of the "one central reason" standard for the causal nexus requirement for asylum, the BIA and IJs vary in their application of the law depending on the circuit court precedent in their jurisdiction.

38. Aleinikoff et al., *supra* note 19, at 852.

39. *Id.*; 8 U.S.C. § 1225(b)(1)(B)(iii)(III) ("[T]o the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).").

40. Aleinikoff et al., *supra* note 19, at 853.

41. *Id.* at 281.

42. 8 U.S.C. § 1103(a)(1) (2006). Only a small percentage of BIA decisions are considered "precedential" and those decisions are published in the official reports, "Administrative Decisions Under Immigration and Nationality Laws of the United States" (abbreviated as "I & N Dec."). See Aleinikoff et al., *supra* note 19, at 284–85; 8 C.F.R. §§ 103.3(c), 103.9(a), 1001.1(i) (2010).

43. 8 U.S.C. § 1252(b)(2) (2006).

44. 8 U.S.C. § 1252(b)(4).

45. See *Immigration Basics: Sources of Law*, Immigration Equality, <http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/asylum-basics-sources-of-law> (last visited Mar. 24, 2012).

B. Development of Sexual Orientation as a Particular Social Group in the U.S.

The definition of “refugee” in the INA requires the applicant to be a member of one of five protected classes: (1) race, (2) nationality, (3) religion, (4) political opinion, or (5) particular social group.⁴⁶ Sexual orientation falls under the category of “particular social group,” since it is not enumerated specifically as a protected class.⁴⁷ Neither Congress nor the Executive Branch have defined the term “particular social group” (PSG) in the U.S. Code or Code of Federal Regulations, thus shifting the task of articulating a definition onto other aspects of the legal process: judicial interpretation, the Attorney General’s discretion, and evolution of the phrase in international law.⁴⁸

As for judicial interpretation, the most influential definition of a PSG is found in the BIA decision *Matter of Acosta*. In this decision, the BIA defined a PSG as a group sharing a “common, immutable characteristic.”⁴⁹ The BIA has further qualified this definition with two factors: (1) social visibility and (2) particularity.⁵⁰ The social visibility requirement means that society perceives certain individuals as belonging to a coherent group and that those individuals are more likely than others to suffer persecution as a result of their membership in that group.⁵¹ The particularity

46. 8 U.S.C. § 1101(a)(42) (2006).

47. *Id.*

48. See generally Edward L. Carter & Brad Clark, “Membership in a Particular Social Group”: *International Journalists and U.S. Asylum Law*, 12 Comm. L. & Pol’y 279, 292 (2007) (discussing the paucity of research related to whether the term applies to journalists).

49. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

50. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 69 (B.I.A. 2007) (“Factors to be considered in determining whether a particular social group exists include whether the group’s shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership.”); see also *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (distinguishing the particularity element— “[a] fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world generally”— and the social visibility element—requiring the group characteristic to be “recognizable and discrete”); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576–77 (9th Cir. 1996) (arguing that immediate family may constitute a particular social group because it is “a focus of fundamental affiliational concerns and common interests for most people” and is “a small, readily identifiable group”).

51. See Carter & Clark, *supra* note 48, at 296 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. at 73–76).

requirement speaks to whether the group of individuals is determinate or distinguishable.⁵²

Sexual orientation has been conclusively defined as a PSG in the international arena, both by U.S. judicial interpretation and by the U.S. Attorney General. Each of these authorities has also begun to articulate the subsets of sexual orientation that fall into the category of a PSG.

The development of sexual orientation as a PSG began in the early 1990s with judicial interpretation. The BIA first ruled that gay men and lesbian women may constitute a PSG in *Matter of Toboso-Alfonso*.⁵³ *Toboso-Alfonso* involved the withholding of deportation of a homosexual Cuban man based on the finding that homosexuals in Cuba have experienced a pattern of anti-gay discrimination and persecution.⁵⁴ The Cuban government's discouragement of homosexuality contributed to the applicant's well-founded fear of persecution in this case.⁵⁵ The BIA found that homosexuality met *Acosta's* immutable characteristic standard in that it is a characteristic that the applicant either cannot or should not be required to change.⁵⁶ Following this decision, in 1994, Attorney General Janet Reno exercised her discretion and acknowledged that sexual orientation may constitute a PSG for the purposes of seeking asylum in the United States.⁵⁷

Finally, international law followed suit. In 1995, the U.N. High Commissioner for Refugees (UNHCR) recognized that homosexuals could constitute a PSG and should be granted refugee status.⁵⁸ Because the United States has consistently adopted international law and borrowed material from the United Nations in framing its definition of a "refugee," the UNHCR's determination influenced the U.S. for this area of asylum law. The fact that the

52. See Carter & Clark, *supra* note 48, at 296 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. at 76).

53. Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 Cornell Int'l L.J. 605, 617 (1993) (citing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990)).

54. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.

55. *Id.*

56. *Id.*

57. Att'y Gen. Order No. 1895-94 (June 19, 1994).

58. United Nations High Comm'r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity 15 (2008), available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>.

United States tracks international law in the area of asylum law is hardly surprising; the U.S. has signed on to the 1967 United Nations Protocol Relating to the Status of Refugees and has adopted its definition of “refugee” almost verbatim from the Protocol.⁵⁹ The Supreme Court has emphasized the significance of this adoption of the definition of a refugee and has argued that “there were also many statements indicating Congress’s intent that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition.”⁶⁰ The BIA and the Supreme Court have both recognized the importance of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, although viewing the Handbook as nonbinding on U.S. courts. The BIA has explained that while it “do[es] not consider the UNHCR’s position in the Handbook to be controlling, the Handbook nevertheless is a useful tool to the extent that it provides [the BIA] with one internationally recognized interpretation of the Protocol.”⁶¹ The Supreme Court has also acknowledged that it is guided by the UNHCR’s analysis of “refugee” in the Handbook.⁶² Therefore, the UNHCR’s interpretation of a PSG is directly relevant to how that term will be understood by authorities in the United States.

The categorization of sexual orientation as a recognized PSG was developed still further in American jurisprudence in the year 2000. In *Hernandez-Montiel v. INS*, the Ninth Circuit expanded sexual orientation as a PSG to include gay men with female sexual identities.⁶³ It explained that “a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that the member either cannot or should not be required to change it.”⁶⁴ By finding that transgender men fit this definition of a PSG, the Ninth Circuit opened the door for various subsets of sexual orientation to serve as legitimate bases for asylum applications.

59. Compare Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter “Protocol”], with 8 U.S.C. § 1101(a)(42) (2006).

60. *INS v. Cardozo-Fonseca*, 480 U.S. 421, 434 (1987).

61. *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985).

62. *Cardozo-Fonseca*, 480 U.S. at 438–39.

63. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93, n. 5 (9th Cir. 2000).

64. *Id.*

Additionally, some circuit court cases indicate that imputed homosexuality, or cases in which the persecutor perceives an individual to be a homosexual and persecutes him on that basis, may be sufficient for eligibility for asylum.⁶⁵ The Attorney General, in his commentary on a proposed rule to amend a regulation governing asylum, confirmed this by explaining that “this language codifies the existing doctrine of imputed political opinion, as well as the existing administrative interpretation that this doctrine also extends to the protected grounds other than political opinion.”⁶⁶ As homosexuality has been affirmed as a protected ground, this commentary supports the notion that imputed homosexuality is sufficient for asylum.

It is well established that homosexuality can constitute a PSG for the purposes of an asylum application. Thus, most of the controversy in sexual orientation asylum cases relates not to whether sexual orientation is a legitimate ground for granting asylum, but rather to whether the applicant has adequately established a well-founded fear of persecution, and whether this fear is in fact “on account of” his sexual orientation.

C. Well-Founded Fear of Persecution

The level of threat an applicant must demonstrate to establish a well-founded fear of persecution differs depending on whether he is applying for asylum or for withholding of removal.⁶⁷ The Supreme Court interpreted these standards as unique in *INS v. Cardoza-Fonseca* and explained the level of threat required for each one. The standard for an affirmative asylum application in the INA of “persecution or a well-founded fear of persecution” is a more lenient standard than the standard for a defensive application for

65. See *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003) (holding that the BIA’s decisions apply the concept of imputation to all five protected grounds); *Pozos v. Gonzales*, 141 F. App’x. 629, 631, n.1 (9th Cir. 2005) (“This court recently removed all doubt about whether the protected ground ‘particular social group’ includes those perceived as homosexuals.”).

66. *Amanfi*, 328 F.3d at 729 (citing 65 Fed. Reg. 76588, 76592 (Dec. 7, 2000)). The proposed amendment to 8 C.F.R. § 208.15 stated “An asylum applicant must establish that the persecutor acted, or that there is a reasonable possibility that the persecutor would act, against the applicant on account of the applicant’s race, religion, nationality, membership in a particular social group, or political opinion, or on account of what the persecutor perceives to be the applicant’s race, religion, nationality, membership in a particular social group, or political opinion.” 65 Fed. Reg. 76588, at 76597–98.

67. *Cardoza-Fonseca*, 480 U.S. at 428.

withholding of removal.⁶⁸ The Supreme Court found that the affirmative asylum standard involves considering the mental state of the applicant to determine whether his fear is well-founded. The Court held that an applicant's fear may be well-founded even if there is less than a 50% chance of him being persecuted, as the relevant inquiry is whether the applicant has a subjective fear of being persecuted rather than the objective possibility of him being persecuted.⁶⁹ The withholding of removal standard in the INA, on the other hand, requires that the applicant "would be threatened in that country."⁷⁰ Therefore, the Supreme Court found that the withholding of removal standard requires the applicant to establish by objective evidence that he is more likely than not to face persecution if he is deported to his country of origin.⁷¹

The BIA has defined persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon" an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.⁷² Persecution may include harm committed by a government or harm committed by those the government is unwilling or unable to control because of the victim's immutable characteristic.⁷³

68. *Id.* at 430; 8 U.S.C. § 1101(a)(42) (2006).

69. *Cardoza-Fonseca*, 480 U.S. at 431; *see also* 8 C.F.R. § 208.13(b)(2)(i) (2010) (listing the elements of a well-founded fear of persecution). An applicant has a well-founded fear of persecution if: "(A) The applicant has a fear of persecution . . . (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and (C) He or she is unable or unwilling to return to . . . that country because of such fear." *Id.*

70. 8 U.S.C. § 1231(b)(3)(A) (2006).

71. *Cardoza-Fonseca*, 480 U.S. at 430.

72. *Matter of Acosta*, 19 I. & N. Dec. 211, 211-12 (B.I.A. 1985). For examples of prior cases adopting this definition, *see Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (defining persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive"); *Matter of Maccaud*, 14 I. & N. Dec. 429, 434 (B.I.A. 1973) (citing *Kovac*, 407 F.2d at 107); *Matter of Diaz*, 10 I. & N. Dec. 199, 200 n.1 (B.I.A. 1963) (defining persecution as "(i) the infliction of sufferings, harm or death on those who differ (as in origin, religion or social outlook) in a way regarded as offensive or meriting extirpation . . .") (internal citation omitted); *Matter of Laipenieks*, 18 I. & N. Dec. 433, 456-57 (B.I.A. 1983) (defining persecution as "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not [only] be physical, but may take other forms . . .").

