PROVING PERSECUTION: THE BURDENS OF ESTABLISHING A NEXUS IN RELIGIOUS ASYLUM CLAIMS AND THE DANGERS OF NEW REFORMS

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INTRODUCTION

Upon entering the United States, asylum seekers often have a difficult and completely unknown path before them. They may know little or no English and have no concept of the detailed and complex immigration system they must navigate in order to remain in the United States. Take, for example, a woman from China, who also happens to be a Christian. She has fled to the United States from her home country because she has been tortured and beaten for being a Christian in a country that does not approve of Christianity. Her first step is to apply for asylum—an arduous task given her lack of English and the complexity of the system.[1] Eventually, she finds someone to assist her in filing the application,[2] but she still cannot read what it says. Once the application is filed, she goes before an asylum officer who finds that he cannot make a decision on the claim. The officer does not deny her application, but rather refers her to an immigration judge for a full hearing on her case. Once in the immigration court system, she attends a master calendar hearing at which the date for her full merits hearing is set. The date set is almost a full year away.[3]

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1. Asylum seekers, if stopped at the border upon their arrival, must pass a credible fear interview before being allowed to enter the United States. 8 C.F.R. § 1208.30 (2006). Also, if an asylum seeker arrives without valid documentation, she may be detained at any time. *See* 8 U.S.C.A. § 1226(b) (2006).

2. As with all asylum claims, this application must be filed within one year of arrival in the United States or the applicant is statutorily barred from relief unless she falls into one of the two narrowly construed exceptions. 8 U.S.C.A. § 1158(a)(2)(B), (D).

3. Technically, the application would have to be adjudicated within 180 days, but at the busier immigration courts, that often does not happen. *Id.* § 1158(d)(5)(A)(iii). The wait can last several years.

By this time, she has also found an attorney to represent her, but can barely afford to pay for the representation.[4] At the merits hearing, the immigration judge ("IJ") listens to her testimony and the same day issues an oral decision denying her claim. The IJ states that she cannot prove she was persecuted because of her Christianity and is thus not eligible for asylum. She files an appeal with the Board of Immigration Appeals ("BIA"), which denies her claim without an opinion, simply adopting the IJ's decision.[5] At this point, she has a working knowledge of English, has found a place to live and work, and has friends. She has also been ordered deported.

The asylum system in the United States is greatly flawed. It is one of the most complicated and difficult asylum systems in the world,[6] due in part to the intricate and complicated standards an asylum seeker must fulfill to remain in the United States.[7] This is a sad fact, given that the United States is still considered the land of freedom and opportunity by the persecuted in the world who arrive seeking safety and protection.[8] The narrow lines drawn by decision makers in the United States hinder, rather than help, asylum seekers in their quest for safety. Furthermore, the United States has veered significantly from the original purpose and obligation of asylum, which was to protect those who were unable or unwilling to remain

4. Aliens in immigration court proceedings do have a right to counsel. 8 C.F.R. § 1240.11(c)(iii). As these are civil administrative proceedings and not criminal, however, counsel is obtained at the alien's expense, or the alien must seek pro bono services. *Id.*

5. This process is known as affirming without an opinion or "AWO" for short. *Id.* § 1003.1(e)(4). It is a result of the streamlining implemented in 2002 by then-Attorney General John Ashcroft.

6. The rate at which asylum is granted is low in the United States considering the high number of pending applications. In 2004, the United States decided 21,148 cases granting asylum. U.N. High Comm'r for Refugees ("UNHCR"), Population and Geographical Data Section, *2004 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and Other Persons of Concern to UNHCR*, tbl.5 (June 17, 2005), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=42b283744 [hereinafter *2004 Global Refugee Trends*]. But the number of pending asylum cases, being a combination of both first-instance cases and appeals, is 263,710. *Id.*

7. Two popular tests are the nexus test, which will be discussed in this Note, and the test for establishing a well-founded fear of persecution. For an overview and explanation of the well-founded fear standard, see James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear"?*, 26 MICH. J. INT'L L. 505 (2005).