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

The cases discussed below provide an introduction to how individuals have succeeded or failed in establishing a well-founded fear of persecution.

1. Past Persecution

Where an applicant proves a pattern of past persecution of people who fall into the same PSG to which he belongs, courts have held that there is a rebuttable presumption that his fear of persecution is well-founded.⁷⁴ The government can rebut this presumption by illustrating either that there has been a fundamental change in the circumstances of the country such that the applicant no longer has a well-founded fear or that the applicant can be reasonably expected to relocate within his country of origin.⁷⁵

How a pattern of persecution is proved depends on whether the persecution was committed by government or non-government actors. When an applicant can demonstrate a consistent history of certain government action, such as arbitrary detention, threats of violence or death threats, or sexual assault, he will succeed in establishing the rebuttable presumption of a well-founded fear of persecution.⁷⁶ *Toboso-Alfonso* was such a case. Toboso-Alfonso claimed that he had been required to appear before the Cuban police every two or three months for a physical examination and a hearing regarding his sex life and partners.⁷⁷ He claimed to have been detained for three or four days while being subjected to physical and verbal abuse without being charged with a crime.⁷⁸ The IJ found this testimony to be credible and to rise to the level of past persecution.⁷⁹

However, in order for the injury at the hand of nongovernmental actors to qualify as persecution, the IJ must find that the government was unable or unwilling to protect the applicant.⁸⁰ The standard is much more difficult to meet. The Eighth

74. 8 C.F.R. § 208.13(b)(1) (2010).

75. 8 C.F.R. § 208.13(b)(1)(i).

76. See *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1054 (9th Cir. 2006) (holding that a six-hour detention by police in conjunction with other unreported incidents constitutes past persecution); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (holding that sexual assault, including forced oral sex by a police official, may constitute persecution); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (holding that death threats alone can constitute persecution).

77. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820–21 (B.I.A. 1990).

78. *Id.* at 821.

79. *Id.* at 822.

80. *Valiukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001).

Circuit's decision in *Nabulwala v. Gonzales* provides a useful articulation of the standard. In this case, the Eighth Circuit found that the IJ had not made sufficient findings in this regard.⁸¹ The petitioner had been attacked by a mob of people with sticks and stones during a meeting of a lesbian advocacy organization of which she was a member.⁸² She testified that officers of the Ugandan Human Rights Commission were present during these attacks and had told the advocacy group to dissolve and stop engaging in homosexual activity.⁸³ Her family had also forced her to have sex with a stranger and had expelled her from her clan.⁸⁴

The IJ found that these acts were isolated incidents, holding that private family mistreatment did not rise to the level of persecution if it was not sponsored or authorized by the government.⁸⁵ However, the Eighth Circuit remanded the case to the BIA, ruling that the IJ's findings were insufficient because they had misunderstood the standard. The Eighth Circuit held that the IJ needed to make specific findings regarding the government's inability or unwillingness to protect the applicant from persecution by nongovernmental actors; it was not sufficient to only make findings regarding whether the persecution was government-sponsored.⁸⁶

On the other hand, the government can rebut the presumption of a well-founded fear of persecution due to past persecution by establishing that internal relocation was a viable option.⁸⁷ In one such case, *Galicia v. Ashcroft*, the petitioner had been beaten and verbally abused by neighbors in his village in Guatemala.⁸⁸ The First Circuit upheld the IJ's decision to deny asylum because the petitioner had not shown that he could not safely live elsewhere in the country and, therefore, had not demonstrated that a reasonable person in the petitioner's position would fear persecution on being returned.⁸⁹ The court additionally found that the petitioner had not made an effort to contact the authorities or other groups that may have been able to assist him, and that his evidence

81. *Nabulwala v. Gonzales*, 481 F.3d 1115, 1119 (8th Cir. 2007).

82. *Id.* at 1116.

83. *Id.*

84. *Id.* at 1117.

85. *Id.* at 1118–19.

86. *Id.* at 1119.

87. 8 C.F.R. § 208.13(b)(1)(i) (2010).

88. *Galicia v. Ashcroft*, 396 F.3d 446, 447 (1st Cir. 2005).

89. *Id.* at 448.

of past persecution was consequently insufficient.⁹⁰ The applicant's inability to demonstrate that internal relocation was not an option prevented the court from finding that he had a well-founded fear of persecution if he returned to his country of origin, with or without a showing of past persecution.

2. Establishing a Well-Founded Fear of Future Persecution Without Past Persecution

There are only a few reported circuit court cases finding a well-founded fear of persecution without a showing of past persecution. This lack of case law illustrates that a demonstration of past persecution is effectively a requirement to establish a well-founded fear of persecution.

Bromfield v. Mukasey is the only case to date in which a court has granted a petition for review to an applicant who has not experienced past persecution on account of his homosexuality but claims to have a well-founded fear of persecution.⁹¹ In this case, the applicant was a Jamaican national who "came out" four years after being admitted to the United States.⁹² He returned to Jamaica twice to visit family but claimed that he did not want to return to live there due to violence against homosexuals.⁹³ Bromfield testified using articles about violence against gay men and using the 2005 U.S. State Department Country Report for Jamaica. These documents illustrated that violence against homosexuals by private actors was widespread, and that Jamaica criminalizes homosexual conduct, making it punishable by up to ten years of imprisonment.⁹⁴ The IJ found that the violence against homosexuals by private actors did not rise to the level of persecution.⁹⁵ The Ninth Circuit reversed, finding that when the persecutors are motivated by the victim's homosexuality, as they were in this case, their acts constitute persecution rather than acts of random violence.⁹⁶ Thus, the court found that Bromfield had established a well-founded fear of persecution.⁹⁷

90. *Id.*

91. *Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008).

92. *Id.* at 1073.

93. *Id.*

94. *Id.* at 1074.

95. *Id.* at 1077.

96. *Id.*

97. *Id.*

In *Salkeld v. Gonzales*, an Eighth Circuit case, the petitioner was seeking asylum and withholding of removal based on a well-founded fear of persecution for being a homosexual in Peru.⁹⁸ He claimed that despite having never revealed his homosexuality while living in Peru, he had suffered verbal abuse for having homosexual tendencies.⁹⁹ Additionally, although he had never experienced physical abuse himself, he had witnessed the physical abuse of a student on account of his homosexuality.¹⁰⁰ A professor testified on the petitioner's behalf that Peruvian society is intolerant of homosexuality and that the police often do nothing to protect homosexuals, even joining in the harassment periodically.¹⁰¹ He also testified that in 2001, paramilitary groups hunted down and killed homosexuals.¹⁰²

Nonetheless, after finding that homosexuality is not illegal in Peru, and that homosexuals can live more safely in other parts of Peru, the IJ ruled that the petitioner did not meet the requirement of a well-founded fear of persecution or the higher "more likely than not" standard for withholding.¹⁰³ The BIA affirmed the IJ's decision and the Eighth Circuit denied the petition for review.¹⁰⁴

Salkeld is only one of many examples of asylum petitions denied on the basis of inadequate evidence of past persecution.¹⁰⁵ Thus, as the case law demonstrates, an applicant is much more likely to succeed on a sexual orientation asylum claim if he can present evidence of past persecution as the explanation for his "well-founded fear of persecution." Without examples of past persecution, it seems, it is nearly impossible for an asylum applicant to prove a well-founded fear of future persecution.

Technically, the requirement of a well-founded fear of persecution may be fulfilled either by a demonstration of past

98. *Salkeld v. Gonzales*, 420 F.3d 804, 806 (8th Cir. 2005).

99. *Id.* at 807.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 808.

104. *Id.*

105. See *Paredes v. U.S. Att'y Gen.*, 219 F. App'x 879, 887 (11th Cir. 2007) (holding that the applicant did not have a well-founded fear of persecution, as Venezuela had taken affirmative steps towards protecting homosexuals); *Forrester v. Att'y Gen.*, 207 F. App'x 258, 261 (3d Cir. 2006) (holding that applicant failed to provide evidence that she had suffered mistreatment on account of her sexual orientation, and finding that even if she were to suffer such mistreatment, there was no evidence that the Jamaican government condoned it).

persecution, which establishes a rebuttable presumption of a well-founded fear of persecution, or by a demonstration of a well-founded fear of future persecution without any evidence that the applicant had previously experienced persecution. But because federal courts have rarely considered the evidence to be sufficient for a successful application in the latter case, the most promising way for an applicant to succeed in an asylum application on account of sexual orientation is by establishing that he experienced past persecution. The cases discussed below therefore focus on ultimately successful asylum applications—that is, on cases in which the applicant proved that he had experienced past persecution. As discussed below, the crucial question then becomes whether or not the persecution they experienced was on account of their sexual orientation.

III. “ON ACCOUNT OF”: THE CAUSAL NEXUS BETWEEN PERSECUTION AND SEXUAL ORIENTATION

The final statutory requirement for an asylum claim, derived from the phrase “on account of” in section § 101(a)(42) of the INA, is that a causal nexus must exist between the established persecution and the applicant’s PSG.¹⁰⁶ This causal nexus is defined by the persecutor’s state of mind during the persecution. The Ninth Circuit, later cited by Congress in the House Conference Report for the REAL ID Act, explained the relevance of the state of mind: “in those cases in which a persecuted activity could stem from many causes . . . the victim must tie the persecution to a protected cause. To do this, the victim needs to show the persecutor had a protected basis (such as the victim’s political opinion) *in mind* in undertaking the persecution.”¹⁰⁷

A. Development of the “On Account Of” Nexus

The development of the “on account of” nexus, both prior to and following the passage of the REAL ID Act, provides insight into the significance of the standard’s interpretation. This causal nexus, while essential for a successful asylum application, may be difficult to determine because the harm and persecution the applicant experienced may have been caused by various factors other than the applicant’s protected ground. To respond to this problem, in 1996, the

106. 8 U.S.C. § 1101(a)(42)(A) (2006).

107. *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (emphasis added); H.R. Rep. No. 109-72, at 163 (2005).