8. Despite its low grant rate, the United States is still a popular destination for asylum seekers, receiving nearly 27,900 new asylum applications in 2004. *2004 Global Refugee Trends*, *supra* note 6, ¶ 36.

in their own countries because of a fear of persecution.[9] This purpose of asylum is embodied in the internationally accepted definition of "refugee," adopted by the United Nations in 1951 to better protect those who cannot avail themselves of protection in their own countries.[10]

Those fleeing religious persecution are particularly vulnerable in the United States asylum system. There is a generally accepted belief that freedom of religion is a universal concept to which most nations adhere.[11] Unfortunately, this is not the case. Many nations claim to allow free religious practice[12] but, in reality, egregious violations of this right are occurring in numerous countries.[13] The United States is one of the nations proclaiming to protect religious freedom, as it is one of the basic freedoms upon which the nation was founded.[14] Domestic courts often fall into the trap, however, of believing that another nation's proclaimed religious freedom means that it does not persecute on religious grounds. The decision maker who so assumes often refuses to find a nexus between the asylum seeker's persecution and her religion. If a foreign state claims to accept religious freedom but regulates it, United States courts will often find that the asylum

9. Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 589 (2000) ("The asylum system of any country must accomplish two principal goals. First, the system must protect those fearing persecution or serious danger (civil conflict, serious human rights violations). Second, to maintain public support for that first goal, the asylum system must deter abuse."). *See also infra* note 175 and accompanying text.

10. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention of 1951]. The Convention came into force on April 22, 1954. *Id.* n.1. Please note that the terms "refugee" and "asylum seeker" will be used interchangeably throughout this Note.

11. *See, e.g.*, Universal Declaration of Human Rights art. 18, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (stating that "[e]veryone has the right to freedom of thought, conscience and religion").

12. *E.g.*, XIAN FA art. 36 (1982) (P.R.C.) (stating that the "[c]itizens of the People's Republic of China enjoy freedom of religious belief"). Although the Constitution of the People's Republic of China claims to tolerate several religions, the government has strict regulations on the formation of churches and other practices. *See, e.g.*, Zongjiao shiwu tiaoli [Regulations on Religious Affairs], Decree No. 426, Nov. 30, 2004 (P.R.C.), *available at* http://www.amityfoundation.org/cms/user/3/docs/decree_426.pdf. Note, however, that article 36 grants only the right to believe or not to believe and that the state protects "normal" religious practice. XIAN FA art. 36.

13. *See, e.g.*, U.S. DEP'T OF STATE, 109TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005, at 717–83, 1509–53 (Joint Comm. Print 2006).

14. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

seeker suffered prosecution for breaking a law and not persecution for religious beliefs.[15]

This Note contends that the United States has become one of the most difficult nations in which to win asylum from religious persecution, and thus the original intention of asylum has become skewed. There are many factors contributing to this state of affairs, which is where this Note begins. Part I focuses on the origins of what is now known as the "nexus test," in which an asylum seeker must prove that she was persecuted because of her race, religion, nationality, membership in a particular social group, or political opinion. It discusses the original purpose of asylum—the protection of those unable to protect themselves—and how that purpose eventually led to the United Nations Convention Relating to the Status of Refugees ("1951 Refugee Convention" or "Convention") and the acceptance of a standard international refugee definition. Next, Part II discusses the shift in American law from the Refugee Convention's definition to a slightly different one that has had a substantial negative impact. This Part also explains the two-part nexus test, which results from the slightly altered definition and includes proving the motivation of the persecutor. This section then explores the application of the nexus test to religious persecution claims both domestically and abroad, and demonstrates how easily the United States falls into the trap of differentiating prosecution based on religious practice from persecution based on religious belief. Part III addresses the Real ID Act,[16] new legislation recently enacted that modifies the standards for asylum, and how the Act will negatively impact religious asylum claims. Finally, this Note concludes by discussing the need to return to the original meaning and purpose of asylum and to abide by international obligations, as well as the type of legislation that would cause this to happen.

15. This is demonstrated in American courts to some degree in asylum law, but also in International Religious Freedom Act cases where a distinction is drawn between religious belief and religious practice. *See infra* Part II.B.

16. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C.).

I. THE ORIGINS OF THE NEXUS TEST AND THE PURPOSE OF A COMMON REFUGEE DEFINITION

One of the most insurmountable obstacles for an asylum seeker is what has become known as the "nexus test."[17] This test is based on three words in the definition of a refugee, as found in United States law, which states that an asylum seeker's past persecution or fear of future persecution must be "*on account of* race, religion, nationality, membership in a particular social group, or political opinion."[18] This seemingly straightforward and easily applied definition has been interpreted by United States courts to require a demonstration that the persecutor was motivated by one of the reasons listed in the refugee definition.[19] Essentially, United States courts demand that the asylum seeker prove the subjective intention of her persecutor.[20] This kind of proof is extremely difficult to obtain. The nexus test as it exists in American law is also quite different from that used by other members of the international community,[21] despite the common source of the definitions: the United Nations Convention Relating to the Status of Refugees.[22]

A. *The Precursors to the United Nations Convention Relating to the Status of Refugees*

Since the creation of civilized communities, people have fled their homes to escape persecution.[23] In the early twentieth century, international organizations tried to create a system to protect those

17. *See infra* Part II.A.

18. 8 U.S.C. § 1101(a)(42)(A) (2000) (emphasis added).

19. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992) ("[T]he mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as [8 U.S.C. § 1]101(a)(42) requires.").

20. This requirement has no basis in the formation of definition set forth by the Refugee Convention of 1951. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 50 (2d ed. 1996).

21. *See infra* Part II.C.

22. Refugee Convention of 1951, *supra* note 10, art. 1. The Convention is binding on the 144 signatory nations, and is thus the basis for most nations' refugee definitions. U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, *available at* http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63.

23. Marilyn Achiron, *A "Timeless" Treaty Under Attack*, REFUGEES, 2001, at 6–7.

fleeing persecution.[24] The 1951 Refugee Convention[25] is perhaps the most comprehensive and readily accepted form of protection, but it most certainly was not the first. Many other organizations, treaties, and agreements also created basic and necessary protections for certain refugees. The roots of international refugee protection trace back to the League of Nations, which was officially formed in 1919 with the adoption of its constitution at the Paris Peace Conference.[26] The primary concern of the League of Nations was the establishment of "international co-operation" and "international peace and security."[27] As far as refugees were concerned, the League's major dilemma was Russian refugees who fled their homes following World War I, the Balkan Wars, and the Greco-Turkish Wars.[28] Several arrangements in the 1920s created protections for Russian, as well as Armenian, refugees.[29] None of these arrangements, however, had any significant binding force, and none of them provided general protection for all refugees. They were very specific about which groups could receive protection (i.e., Russians and Armenians), and did not provide for other groups.

The first substantial League of Nations treaty providing refugee protection was the 1933 Convention Relating to the International Status of Refugees ("1933 Convention").[30] The 1933 Convention constituted a leap forward in refugee protection, as it dealt with a broad range of refugee issues such as labor, welfare, and education.[31] The 1933 Convention also established the concept of *refoulement*, or "return," which is a crucial element of modern asylum law.[32] The premise of *refoulement*, or *non-refoulement*, is that when an asylum

24. *Id.*

25. Refugee Convention of 1951, *supra* note 10.

26. League of Nations Covenant.

27. League of Nations Covenant pmbl.

28. Gilbert Jaeger, *On the History of the International Protection of Refugees*, 83 INT'L REV. RED CROSS 727, 727 (2001).

29. *See, e.g.*, Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements Dated July 5th, 1922, and May 31st, 1924, May 12, 1926, 89 L.N.T.S. 48; Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 13 L.N.T.S. 238. For the most part, the arrangements provided definitions of Russian and Armenian refugees and laid out the requirements for identity certificates that were to be given to anyone qualifying as a refugee.

30. Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199 [hereinafter Status of Refugees].

31. *See id.* arts. 7, 9–12.

32. *Id.* art. 3.

seeker enters a given nation's borders, that nation is not permitted to send her back to a country where she could face persecution and torture.[33] It is essentially an obligation to protect, and is a commonly accepted part of international law. Again, however, the 1933 Convention did not set forth a general definition of a refugee, and it applied only to Russians, Armenians, and other assimilated refugees.[34] That is not to say that the 1933 Convention was not influential; it most certainly was. Nine states ratified the 1933 Convention,[35] and it was a binding force while in effect, contributing significantly to the 1951 Refugee Convention, thus making it the most widely utilized refugee protection method of its time.