BIA established a test for determining a nexus. In *Matter of S-P-*, the BIA held that the applicant was not required to conclusively illustrate the persecutor's motive.¹⁰⁸ Rather, the standard of review was to be whether the applicant had produced evidence from which it was reasonable to believe that the harm was motivated, *at least in part*, by an actual or implied protected ground.¹⁰⁹ Evidence could include supporting documents and corroborative background evidence.¹¹⁰ The case emphasized the importance of remaining cognizant of Congress's humanitarian purposes of conforming to the U.N. Convention in adjudicating mixed motive cases.¹¹¹

The court also recognized two areas of uncertainty in determining the causal nexus and in proving the persecutor's motive: (1) cases where the motive is not readily ascertainable and (2) cases

108. *In re S-P-*, 21 I. & N. Dec. 486, 489 (B.I.A. 1996) (granting asylum where applicant was detained and abused by the Sri Lankan government in order to obtain information about the identity and location of guerilla members, and where applicant's political views were antithetical to the government); *see also* *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) (holding that persecutory conduct may have multiple motives as long as one of the motives relates to a protected ground); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988) (holding that applicant does not bear the unreasonable burden of establishing the persecutor's exact motivation, but must establish facts that would convince a reasonable person that the danger arises on the account of one of the enumerated grounds); *Matter of R*, 20 I. & N. Dec. 621, 629 (B.I.A. 1992) (Dunne, concurring) (finding that the alien only bears the burden of establishing the reasonableness of a motivation which is related to an enumerated ground).

109. *In re S-P-*, 21 I. & N. Dec. at 490; *see also* *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that the applicant must provide some evidence, direct or circumstantial, that a guerilla organization's attempt to conscript him was on account of his political opinion).

110. *In re S-P-*, 21 I. & N. Dec. at 490; *see also* *Matter of Dass*, 20 I. & N. Dec. 120, 125 (B.I.A. 1989) (holding that without supporting documentation or evidence, applicant failed to establish a well-founded fear of persecution based on his testimony, which included factual matters involving himself and general testimony regarding the situation). An asylum application must be adjudicated on the evidence in the record, and if significant evidentiary gaps exist in the application, it will be denied for failure to provide sufficient proof. However, an application will not fail due to lack of documentary or corroborative evidence when the alien's own testimony is the only available evidence and is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alleged fear." *Zhang v. INS*, 386 F.3d 66, 81 (2d Cir. 2004).

111. *In re S-P-*, 21 I. & N. Dec. at 492; *see also* S. Rep. No. 256, at 1 (1974), *reprinted in* 1980 U.S.C.C.A.N. 141 (explaining that Congress was seeking to conform to the U.N. Convention's definition of "refugee" to give "statutory meaning to our national commitment to human rights and humanitarian concerns").

in which the evidence suggests multiple motives.¹¹² As an example of the first area of uncertainty, the court described a situation in which an enumerated ground may or may not have been the reason for an unprovoked attack by unknown assailants.¹¹³ In these cases, direct or circumstantial evidence of the persecutor's motive would be essential to the success of the application.¹¹⁴

The court described the second area of uncertainty—cases of multiple motives—as potentially involving a situation in which a prosecution for an offense is a pretext for persecuting the individual for his political opinion and/or for allowing the government to gather intelligence.¹¹⁵ In such a situation, the court explained that the BIA should take various factors into account to determine whether the individual was persecuted. These factors should include the nature of the crime and the severity of its punishment, the applicant's political opinion, the motives behind the applicant's actions, the nature of the act committed by the applicant, the nature of the prosecution and its motives, and the nature of the law on which the prosecution was based.¹¹⁶ The BIA elaborated on these criteria in 1997 in *Matter of T-M-B-*, finding that country profiles submitted by the Department of State's Bureau of Democracy, Human Rights, and Labor are entitled to considerable deference as evidence of persecutors' motive.¹¹⁷

Both *Matter of S-P-* and *Matter of T-M-B-* were precedential cases until the passage of the REAL ID Act of 2005. Yet, with this act, Congress altered the BIA's "at least in part" standard for determining the "on account of" nexus between the established persecution and the applicant's PSG. Section 101(a)(3) of the REAL ID Act now

112. *In re S-P-*, 21 I. & N. Dec. at 492.

113. *Id.*

114. *Id.* Various circuits have previously held that when no other motive is articulated and circumstantial evidence exists that the persecution is on account of the protected ground, this triggers a rebuttable presumption that the motive is based on the protected ground. However, Congress intended to do away with this rebuttable presumption with the REAL ID Act. *See infra* Part IV.A.

115. *In re S-P-*, 21 I. & N. Dec. at 492.

116. *Id.* at 493 (citing *Matter of Izatula*, 20 I. & N. Dec. 149, 157 (B.I.A. 1990) (concurring opinion)).

117. *Matter of T-M-B-*, 21 I. & N. Dec. 775, 779 (B.I.A. 1997) (holding that criminal extortion efforts do not constitute persecution "on account of" political opinion where it is reasonable to conclude that those who threatened or harmed the respondent were not motivated by applicant's political opinion); *see also* *Kazlauskas v. INS*, 46 F.3d 902, 906 (1995) (explaining that the State Department Country Report on Human Rights Practices has been described as the most appropriate and best resource for information on political situations in foreign nations).

specifies that “to establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least *one central reason* for persecuting the applicant.”¹¹⁸ In using the “one central reason” language, Congress sought to adopt a uniform standard for addressing mixed motive situations, responding to national security concerns of terrorists utilizing the asylum system to gain entry into the United States.¹¹⁹ In the House Conference Report on the REAL ID Act, with which the Senate unanimously agreed in passing the act,¹²⁰ Congress explicitly rejected a Ninth Circuit case using the “at least in part” standard.¹²¹ However, in the same conference report, Congress endorsed cases decided before the enactment of the “one central reason” standard that used thresholds such as “in meaningful part” and “primarily” in reference to the persecutor’s motivation on a protected ground.¹²²

The first case to assess the REAL ID Act’s “one central reason” standard was *In re J-B-N & S-M-*, heard by the BIA in 2007.¹²³ Considering the ordinary meaning of the statute first, the BIA explained that the statute permits aliens whose persecutors had multiple motives to establish a nexus to a protected ground.¹²⁴ The BIA defined “central” as “[h]aving *dominant* power, influence, or control.”¹²⁵ The BIA also considered legislative history, providing that

118. REAL ID Act of 2005 § 101(a)(3), 8 U.S.C. § 1158(b)(1)(B)(i) (2006) (emphasis added).

119. H.R. Rep. No. 109-72, at 163 (2005) (explaining that varying evidentiary standards across federal appellate courts were resulting in inconsistent outcomes).

120. *U.S. Senate Roll Call Votes 109th Congress - 1st Session*, Senate.gov, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00117 (last visited Mar. 24, 2012).

121. H.R. Rep. No. 109-72, at 163 (citing *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999)).

122. H.R. Rep. No. 109-72, at 163 (citing *Girma v. INS*, 283 F.3d 664, 668 (5th Cir. 2002) (upholding the BIA’s use of the standard that an applicant for asylum must present evidence sufficient for one to reasonably believe that the harm suffered was motivated in meaningful part by a protected ground); *Useinovic v. INS*, 313 F.3d 1025, 1033 (7th Cir. 2002) (holding that the applicant presented minimal evidence that the robbery was aimed at him primarily for his religious beliefs and not for his mother’s valuables)).

123. *J-B-N- & S-M-*, 24 I. & N. Dec. 208 (B.I.A. 2007).

124. *Id.* at 213.

125. *Id.* at 212 (citing Webster’s II New College Dictionary 181 (1st ed. 1995)) (emphasis added).

the protected ground may not be “incidental or tangential to the persecutor’s motivation.”¹²⁶ It defined “incidental” as “[o]f a minor, casual, or subordinate nature,” to establish that where a protected ground is subordinate to another (unprotected) reason for the persecution, an applicant is ineligible for asylum.¹²⁷ It defined “tangential” as “[s]uperficially relevant.”¹²⁸

Thus, the BIA found that the standard for determining the causal nexus of the persecution remains largely unchanged by the REAL ID Act, as the legislation still required that the protected ground must play more than a minor role in the applicant’s past persecution.¹²⁹ The BIA established that “one central reason” mandates that the protected ground “cannot be incidental, tangential, superficial, or subordinate to another reason for harm”—a more stringent standard than its previous “at least in part” standard.¹³⁰ Whether an applicant meets this standard is a question of fact determined by testimonial evidence, taking into account documents and corroborative background evidence.¹³¹

B. Current Interpretations of the “One Central Reason” Standard in the Federal Courts

The “one central reason” standard established by the REAL ID Act has been applied to asylum applications made following May 2005.¹³² Due to the novelty of the standard, most federal courts of appeals have only recently applied the standard in their assessment of whether an applicant’s past persecution was on account of his membership in the PSG. However, even among those relatively few recent decisions, there are divergent interpretations. Five circuits have adopted the BIA’s interpretation of the “one central reason” standard; four circuits have applied the “one central reason” standard without mentioning the BIA’s interpretation; one circuit (the Ninth) has adopted the BIA’s interpretation but has elaborated on it; and one circuit (the Third) has rejected the BIA’s definition.

126. *J-B-N- & S-M-*, 24 I. & N. Dec. at 213 (citing H.R. Rep. No. 109-72, at 163 (2005) (quoting 65 Fed. Reg. 76588, 76592 (Dec. 7, 2000))).

127. *J-B-N- & S-M-*, 24 I. & N. Dec. at 213 (citing Webster’s II New College Dictionary 181 (1st ed. 1995)).

128. *J-B-N- & S-M-*, 24 I. & N. Dec. at 213.

129. *Id.* at 214.

130. *Id.*

131. *Id.* (citing *S-P-*, 21 I. & N. Dec. 486, 490 (B.I.A. 1996)).

132. REAL ID Act of 2005 § 101(h)(2), 8 U.S.C. § 1158(b)(1)(B) (2006).

The First, Second, Fourth, Fifth, and Tenth Circuits have plainly adopted the BIA's interpretation of "one central reason" directly from *Matter of J-B-N- & S-N*—namely, that the protected ground "cannot be incidental, tangential, superficial, or subordinate to another reason for harm."¹³³ The Sixth, Seventh, Eighth, and Eleventh Circuits have used the "one central reason" standard from the REAL ID Act but have not adopted the BIA's interpretation of "one central reason."¹³⁴

The Ninth and Third Circuits, on the other hand, have considered the standard in depth, with the Ninth Circuit choosing to adopt the BIA's interpretation and Third Circuit choosing to reject it. In *Parrusimova v. Mukasey*, the Ninth Circuit adopted the BIA's interpretation of "one central reason," but qualified it in a manner that makes it inconsistent with the BIA's interpretation.¹³⁵ The court

133. See *J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007); *Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) (holding that the petitioner did not meet the "one central reason" standard as his persecutors were primarily economically motivated); *Gou Mei Lin v. Holder*, No. 08-4536-ag, 2009 WL 3161374, at *2 (2d Cir. Oct. 2, 2009) (holding that applicant is not precluded from establishing that one of the central reasons for his persecution was the government's suspicion that he was involved in cult activities, even though he may have also been arrested for interfering in the prosecution of illegal cult activities); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009) (holding that the petitioner's religious or political beliefs were not more than incidental or tangential to the persecution he suffered); *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009) (holding that petitioner's religion was not one of the central reasons in his persecution); *Dallakoti v. Holder*, 619 F.3d 1264, 1266 (10th Cir. 2010) (holding that the applicant has not provided evidence that his or his family's political opinions were one of the central reasons for his persecution).

134. See *Lin v. Holder*, 565 F.3d 971, 976 (6th Cir. 2009) (holding that petitioner failed to provide sufficient evidence that his Falun Gong activities would be a central reason for his persecution upon his return to China); *Chen v. Holder*, 607 F.3d 511, 514 (7th Cir. 2010) (holding that a remand was warranted to determine whether petitioner's imputed political opinion was at least one central reason for her persecution); *Carmenatte-Lopez v. Mukasey*, 518 F.3d 540, 541 (8th Cir. 2008) (holding that the record lacked evidence that the petitioner was sought by armed men on account of his imputed political beliefs); *Miguel-Francisco v. U.S. Att'y Gen.*, No. 10-15351, 2011 WL 2206720, at *1 (11th Cir. June 7, 2011) (finding that acts of private violence do not rise to the level of persecution on account of a protected ground).

135. *Parrusimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2008); see also *Zhiqiang v. Holder*, 652 F.3d 1011, 1019 (9th Cir. 2011) (finding that petitioner satisfied the nexus requirement as he only had to prove that his political opinion was at least one of the central reasons for his persecution, not necessarily the dominant reason).

defined “central” as being “of primary importance.”¹³⁶ It then explained that the protected ground has to be neither the only reason for the persecution nor the most important reason for the persecution.¹³⁷ Specifically, the court explained that the standard “does not require that such reason account for 51% of the persecutor’s motivation” and that “an asylum applicant need not prove which reason was dominant.”¹³⁸ The court clarified that the motive is a central reason if the persecutor would not have harmed the applicant without this motive.¹³⁹ It went on to explain that this analysis is consistent with the BIA’s interpretation and that it is persuaded by that interpretation.¹⁴⁰ However, in reality, the Ninth Circuit’s interpretation is not as stringent as the BIA’s interpretation. Whereas the BIA held that the protected ground could not be subordinate to any other motives for persecution, the Ninth Circuit found that asylum should be granted if the applicant could prove that *but for* the motive of the protected ground, the persecutor would not have harmed the applicant.

The discrepancy in standards may be apparent in situations where but for *either* of the two motives, the persecutor would not have harmed the applicant, as required by the Ninth Circuit. For example, assume the protected ground motive was 45% of the motive behind the persecutor’s actions and the alternate factor was 55% of the persecutor’s motive. In such a case, the protected ground motive would be subordinate to the alternate motive. This situation would fail to satisfy the BIA’s interpretation; yet the Ninth Circuit might find that but for either of the motives, the persecutor would not have harmed the applicant. Therefore, despite its own claims to the contrary, the Ninth Circuit’s interpretation of “one central reason” may be inconsistent with the BIA’s interpretation.

The Third Circuit, on the other hand, has held that the BIA’s interpretation of “one central reason” (i.e. “cannot be subordinate”) was inconsistent with the plain meaning of the statute.¹⁴¹ The court

136. *Parrussimova*, 555 F.3d at 740 (citing Merriam Webster’s Collegiate Dictionary 201 (11th ed. 2003)).

137. *Parrussimova*, 555 F.3d at 740.

138. *Id.* at 740–41.

139. *Id.* at 741.

140. *Id.* (explaining that the BIA’s interpretation “points in the same direction”).

141. *Ndayshimiye v. Att’y Gen. of the U.S.*, 557 F.3d 124, 129 (3d Cir. 2009). The court used the two-step *Chevron* inquiry. First, the court determined whether Congress had directly spoken on the issue, and second, if the plain

argued the statutory language “*at least one* central reason” highlights that the persecutor may have had *more than one* central motive and that the hierarchy in the importance of reasons is irrelevant.¹⁴² It argued that the BIA contradicted itself by rejecting the principle that the protected ground must be dominant, yet mandating that the protected ground not be subordinate to any other reason.¹⁴³ The Third Circuit then discussed the Ninth Circuit’s unique interpretation of “one central reason,” finding it to be consistent with the removal of “cannot be subordinate” from the BIA’s interpretation and with Congress’s intent in enacting this amendment.¹⁴⁴ The Third Circuit, therefore, adopted the BIA’s interpretation *without* the “cannot be subordinate” clause of the interpretation.

Three primary interpretations then exist for the “one central reason” standard to satisfy the required nexus between the persecution and the causal basis for that persecution: (1) the BIA interpretation, “cannot be incidental, tangential, superficial, or subordinate to another reason for harm”; (2) the Ninth Circuit’s interpretation, that but for the protected ground, the persecutor would not have harmed the applicant; and (3) the Third Circuit’s interpretation, “cannot be incidental, tangential, or superficial to another reason for harm.”

IV. APPLYING THE “ONE CENTRAL REASON” STANDARD TO SEXUAL ORIENTATION CASES

The REAL ID Act’s “one central reason” standard has only been applied to cases in which the application for asylum was made

language of the statute was ambiguous, the court determined whether the BIA’s interpretation was reasonable. *Id.*; see also *Tellez-Restrepo v. Att’y Gen. of the U.S.*, No. 09-4139, 2011 WL 2647958, at *3 (3d Cir. July 7, 2011) (finding that petitioner had not satisfied the nexus requirement as she had not provided substantially enough evidence that her imputed political opinion was not just incidental, tangential, or superficial to her persecution.); *Abdeen v. Att’y Gen. of the U.S.*, No. 11-1265, 2011 WL 5126283, at *3 (3d Cir. Oct. 19, 2011) (holding that the applicant’s political opinion was not more than incidental or peripheral to his abduction).

142. *Ndayshimiye*, 555 F.3d at 129 (emphasis added).

143. *Id.* at 129–30 (citing *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212–13 (2007) (noting that Congress intentionally rejected a “central reason” standard, as the definition of “central” includes “having *dominant* power, influence, or control,” which could pose problems in mixed motive cases).

144. *Ndayshimiye*, 555 F.3d at 131.

in or after May 2005, when the statute was enacted.¹⁴⁵ Therefore, although various asylum applications on account of sexual orientation filed after May 2005 have reached circuit courts, none of the circuit court decisions have spoken on the issue of nexus in these applications or have applied the “one central reason” standard.¹⁴⁶

However, when such a case is before a circuit court, the court’s chosen interpretation of “one central reason” will impact—and may even determine—the outcome of the case. The BIA’s stricter interpretation of the standard may result in the denial of an asylum application, where the same case in the Third Circuit may result in the granting of an asylum application. The BIA’s interpretation is the most stringent standard, mandating that the protected ground must not be incidental, tangential, superficial, or subordinate to any other motive the persecutor may have had.¹⁴⁷ The Third Circuit requires that the protected ground not be incidental, tangential, or superficial to any other motive for the persecution, but does not require the applicant to prove that the protected ground was not subordinate to any other motive.¹⁴⁸ The Ninth Circuit requires the applicant to establish that but for his protected ground, he would not have been persecuted, which is not necessarily consistent with the BIA’s interpretation.¹⁴⁹

145. REAL ID Act of 2005 § 101(h)(2), 8 U.S.C. § 1158(B)(1)(b)(i) (2006).

146. The Third Circuit has considered an asylum application filed after May 2005, but the nexus between the petitioner’s homosexuality and persecution was not at issue in this case and the court only considered whether the petitioner had established sufficient evidence of past persecution or a well-founded fear of persecution. *Dorosh v. U.S. Att’y Gen.*, 427 F. App’x 127 (3d Cir. 2011). The Second Circuit has also considered such a case where the nexus was not at issue, and the court instead found that petitioner had not provided sufficiently specific evidence that she would be persecuted for being a lesbian in Venezuela. *Lopez-Amador v. Holder*, 649 F.3d 880 (2d Cir. 2011). The Seventh Circuit similarly denied a petition for review when applicant presented no corroborating evidence forming a credible basis for his persecution having been on account of his homosexuality. The court did not discuss the issue of nexus in detail. *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008). Finally, in a case involving a petitioner who filed for asylum on account of homosexuality after May 2005, the Eleventh Circuit considered nexus based on the previous standard that the applicant only needs to show that his persecution was motivated at least in part by the protected ground. *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 950 (11th Cir. 2010).

147. *In re J-B-N-*, 24 I. & N. Dec. at 214.

148. *Ndayshimiye v. Att’y Gen. of the U.S.*, 557 F.3d 124, 129 (3d Cir. 2009).

149. *Parrussimova v. Mukasey*, 533 F.3d 1128, 1134 (9th Cir. 2008).

It is likely that the facts of recent cases involving applications for asylum on account of sexual orientation will be analogous to those in future asylum applications; indeed, many fact scenarios are likely to repeat in future applications. But new cases will be evaluated under the new “one central reason” standard, which is currently interpreted differently by different courts. It is useful to analyze these former cases under the various interpretations in order to shed light on the potential for inconsistent outcomes. As discussed below, there are two main types of cases in which application of the different standards would lead to inconsistent outcomes. The first set of cases are those where courts have presumed, based on circumstantial evidence, that the motive for persecution was the protected ground. Although Congress intended to do away with this presumption under the REAL ID Act, the new BIA standard would go even further in denying applications where there was robust evidence that the persecution had been *on account of* the protected ground, but where it was not absolutely clear that the persecutors had been *motivated by* the protected ground. This would involve situations, for example, where there was evidence of the persecutor’s hostility towards the applicant’s protected ground but where the persecutor had not made a clear statement that he or she was persecuting the applicant *because of* this hostility. The second set of cases are those involving mixed motives, where the BIA standard would result in the denial of applications where it was not clear that the protected ground motive was dominant over the alternate motive.

A. Cases Raising a Presumption of Motive

One set of cases that will result in inconsistent outcomes with the application of varying interpretations of “one central reason” are those in which circumstantial evidence has raised a presumption of motive based on the applicant’s sexual orientation. The Third, Ninth, and Eleventh Circuits have considered cases in which the applicant’s petition for review was granted even though the court could not determine an alternative legitimate purpose for the government’s actions towards the individual. The courts saw these situations as triggering a rebuttable presumption that if no other reason for persecution could be determined, the persecution must have been motivated by the applicant’s sexual orientation.

For instance, courts have raised this presumption when there was no reason to believe that the applicant’s criminal activity or other

conduct provided a legitimate basis for the government's actions.¹⁵⁰ Congress specifically addressed this judicially-made doctrine in the House Conference Report on the REAL ID Act.¹⁵¹ It explained that courts violate precedent by presuming a political motive behind the government's actions.¹⁵² The House Report—supported unanimously by the Senate—argued that such a presumption improperly shifts the burden to the government to provide a legitimate purpose.¹⁵³ In response to national security concerns, Congress was attempting to raise the bar for applicants in such cases to affirmatively establish the persecutor's motive, rather than allowing them to rely on the rebuttable presumption. With this change, Congress ensured that courts could no longer utilize a rebuttable presumption, making the cases more difficult to adjudicate.