The League of Nations saw the birth of refugee protection, but the International Refugee Organization ("IRO") saw that concept grow until it finally matured into the 1951 Refugee Convention.[36] The IRO was created in 1946 by a United Nations Resolution.[37] The IRO represented a group of nations very concerned with the large number of refugees and displaced persons in the world, and its primary objective centered on the resettlement of those without a country.[38] The IRO was also supposed to be a temporary group committed to the protection and establishment of bona fide refugees in a safe place.[39] The IRO's constitution provides what appears to be the first generally applicable definition of "refugee." Refugees, for purposes of the IRO, were those who were "considered refugees before the outbreak of the second world war, *for reasons of* race, religion, nationality or political opinion."[40] This definition does not seem to offer much guidance, as it is defining a term with the term itself, but the grounds of race, religion, nationality, and political opinion are

33. BLACK'S LAW DICTIONARY 1083 (8th ed. 2004).

34. Status of Refugees, *supra* note 30, art. 1. Assimilated refugees are those of Syrian or Kurdish origin who no longer enjoy the protection of their State. Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favor of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63, 65.

35. The ratifying states were Belgium, Bulgaria, Denmark, Egypt, France, Italy, Norway, and Czechoslovakia. Status of Refugees, *supra* note 30.

36. *See* Refugee Convention of 1951, *supra* note 10.

37. G.A. Res. 62 (I), U.N. Doc. A/RES/62 (Dec. 15, 1946) [hereinafter CONST. OF THE INT'L REFUGEE ORG.].

38. *Id.* pmbl.

39. *Id.*

40. *Id.* Annex I, Pt. I(A)(1)(c) (emphasis added). In the IRO Constitution, a refugee is also anyone who was a victim of the Nazi or fascist regimes or a Spanish Republican or other victim of the Falangist regime in Spain. *Id.* Annex I, Pt. I(A)(1)(a)–(b).

explicitly mentioned. These grounds are the framework around which the modern refugee definition revolves.[41] Thus, the IRO constitution formed the first concrete step toward a more encompassing refugee definition.

B. *The 1951 Refugee Convention, a Standard Definition, and the Creation of the Nexus Test*

Soon after the creation of the IRO and the disintegration of the League of Nations (in 1946), the newly created United Nations realized that the refugee problem was so pervasive that a temporary organization could not adequately address the problem. World War II had just ended and, in the aftermath, many displaced persons were either afraid to return home or had no home to which they could return.[42] In response to this large number of stateless persons, the 1951 United Nations Convention Relating to the Status of Refugees was born. The 1951 Refugee Convention is still in force today and is the source from which the United States drew much of its asylum law.[43] For instance, the definition of a refugee in the United States Immigration and Nationality Act ("INA")[44] is based on the definition provided by the 1951 Refugee Convention.[45] The most significant aspect of the Convention is that it provided a much-needed standard definition of "refugee." Under the Convention, a refugee is someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

41. *See* U.N. High Comm'r for Refugees, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 3, 4 n.3, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004).

42. The United States granted permanent resident status to approximately 15,000 individuals living in the U.S. after the war and allowed for the admission of another 400,000 in the years that followed. The Displaced Persons Act of 1948, ch. 647, § 4(a), 62 Stat. 1009, 1011 (1948); Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L L.J. 1, 49–50 (1998).

43. The Protocol updates and slightly alters the Refugee Convention of 1951, but the only substantial changes made removed time and geographical restrictions on claims. Protocol Relating to the Status of Refugees pmbl., Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The United States is a signatory to the Protocol, which adopts the Convention, and is thus bound by the Convention.

44. 8 U.S.C. § 1101(a)(42)(A) (2000).

45. Refugee Convention of 1951, *supra* note 10, art. 1(A)(2).

> political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[46]

The Convention finally set forth a universal definition applicable to people from all nations, not just those nations most in need at any particular time.