Prior to the REAL ID Act, there were several important cases involving sexual orientation as the protected ground that had employed the rebuttable presumption. Considering these cases anew in light of the requirements introduced by the REAL ID Act illustrates how application of the varying interpretations of “one central reason” would now result in inconsistent outcomes.

The Ninth Circuit decided one such case in 2005. The case, *Karouni v. Gonzales*, involved an applicant from Lebanon applying for asylum on account of his homosexuality.¹⁵⁴ The record provided that the Lebanese government condemned homosexuality and that Hizballah, which largely controlled the territory in which the applicant resided, applied a version of Islamic Law under which homosexuality is punishable by death.¹⁵⁵ Although Karouni had never

150. *Id.* (citing *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) (“In this case, Singh was not the target of any legitimate government prosecution. As in *Blanco-Lopez*, ‘[w]e find no evidence in the record . . . that an actual, legitimate, criminal prosecution was initiated against [the applicant.]’”)); *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (“We conclude that the incident . . . was not in furtherance of a criminal prosecution, but rather was one of governmental persecution based on Blanco-Lopez's perceived political beliefs.”); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (“When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity . . . the most reasonable presumption is that the government's actions are politically motivated.”).

151. H.R. Rep. No. 109-72, at 163 (2005).

152. *Id.*

153. *Id.*

154. *Karouni v. Gonzales*, 399 F.3d 1163, 1167 (9th Cir. 2005).

155. *Id.* (citing Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, 1997 Country Report on Human Rights Practices-Lebanon (1998); Jin S.

informed his family of his homosexuality, he had spent time with his cousin, Khaleil, who was also gay and whose family had discovered his sexual orientation.¹⁵⁶ Khaleil was shot in the anus at his apartment in 1984 by Hizballah, and, after surviving the injuries, was shot to death in his apartment by Hizballah in 1986.¹⁵⁷ Karouni was also interrogated at his apartment in 1984 by two men dressed in militia garb who identified themselves as members of the Amal Militia, regarding whether he had a homosexual relationship with a specific man.¹⁵⁸ Karouni fled to the United States in 1987.¹⁵⁹ Various other homosexuals with whom Karouni was acquainted were also jailed, beaten, and interrogated.¹⁶⁰

Employing the rebuttable presumption, the Ninth Circuit found that because asylum applicants do not bear the burden of establishing the exact motive of their persecutors, circumstantial evidence, or “obvious signs” connecting the persecutory acts to the alleged persecutors’ motives, can be sufficient to establish that the persecution was undertaken on account of the protected ground.¹⁶¹ The court found that the shooting of Khaleil in the anus was, therefore, *res ipsa loquitur* evidence that the persecutors shot him because he was a homosexual.¹⁶² The fact that Karouni’s cousin was persecuted on account of his sexual orientation was circumstantial evidence that Karouni’s interrogation was on account of his sexual

Park, Comment, *Pink Asylum: Political Asylum Eligibility of Gay Men and Lesbians Under U.S. Immigration Policy*, 42 UCLA L. Rev. 1115, 1143–44 (1995)).

156. *Karouni*, 399 F.3d at 1168.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1174 (citing *Ali v. Ashcroft*, 394 F.3d 780, 785 (9th Cir. 2005) (“We have repeatedly held that asylum applicants bear neither the unreasonable burden of establishing the exact motives of their persecutors nor the burden of showing that their persecutors were motivated *solely* ‘on account of’ one of the protected grounds.”)); *see also* *Deloso v. Ashcroft*, 393 F.3d 858, 864 (9th Cir. 2005) (“An applicant need not present direct evidence of a persecutor’s motives if there is compelling circumstantial evidence”); *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) (“As long as the applicant produces evidence from which it is reasonable to believe that the persecutor’s action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum.”); *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000) (“Because it is so difficult to prove motives with any precision, the Supreme Court teaches that an applicant does not have to provide direct evidence that his persecutors were motivated by one of the protected grounds; instead, compelling circumstantial evidence is sufficient.”).

162. *Karouni*, 399 F.3d at 1174.

orientation and that he could be subjected to the same level of persecution as Khaleil.¹⁶³

The analysis and outcome in such a case may change with the REAL ID Act's "one central reason" standard. Congress has clearly precluded the use of a presumptive motive based on the lack of other evidence.¹⁶⁴ The various interpretations of that standard therefore become centrally important in determining the outcome of a case like Karouni's.

Under the Third Circuit's interpretation of "one central reason"—that the reason for persecution "cannot be incidental, tangential, or superficial to another reason for harm"—the outcome of this case is unlikely to change. Hizbollah shot and killed Karouni's gay cousin.¹⁶⁵ Additionally, they specifically questioned Karouni on his homosexuality, illustrating that his sexual orientation was central to their motive for persecuting him.¹⁶⁶ Finally, their treatment of other homosexuals only confirms that it would not be abnormal for them to target him for his sexual orientation.¹⁶⁷ Therefore, the court does not need to utilize the presumption arising from a lack of an alternative motive. Sufficient affirmative evidence of the motive of the protected ground exists.

Similarly, applying the Ninth Circuit's *but for* interpretation is unlikely to change the outcome of the case. Considering the specific targeting of Karouni and Khaleil, as well as the fact that the questioning was directed towards Karouni's sexual orientation, the Ninth Circuit's analysis would find that it is unlikely that *but for* his homosexuality, he would have been targeted.

However, the case may not have the same outcome if the BIA's interpretation—"cannot be incidental, tangential, superficial, or subordinate to another reason for harm"—were applied. In this case, the Ninth Circuit had found that the evidence in Karouni's favor was "circumstantial" and not necessarily representative of the persecutor's exact motive.¹⁶⁸ Under the BIA's interpretation of the standard, it would be difficult for the applicant to establish that his sexual orientation was not subordinate to any other motive without being able to confirm both that Hizbollah did not have any alternate

163. *Id.*

164. H.R. Rep. No. 109-72, at 164 (2005).

165. *Karouni*, 399 F.3d at 1168.

166. *Id.*

167. *Id.*

168. *Id.* at 1174.

motives for their actions and that Karouni's sexual orientation was, in fact, the exact motive for the actions. Therefore, in a case with such targeted persecution and circumstantial evidence, the application of the three standards may result in inconsistent outcomes.

On the other hand, a case with substantial corroborating evidence of the persecutor's motive may not require the use of a presumption of motive and may result in a consistent outcome in favor of the applicant under all three interpretations. One such case was decided by the Ninth Circuit in 2005 using circumstantial evidence to raise a presumption of motive. The case, *Boer-Sedano v. Gonzales*, involved a Mexican applicant who had been stopped by a police officer on nine occasions.¹⁶⁹ The officer informed Boer-Sedano on the first occasion that he was being held for being gay, and on other occasions, drove him to a dark location, forcing Boer-Sedano to perform oral sex on him.¹⁷⁰ The officer threatened him in various ways and on one occasion mentioned that by killing Boer-Sedano, he would not be committing murder but "cleaning up society."¹⁷¹ Additionally, in 1989, the Mexican police conducted multiple raids, including of Boer-Sedano's workplace, where he was asked if he was a homosexual but denied his homosexuality to avoid arrest.¹⁷²

The court found that Boer-Sedano's experience, which amounted to persecution, was on account of his homosexuality. In describing its reasoning, the court relied on the evidence that the officer only arrested Boer-Sedano after asking whether he was gay and that the officer's words during the assaults illustrated that he was motivated by Boer-Sedano's sexual orientation.¹⁷³ Citing *Karouni*, the court held that when no evidence of a legitimate purpose for the government's harassment exists, a presumption that the motive is on account of a protected ground arises.¹⁷⁴

This case presented such strong corroborative evidence of the persecutor's motive that even without using a presumption, the outcome under any of the interpretations of "one central reason" would likely be in the applicant's favor. Applying the Third Circuit's interpretation, sufficient direct and circumstantial evidence of the officer's repeated references to his homosexuality illustrate that Boer-

169. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1086 (9th Cir. 2005).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1089.

174. *Id.* (citing *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)).

Sedano's sexual orientation was not incidental, tangential, or superficial to any alternative motives.

Similarly, applying the Ninth Circuit's interpretation, it is unlikely that *but for* Boer-Sedano's sexual orientation, this specific officer would have repeatedly targeted him and subjected him to sexual abuse.

All the evidence in this case, from the timing of the officer's actions to the officer's statements, relates to Boer-Sedano's homosexuality. Therefore, even if an alternative motive existed for the officer's actions, the court would be unlikely to find that Boer-Sedano's homosexuality was subordinate to any alternate motives for his persecution, as mandated by the BIA's interpretation of "one central reason." Even under the strict BIA standard, Boer-Sedano would have been able to prove persecution.

However, in cases without as strong corroborating evidence as *Boer-Sedano* and without the ability to use such a presumption of motive, courts are not likely to reach the same outcome under each of the three interpretations. Under the Third and Ninth Circuit interpretations of "one central reason," the presumption of motive may not be essential to the outcome of the case. With some evidence of the persecutor's knowledge and disapproval of the applicant's sexual orientation, the applicant is likely to be able to establish that his sexual orientation was not incidental, tangential, or superficial to any alternative motives, or that *but for* his sexual orientation, he would not have been persecuted, allowing him to be granted asylum in the Third and Ninth Circuits respectively. However, the BIA's interpretation of "one central reason" would require the applicant to compare the protected ground to other potential motives and prove that the persecution on the basis of PSG is not subordinate to other reasons for persecution. When no evidence of other motives exists, though, this requirement would place an undue burden on the applicant. It is therefore likely that the same applicant, who would have been granted asylum in the Third and Ninth Circuits, would be denied asylum by any court applying the BIA's interpretation.

One case where the court had not been as confident that the protected ground was the primary motive—but nonetheless found it sufficient that the protected ground was at least a part of the reason—provides another illustration of the importance of a uniform standard in the absence of the rebuttable presumption. *Ayala v. U.S. Attorney General*, decided in 2010 in the Eleventh Circuit, makes clear that in the absence of a presumption of motive, the outcome of

this sort of case may depend on the interpretation that the court adopts.¹⁷⁵ Although the asylum application in *Ayala* was filed after May 2005, the court did not use the new “one central reason” standard in its decision.

Ayala claimed that in December 2004, he was assaulted after leaving a gay nightclub by several Venezuelan police officers who hit him, robbed him, handcuffed him, detained him in their car, placed a hood over his head, and forced him to perform oral sex on one of the officers.¹⁷⁶ The officers threatened to arrest him for being homosexual and threatened to plant drugs in his house.¹⁷⁷ The IJ and BIA found that Ayala had failed to prove that he was sexually assaulted on account of his sexual orientation; apparently, the IJ and BIA did not consider the officers’ slurs to constitute proof of the reason for the assault, and in fact failed to mention the slurs all together.¹⁷⁸ The government also submitted evidence that discrimination against homosexuals had decreased in Venezuela.¹⁷⁹

In this case, the court did not utilize the “one central reason” standard even though the application for asylum was filed following the enactment of the REAL ID Act. Instead, the court referred to the prior standard, requiring that the applicant show that the persecution was motivated at least in part by a protected ground.¹⁸⁰ The court found that the BIA had failed to provide a “reasoned explanation” that would explain the persecution if the officers had *not* been motivated by Ayala’s homosexuality. It held that the BIA had erred in its finding that the harm was the result of rogue acts of policemen and was not associated with prejudice on account of Ayala’s homosexuality.¹⁸¹

Because the applicant provided some evidence that the persecution had been motivated by Ayala’s sexual orientation, the court placed the burden on the IJ to provide an alternate legitimate explanation for the persecution. In *Karouni* and *Boer-Sedano*, the Ninth Circuit was confident that the applicant’s sexual orientation was the primary, and possibly, sole motivation for the persecution.

175. *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 949 (11th Cir. 2010).

176. *Id.* at 943.

177. *Id.*

178. *Id.* at 950.

179. *Id.* at 946.

180. *Id.* at 949 (citing *De Santamaria v. U.S. Att’y Gen.*, 525 F.3d 999, 1007 (11th Cir. 2008)).

181. *Ayala*, 605 F.3d at 950–51

However, in this case, the court emphasized that Ayala's sexual orientation was only *at least in part* the motivation for his harm.¹⁸²

Evaluating this same case under the BIA's "cannot be subordinate" interpretation of the "one central reason" standard, however, a court may not rule for the applicant. The persecution occurred on a single occasion, unlike *Boer-Sedano*, in which it occurred on nine occasions. Therefore, the evidence may not be sufficient to establish that Ayala's homosexuality played a dominant role over all other motives in the persecution. It is, however, sufficient to illustrate that his homosexuality played *at least one* central role in the harm.

Additionally, unlike in *Karouni* and *Boer-Sedano*, the government in this case provided evidence that there was decreasing discrimination against homosexuals in Venezuela, which could have contradicted the notion that the persecution was motivated by homophobia.¹⁸³ This lower level of corroborating evidence than in *Boer-Sedano* could preclude courts applying the BIA interpretation from finding that Ayala's sexual orientation was not subordinate to any alternate motive for the persecution. In cases with overwhelming evidence of the persecutor's motive, no question is raised that the protected ground is the primary motive. But in this case, without overwhelming evidence, Ayala would be forced unjustifiably to compare the motive of the protected ground to other potential motives, even in situations where no evidence of such alternate motives exists.

Application of the Third Circuit's interpretation, however, may result in a different outcome in this case. The court may have considered Ayala's testimony of the officers threatening to arrest him for his homosexuality and their sexual assaults as sufficiently strong evidence to show that the protected ground was not simply incidental, tangential, or superficial to any alternative motive. Likewise, the fact that Ayala was arrested after leaving a gay nightclub would further

182. *Id.* at 950. Ayala was also applying for asylum on account of his political opinion, but in the evaluation of this specific incident as evidence of his persecution, the court focused on his sexual orientation as the protected ground. Therefore, it does not appear that the "at least in part" standard was used with regard to political opinion as the alternate motive for this specific incident.

183. *Id.* at 946.

strengthen the finding that *but for* his homosexuality, he would not have been arrested, meeting the Ninth Circuit's threshold.¹⁸⁴

In the past, courts were able to presume that without evidence of a legitimate alternate motive for the harm, the motive for the persecution was the protected ground. This presumption is no longer valid under the REAL ID Act. In cases with strong corroborating evidence of the persecutor's motive, such as *Karouni* and *Boer-Sedano*, the outcome is unlikely to change without this presumption. The evidence in these cases carries enough weight to establish that the applicant's sexual orientation was the primary and dominant motive for the persecution. However, in cases such as *Ayala*, the presumption was more significant to the outcome of the case. In that case, the court did not find the evidence that the persecutor was motivated by the applicant's sexual orientation to be sufficient. Since no evidence of alternate motives existed, however, the outcome of the case under the new law would depend on which court was hearing the case. The Third and Ninth Circuit interpretations of the standard would likely result in the court finding that the applicant's sexual orientation was *at least one* central reason to his persecution. However, the BIA interpretation would require the court to evaluate any other potential motives that existed in order to make a comparison of whether the applicant's homosexuality was subordinate to these motives. Therefore, the varying interpretations are likely to alter the court's analysis and decisions in these cases without using a presumption of motive.

This inconsistency in outcomes between circuits may cause applicants to forum shop, choosing where to enter the country and file their application based on where they expect to receive the most lenient standard in the adjudication of their case. This would cause unnecessary strain on certain ports of entry and create incentives for poorly-designed, reactionary law-making. More significantly, the inconsistency will result in fundamental unfairness, as applicants would receive varying treatment based on the circuit in which they filed their asylum application but without having a voice in the

184. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005) (holding that the fact that the police only arrested Boer-Sedano after seeing him with a friend, whom he concluded was Boer-Sedano's partner, indicates that he had been motivated by Boer-Sedano's sexuality); *Borja v. INS*, 175 F.3d 732, 735-36 (9th Cir. 1999) (holding that the fact that petitioner was only assaulted by members of a violent, anti-government group after telling them that she was opposed to their practices established past persecution on account of a protected ground).

democratic process in the circuit in which their applications are decided. As aliens who do not have the opportunity to effect change in the process that determines their future, these applicants should, at the very least, be treated consistently by the courts, and not have their fates determined by the mere chance of which circuit's jurisdiction they happened to fall under when they entered the country.

B. Cases Presenting the Possibility of Alternate Motives

Another set of cases where the “one central reason” test is likely to play a major role are cases of mixed motives, where the IJ must discern whether, even with another established motive for the persecution, the sexual orientation motive was *central* to the persecution. With the new standard introduced by the REAL ID Act, these cases will require a deeper analysis of the evidence, as the motives will have to be compared for their impact on the persecutor. This is especially true under the BIA's interpretation of the standard.

One such mixed motive case decided by the Second Circuit in 2006, *Morett v. Gonzales*, involved an applicant from Venezuela who experienced sexual assault, harassment, and extortion by several police officers.¹⁸⁵ Morett was first sexually assaulted by a police officer in his car, while other officers raped his friends in a police van. The officers assaulted Morett and his friends after witnessing two of Morett's friends kissing in his car. All of the officers used homophobic slurs during the assaults.¹⁸⁶ A police officer in a supervisory position then launched a five-month surveillance and intimidation campaign against Morett, involving threats of sexual assault, continuous phone calls, and extortion of a large sum of money.¹⁸⁷ The court explained that the officer subjected him to this treatment after seeing him “dressed in a flamboyantly gay manner.”¹⁸⁸

In this case, the IJ had found that these incidents were isolated criminal acts, motivated by the officers' desire to extort money from Morett, rather than persecution of Morett.¹⁸⁹ On review, the Second Circuit used a standard that persecution on account of a protected ground “does not mean persecution *solely* on account” of

185. *Morett v. Gonzales*, 190 F. App'x 47, 48 (2d Cir. 2006).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

that ground.¹⁹⁰ The Court found that Morett had experienced past persecution, and, in conjunction with various reports indicating a pattern and practice of abuse by the police against homosexuals in Venezuela, it determined that this persecution was on account of his homosexuality.¹⁹¹

Using the negative standard that the protected ground is not required to be the sole motive for the persecution, the court was able to find easily that the persecution had been undertaken on account of the protected ground.¹⁹² The court established that Morett's homosexuality played some role in the persecution based on evidence of homophobic epithets and the fact that he and his friends were targeted only after the recognition of their sexual orientation. However, where the persecutor has a clear alternative benefit to gain from the persecution—in this case, monetary gain in the form of extortion—the REAL ID Act's new standard of "one central reason" would require substantial analysis and corroborating evidence. It would be insufficient to illustrate that the applicant's homosexuality played *some role* in the persecution; the applicant would need to prove that it played a *central role* in the persecution.

Under the BIA's interpretation of "one central reason," the applicant would have the burden of establishing that his sexual orientation was not incidental, tangential, superficial, or subordinate to any alternate motive.¹⁹³ The evidence would have to establish that the police officers were *more* highly motivated by the applicant's homosexuality in their persecution than by the desire to extort money in order for the sexual orientation motive to not be subordinate to the alternate motive. This level of corroborating evidence may be unduly burdensome on the applicant. Regardless of the evidence of sexual assault and homophobic epithets, it would require something just short of a clear statement by the persecutor that his motive was the applicant's sexual orientation and that the monetary gain was only an incidental benefit.

The Third Circuit's approach to "one central reason" without the use of "cannot be subordinate" would make the applicant's efforts to prove persecution on the basis of sexual orientation more plausible

190. *Id.* (citing *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) ("the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution")).

191. *Morett*, 190 F. App'x at 49.

192. *Id.* at 48.

193. *See In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212–13 (2007).

in a case like *Morett*. The applicant has produced substantial evidence that the persecution correlated with the officer's discovery of the applicant's homosexuality and that the persecution was accompanied by clear evidence of the officer's negative view of homosexuality.¹⁹⁴ However, the court would not have to compare this evidence to evidence of the officer's desire to extort money.

Under the Ninth Circuit's approach to "one central reason," the applicant would have to establish that the officer chose to persecute him *because of* his homosexuality. Whether the desire to extort money then became a comparable motive would be irrelevant. In a case such as *Morett*, if the applicant can establish that he was only approached by the officers after their discovery of his homosexuality—as *Morett* did—he is likely to succeed on his claim that *but for* his homosexuality, the officers would not have targeted him.

In another mixed motive case decided by the Ninth Circuit in 2005, *Pozos v. Gonzales*, the court also did not require a very high threshold of evidence to establish that the applicant's persecution had been on account of his homosexuality.¹⁹⁵ This case involved an applicant from Mexico who had been raped, repeatedly beaten, and forced into prostitution, compelling the conclusion that he had experienced past persecution.¹⁹⁶ The court acknowledged that regardless of whether Pozos was homosexual, his perceived or imputed homosexuality was sufficient for a PSG claim.¹⁹⁷ The court held that, contrary to the IJ's determination, the persecution Pozos experienced was on account of his homosexuality.¹⁹⁸ The court acknowledged that other factors may have played a role in the harm—albeit without discussing what those factors were—but that the persecution was motivated at least in part by Pozos' perceived sexual orientation.¹⁹⁹ It found that the persecutor's statements were sufficient circumstantial evidence that he was motivated by Pozos'

194. *Morett*, 190 F. App'x at 48.

195. *Pozos v. Gonzales*, 141 F. App'x 629, 631 (9th Cir. 2005).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing *Hoque v. Ashcroft*, 367 F.3d 1190, 1198 (9th Cir. 2004) ("A persecutor may have multiple motives for inflicting harm on an asylum applicant. As long as the applicant produces evidence from which it is reasonable to believe that the persecutor's action was motivated, at least in part, by a protected ground, the applicant is eligible for asylum.")).

sexual orientation, even though his statements may not have been explicit.²⁰⁰

However, it is unlikely that such a case—where the existence of other motives is possible but it is unclear what those motives are and how strong a role they played in the persecution—would have had the same outcome if the court had applied the BIA’s interpretation of “one central reason.” With only the circumstantial evidence of the persecutor’s statements, which are not express in regards to his motive, establishing that the protected ground motive was not subordinate to any other motives would prove very difficult.

Using the Third Circuit interpretation of “one central reason,” however, it is more likely that a court would reach the same outcome as in the actual case. Whether the applicant can establish that the protected ground motive was not incidental, tangential, or superficial to other motives would depend on the amount of direct or circumstantial evidence the applicant could produce regarding the connection between the persecution and the protected ground. In the actual case, the court appeared confident that the persecutor’s statements constituted sufficient circumstantial evidence to hold that the persecution was at least in part on account of Pozos’ homosexuality. For this level of circumstantial evidence to be sufficient to establish that Pozos’ homosexuality was a “central reason” for the persecution under the BIA’s interpretation, however, the court would have been required to undertake a much deeper analysis of the evidence and would perhaps have required the support of country reports indicating a pattern of this kind of persecution against homosexuals in Mexico.

Similar requirements apply to the Ninth Circuit’s threshold that *but for* Pozos’ sexual orientation, he would not have been persecuted. The court would have to consider whether the persecutor’s statements indicate that he targeted Pozos *because of* his sexual orientation, and it would have to be convinced that his sexual orientation was not just an additional factor contributing to the persecution.

The inconsistency in outcomes of applying the various interpretations of “one central reason” is most likely to be apparent in cases of mixed motive where the applicant claims to have been

200. *Pozos*, 141 F. App’x at 631 (citing *Gafoor v. INS*, 231 F.3d 645, 651 (9th Cir. 2000) (“[A]n applicant need not present direct evidence of a persecutor’s motives if there is circumstantial evidence.”)).

persecuted on account of the protected ground by being criminally *prosecuted* for his activities.²⁰¹ This set of mixed motive cases are of particular concern as they involve state actors persecuting individuals under color of law. As a result, it is even more difficult in these cases than in ordinary mixed motive cases for individuals to prove that the treatment they received was not an authorized repercussion of violating the law, but was in fact persecution on account of their protected ground.

Kimumwe v. Gonzales, decided in the Eighth Circuit in 2005, is an example of such a case.²⁰² In this case, the court found that rather than having been persecuted on account of his sexual orientation, Kimumwe had been punished for “luring” heterosexuals into sexual relationships.²⁰³ The Court found that there was therefore insufficient evidence of persecution of homosexuals in Zimbabwe.²⁰⁴

Kimumwe was first expelled from school at the age of twelve for allegedly luring another male student into having sex with him, as it was illegal to have sex at the school.²⁰⁵ Then at the age of sixteen, while intoxicated, he had sex with another male student in college.²⁰⁶ The other student reported the incident to school officials

201. Federal circuit courts have universally adopted a clear distinction between *prosecution* and *persecution*. The legitimacy of the law under which one is prosecuted is determinative of whether the prosecution constitutes persecution. Circuit courts have used two alternative methods to find a law’s legitimacy: either that the law is generally applicable to all citizens or that the state fairly administers the law in question. See Michael English, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 Okla. L. Rev. 109, 125–26 (2007); see also Saleh v. U.S. Dep’t of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (holding that Islamic law applies to all Yemeni Muslims, the majority of the population, thus precluding the prosecution from rising to the level of persecution); Qudus v. INS, No. 297-2815, 1998 WL 60399, at *3 (7th Cir. Feb. 10, 1998) (“Prosecution for violation of laws of general applicability does not amount to persecution . . .”); Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004) (holding that applicant had not produced evidence that the criminal charges against him were improperly motivated or that he would receive an unfair trial). However, prosecution does rise to the level of persecution when the government utilizes the prosecution to mask its intent to persecute. In mixed motive cases, where the government may have had one arguably legitimate motive for its prosecution, but another illegitimate motive, the illegitimate motive may cause the prosecution to rise to the level of persecution. English, *supra*, at 140–41.

202. *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005).

203. *Id.* at 322.

204. *Id.* at 323.

205. *Id.* at 322.

206. *Id.*

by claiming that Kimumwe “had done something wrong to him.”²⁰⁷ Kimumwe was arrested and claimed that he was told by the police at one point that “it’s illegal to be gay in public,” but also claimed that he did not know why he was arrested.²⁰⁸ He was detained for two months without any criminal charges and released due to a bribe from the head of the orphanage where he was raised. The police gave Kimumwe a letter stating that he had been charged with sodomy and sexual assault and was released due to a lack of evidence.²⁰⁹ As a result, the court found that the government’s actions were not based on Kimumwe’s homosexuality, but rather on his alleged sexual misconduct, even if the punishment was extreme enough to rise to the level of persecution.²¹⁰

Additionally, Kimumwe faced other instances of harassment in Zimbabwe. Authorities chased him and subjected him to disparaging remarks. Neighbors spit on him, kicked him, and threw stones at him. Villagers beat him and even, on one occasion, shocked him with an electric wire.²¹¹ The court found that harassment by local authorities and private parties did not rise to the level of persecution by the government.²¹²

Other extensive evidence of the government’s opposition to homosexuality was also considered by the court to be insufficient to establish that Kimumwe had a well-founded fear of persecution.²¹³ In 1995, Robert Mugabe, Zimbabwe’s President, referred to homosexuals as “sodomites and perverts” with no rights, and later claimed that homosexuals were “worse than dogs and pigs.”²¹⁴ Mugabe also promised to do everything possible to combat homosexuality.²¹⁵ The court found that this evidence in the record still did not illustrate that Kimumwe had faced persecution because, as it said, “persecution is an extreme concept”; the court instead found that he was arrested for illegal sexual conduct.²¹⁶

Applying the “one central reason” standard may result in a different outcome, depending on the interpretation used. The case is

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 322–23.

211. *Id.* at 322.

212. *Id.* (citing *Salked v. Gonzales*, 420 F.3d 804, 808–09 (8th Cir. 2005)).

213. *Kimumwe*, 431 F.3d at 322.

214. *Id.* at 324 (Heaney, J., dissenting).

215. *Id.*

216. *Id.* at 323 (citing *Salked*, 420 F.3d at 808–09).

likely to have the same outcome under the BIA's interpretation of the new standard. The Eighth Circuit used a similar analysis to the BIA's interpretation of the "one central reason" standard. The BIA's standard would require that Kimumwe's homosexuality not be a subordinate motive to his sexual misconduct in his arrest. Given the facts of the case, such a standard would almost certainly have been prohibitively complicated. The evidence suggests that Kimumwe violated established rules or laws at various points in his life, and that he was either arrested or expelled from school as a result. These prior instances would be difficult to explain away, and it is likely that a court would see them as casting doubt on the allegation that Kimumwe's arrest was a form of persecution rather than simply a legitimate reaction to criminal activity.

Moreover, for his case to succeed under the BIA's interpretation, Kimumwe would have to present overwhelming evidence that his arrest was baseless and that the government targeted him for his homosexuality. The corroborating evidence, such as the uncharged detention by the police, the villagers' actions, and Mugabe's comments regarding homosexuals, illustrate that Kimumwe's homosexuality may have been more than just incidental, tangential, or superficial to his arrest for sexual conduct. But proving that his homosexuality was not subordinate to the "legitimate" motive seems nearly implausible.

Under the Third Circuit's interpretation of "one central reason," however, it would be viable for an applicant like Kimumwe to establish that his homosexuality and sexual conduct were central reasons for his persecution. In this case, Kimumwe's homosexuality appeared to be heavily intertwined with his actions being labeled as sexual misconduct. This appearance was supported by substantial evidence of the government's intention to target homosexuals. Thus, it is unlikely that Kimumwe's homosexuality may be considered incidental, tangential, or superficial to the alternative motive for his persecution, even if his sexual conduct provided an alternative motive for the government's actions.

The Ninth Circuit's interpretation—that persecution was established if Kimumwe could prove that he would not have been arrested *but for* his homosexuality—would also more plausibly allow him to meet the "one central reason" standard. After his arrest at the age of sixteen, the police released him for a lack of sufficient evidence. The police had not provided strong corroborative evidence that he had engaged in sexual misconduct at the outset, and the officers arresting him stated explicitly that they were arresting him for being gay. It is

questionable whether they would have arrested him *but for* their suspicion that he was a homosexual. Therefore, the court's analysis under the Ninth Circuit interpretation may lead it to conclude that his homosexuality did play a central role in his detention.

As these cases illustrate, in instances of mixed motive, the outcome may be determined by how much evidence is available to indicate the role of an alternative motive for the persecution. Under previous standards, the court focused on whether the protected ground played some kind of role in the persecution.²¹⁷ Under the BIA's interpretation, however, the motive based on sexual orientation must not be subordinate to any alternative motives. Consequently, the applicant will bear the burden of proving that sexual orientation was the dominant motive for the persecution. Under the Third and Ninth Circuits' interpretations, the applicant will not have to provide this level of comparison; however, the applicant will still bear the burden of providing substantial evidence that his sexual orientation was at least one of the central motives for his persecution.

V. ADOPTING A UNIFORM INTERPRETATION OF THE STANDARD

As demonstrated by their application above, the varying interpretations of "one central reason" are likely to produce inconsistent outcomes of cases. The BIA's interpretation is the most stringent standard, mandating that the protected ground must not be incidental, tangential, superficial, or subordinate to any other motive the persecutor may have had.²¹⁸ The Third Circuit requires that the protected ground not be incidental, tangential, or superficial to any other motive for the persecution, but does not require the applicant to prove that the protected ground was not subordinate to any other motive.²¹⁹ The Ninth Circuit requires the applicant to establish that *but for* his protected ground, he would not have been persecuted, which is inconsistent with the BIA's interpretation.²²⁰

The Third Circuit's interpretation is the most consistent with the language and congressional intent of the statute, and is likely to produce the most consistent outcomes among cases. The Ninth

217. *Morett v. Gonzales*, 190 F. App'x 47, 48 (2d Cir. 2006); *Pozos v. Gonzales*, 141 F. App'x 629, 631 (9th Cir. 2005).

218. *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (B.I.A. 2007).

219. *Ndayshimiye v. Att'y Gen. of the U.S.*, 557 F.3d 124, 129 (3d Cir. 2009).

220. *Parrussimova v. Mukasey*, 533 F.3d 1128, 1134 (9th Cir. 2008).

Circuit's interpretation mandates an analysis similar to the Third Circuit's. However, it lacks the specificity of the Third Circuit's interpretation, which describes what "one central reason" entails. The BIA's interpretation, on the other hand, places an undue evidentiary burden on the applicant.

Faithful adherence to the language of the statute would suggest that the Third Circuit's interpretation of "one central reason" should be adopted. The phrase "*at least one* central reason" indicates that the persecutor may have had more than one central reason for his persecution. Thus, the Third Circuit's interpretation of the phrase—requiring that sexual orientation is not incidental, tangential, or superficial to an alternative motive for persecution—is consistent with the standard that the protected ground must have been a central motive. However, the phrase does not indicate that the motive of the sexual orientation must be compared to alternative motives for a determination of whether it is subordinate or dominant to them. As the Third Circuit recognized, the wording of the statute appears to render irrelevant any comparison of one possible motive to other possible motives in order to determine which is dominant.²²¹

The congressional purpose behind the new standard provides further support for the argument that the Third Circuit's standard should be adopted universally. In the House Conference Report on the REAL ID Act, Congress explained that terrorists have abused the asylum system, pointing to the fact that two of the plotters of the World Trade Center bombing had fabricated false political asylum stories to gain admission to the U.S.²²² House Judiciary Committee Chairman Jim Sensenbrenner, who introduced the Act, stated that "[t]he goal of the REAL ID Act is straightforward: it seeks to prevent another 9/11-type attack by disrupting terrorist travel."²²³ Clearly, then, Congress formulated this section of the REAL ID Act to respond to terrorism.²²⁴

221. *Ndayshimiye*, 557 F.3d at 129 (holding that "[t]he mixed-motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate.").

222. H.R. Rep. No. 109-72, at 160 (2005) (citing Thomas R. Eldridge et al., Nat'l Comm'n on Terrorist Attacks Upon the U.S., 9/11 and Terrorist Travel 99 (2004)).

223. Press Release, H. Comm. on the Judiciary, Sensenbrenner Introduces Terrorist Travel Legislation (Jan. 26, 2005) *available at* http://www.lwvill.org/downloadimm/lwvil_immigration_study_second_packet_us_house_of_rep_judici.pdf.

224. H.R. Rep. No. 109-72, at 161.

In passing this legislation, Congress was specific about the class of people that it wanted to prohibit from obtaining legal status in the United States. Sexual minority asylum-seekers do not fall within that class, and to lump them in with the terrorists in fact targeted by the legislation is an impermissible expansion of the scope of the language and intent of the statute. National security concerns give rise to a temptation to make all immigration laws more stringent. But submitting to this temptation at the expense of asylum seekers who have been persecuted and whose lives are endangered due to their sexual orientation is not only an inappropriate avenue for addressing national security concerns, it is an ineffective and a cruel one.

The U.S. government made a commitment to the concept of *non-refoulement* when it signed on to the Protocol Relating to the Status of Refugees.²²⁵ This Protocol bound the U.S. to Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees, which states that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²²⁶ Although the Convention states that non-refoulement does not apply to “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is,” Congress clarified in the Conference Report which class of refugees it may have reasonable grounds to consider to be a threat to national security. Applicants seeking asylum on account of sexual orientation do not generally fall in this class. The fact that the BIA’s interpretation of the REAL ID Act would deter applicants with histories comparable to Karouni and Ayala—who were not considered to be threats to national security—from being granted asylum is indicative of the fact that the BIA’s interpretation extends far beyond the scope of this Article 33 provision.

Importantly, Congress had also found that evidentiary standards were not consistent across federal appellate courts, which resulted in differing outcomes depending on the court that was hearing the case.²²⁷ The fact that Congress highlighted this discrepancy reinforces the importance of adopting a uniform

225. See Protocol, *supra* note 59.

226. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

227. H.R. Rep. No. 109-72, at 161.

interpretation of the “one central reason” standard to fulfill the purposes of the REAL ID Act.

In addressing the specific standard, Congress explained that it was targeting cases in which a terrorist could falsely claim that his home government is accusing him erroneously of being a terrorist.²²⁸ To overcome the evidentiary issues in these cases, Congress specified that the “one central reason” standard would require aliens who allege to have been erroneously identified as terrorists to bear the same burden as other applicants: offering direct or circumstantial evidence of the motive.²²⁹

The Conference Report does not suggest that the alien should be required to prove that the evidence, whether direct or circumstantial, indicates unequivocally that the protected ground was not subordinate to any alternate motives for the persecution. Rather, the Conference Report appears to be raising the standard in an effort to prevent individuals actually seeking admission to the United States for reasons other than gaining admission based on a fabricated or exaggerated protected ground. Whether or not the protected ground is subordinate to alternative motives for the applicant’s persecution, however, appears to be irrelevant to the congressional purpose. So long as the applicant can establish with sufficient evidence that the protected ground was not incidental, tangential, or superficial to another motive, but was instead central to his persecution, it seems that Congress intended for the applicant to receive asylum.

This determination of which motive is subordinate is particularly irrelevant when the asylum claim is based on the applicant’s sexual orientation. The definition of asylum requires that the applicant establish a well-founded fear of persecution if returned to his country of origin. Past persecution also raises a rebuttable presumption of a well-founded fear.²³⁰ Applying the rule in *INS v. Cardoza-Fonseca*,²³¹ if the applicant were able to provide sufficient evidence that his sexual orientation was a primary reason for his persecution—regardless of whether it predominated over alternative motives for his persecution—it is likely that he would have met the threshold of an objective likelihood of future persecution and a subjective fear of persecution on account of his sexual orientation.

228. *Id.* at 164.

229. *Id.*

230. 8 C.F.R. § 208.13(b)(1) (2010).

231. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–33 (1987).

Considering the purposes of the REAL ID Act, the BIA's interpretation may be raising the bar too high for demonstration of motive. Indeed, even the Ninth Circuit, which claims to have adopted the BIA's standard, has appeared to embrace the idea that an applicant's protected ground need not be the dominant motive. Ultimately, though, the Third Circuit appears to interpret the standard most consistently with the purposes of the act.

There is perhaps an even more troubling effect of implementing the BIA's interpretation; in fact, the BIA standard is likely to create inconsistencies in how cases turn out among applicants who have equally strong claims to asylum simply because of the nature of the evidence they are able to provide. Since these applicants are aliens and are not bound to the decisions of the circuit in which they choose to live, this inconsistency may result in applicants' forum shopping for the most lenient outcome. More importantly, it will result in unjust and unequal outcomes between cases in different circuits, due simply to chance or the luck of the draw based on the circuit in which the applicant filed Form I-589. Leaving such important decisions to chance—especially with regard to asylum applicants in dire, often life-threatening situations—will ultimately disserve the just ends that the immigration system seeks to uphold. It is fundamentally unfair for people in similar situations to receive inconsistent treatment simply because their applications are filed in different courts. Such unequal treatment is contrary to the concept of equal protection, a fundamental value of the American legal system.

For cases in which it is clear that the persecutor's exact motive for harming the applicant was on account of the applicant's sexual orientation, the BIA's interpretation is likely to result in the same outcome as the Ninth or Third Circuits' interpretations. *Boer-Sedano* is such a case, where sufficient evidence existed that the officers targeted the individual on account of his homosexuality.²³² However, in cases where evidence of the persecutor's language and actions exists simultaneously with evidence of other motives, the applicant may be rejected for asylum because he/she is unable to meet the BIA's requirement that his sexual orientation was not subordinate to any alternative motives.

Ayala exemplifies what happens to applicants in this latter category. The Eleventh Circuit found it sufficient that the applicant's

232. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1082 (9th Cir. 2005).

sexual orientation was at least in part a reason for his persecution.²³³ Although the applicant recounted the experience of being detained and sexually assaulted after leaving a gay disco,²³⁴ the fact that he recounted only one incident in the record may not foreclose the possibility of additional motives for his persecution, as is required by the BIA interpretation. Without identifying what other possible motives may exist and establishing that his sexual orientation was not subordinate to them, the applicant's claim may not succeed under the BIA view. The applicants in *Boer-Sedano* and *Ayala* had similar experiences, but *Boer-Sedano* experienced the persecution on multiple occasions. The question then remains: Would the BIA standard require *Ayala* to undergo his experience multiple times before having a legitimate claim, even though his experience in the single incident sufficiently illustrated a central relationship between his sexual orientation and persecution?

On the other hand, with the Third Circuit's interpretation, it is likely that *Ayala* would be able to establish that his sexual orientation was *at least one* central reason in his persecution. He would be able to rely on the evidence of how the officers treated him and the language they used in doing so. Therefore, the Third Circuit's interpretation would prevent a discrepancy in the outcomes of cases such as *Boer-Sedano* and *Ayala*, in which both applicants had strong claims to asylum, but the type of evidence they were able to produce differed.

VI. CONCLUSION

With the expectation that the number of asylum applications made on account of sexual orientation is likely to increase, it is essential that the standards for adjudicating them are uniform in order to preserve fairness for all applicants.²³⁵ Although Congress sought uniformity in this process with the passage of the REAL ID Act of 2005, the varying interpretations of the standard Congress established have prevented courts from achieving uniformity. In fact, these interpretations have had the opposite effect of further complicating and adding uncertainty to asylum adjudication. It is essential that a uniform interpretation be adopted to maintain

233. *Ayala v. U.S. Att'y Gen.*, 605 F.3d 941, 949 (11th Cir. 2010).

234. *Id.* at 943.

235. See Gesaman, *supra* note 14 and accompanying text; Refugee Arrivals, *supra* note 14 and accompanying text.

fairness between asylum applications and to comply with the value of equal protection, which is inherent to the American legal system. A single phrase, “cannot be subordinate,” can become the determinative factor in the outcome of a case and can create inconsistencies.

For national security reasons, Congress sought to raise the standard for establishing a nexus between persecution and the protected ground. However, interpreting the standard to raise it beyond what Congress has stipulated, even if beneficial for national security reasons, may come at a heavy cost to asylum seekers with legitimate claims. Individuals seeking asylum on account of their sexual orientations are one such group that may be negatively impacted by this stringent interpretation.

The Third Circuit’s interpretation of the new standard is the best option. By requiring that the motive of the protected ground not be incidental, tangential, or superficial to any alternative motives of persecution—without requiring that it not be subordinate to every other motive—the Third Circuit has found a middle ground that maintains congressional purpose without being unduly burdensome on applicants. This interpretation encompasses the Ninth Circuit’s view but provides even more specificity, guiding the agencies that are bound by that court’s interpretation. The BIA’s interpretation, on the other hand, may be too high of a standard and a misapplication of the congressional purpose, creating inconsistencies in the outcomes of the cases. Therefore, by adopting the Third Circuit’s approach and removing “cannot be subordinate” from the interpretation of “one central reason,” courts would be able to respond most effectively to both increasing national security concerns and increasing numbers of sexual orientation asylum applications.