The purpose of the Convention and its creation of a standard definition for "refugee" was simple: protection. The preamble clearly states that the United Nations High Commissioner for Refugees ("UNHCR") "is charged with the task of supervising international conventions providing for the protection of refugees."[47] There was also a growing desire to prevent human rights violations at this time, and this included protecting the rights of refugees.[48] In theory, the Convention's definition allowed for any person who feared persecution based on one of the listed grounds to leave her country and find safety elsewhere. Granted, this protection was particularly necessary for those suffering from the chaos of World War II. Many survivors of the Holocaust simply had no place to go at the end of the war. In fact, immediately following World War II, many Jews congregated in displaced persons camps in Germany that were run by the American, British, and French militaries.[49] The close association between refugees and World War II possibly explains why asylum is often referred to as "political asylum"—"political opinion" is one of the grounds listed in the Convention's definition (though the other grounds are equally legitimate bases for claims).[50]

The definition provided by the Convention appears uncomplicated and easily applied. If someone is persecuted or fears

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46. *Id.*

47. *Id.* pmbl.

48. The Universal Declaration of Human Rights was adopted in December 1948, and its dedication to fundamental rights and freedoms was noted and relied on in the preamble to the Refugee Convention of 1951. *See id.*

49. Menachem Z. Rosensaft & Joana D. Rosensaft, *The Early History of German-Jewish Reparations*, 25 FORDHAM INT'L L.J. S-1, S-8 (2001).

50. Refugee Convention of 1951, *supra* note 10, art. 1(A)(2); *see also* U.S. Dep't of State v. Ray, 502 U.S. 164 (1991); Yuan v. U.S. Dep't of Justice, 416 F.3d 192 (2d Cir. 2005); Jamal-Daoud v. Gonzales, 403 F.3d 918 (7th Cir. 2005) (all providing general references to "political asylum").

potential persecution, she can leave her country and seek refuge in another country. In reality, determining whether someone falls within the definition of "refugee," and is thus entitled to protection, is a complex process. To complicate matters further, not every nation has adopted the exact definition provided by the Convention. The Convention's definition uses the phrase "*for reasons of* race, religion, nationality . . . ," while the United States, as noted above, changed "for reasons of" to "on account of" in its own definition of "refugee."[51] This simple three-word phrase in the Convention, "for reasons of," has spawned a multitude of tests and interpretations. Essentially, a court asks an asylum seeker to prove a "nexus" between her fear of persecution and one of the grounds listed in the definition. Foreign courts vary with respect to the level of proof necessary to establish persecution based on an enumerated ground. Some courts require that the Convention ground be the sole cause of persecution while others require it to be a contributing cause.[52] In fact, many courts have concluded that grounds not specifically named in the Convention, such as gender, form a legitimate basis for asylum.[53] The United States is perhaps the only nation to require absolutely that one of the enumerated factors be the primary reason for persecution, which requirement makes the asylum system of the United States particularly complicated.

II. THE "NEXUS TEST" IN THE UNITED STATES AND ITS INCONSISTENCY WITH INTERNATIONAL LAW

The nexus test in the United States, which is based on the definition of "refugee" in the INA, is difficult to satisfy. This difficulty is unexpected and unfortunate considering the original intention of the United States in its adoption of the current refugee definition from the 1951 Refugee Convention. When the United States

51. *See* 8 U.S.C. § 1101(a)(42)(A) (2000).

52. *See* INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992); Minister for Immigration and Multicultural Affairs v. Chen (1999) 92 F.C.R. 333 (Austl.); *In re* Sittampalam, [1990] 13 Imm. L.R. (2d) 287, 287, 298 (Can.).

53. *See* Ward v. Att'y Gen., [1993] 2 S.C.R. 689, 691, 693 (Can.); Islam v. Sec'y of State for the Home Dep't, 2 All E.R. 546 (H.L. 1999); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003).

domesticated the Convention definition in the Refugee Act of 1980,[54] its primary motivation for doing so was to "bring United States law into conformity with [its] international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968."[55]

A. *The Creation of the United States' Test*

The original goal of United States asylum law was to offer protection to the many homeless refugees in the world, and its initial laws placed significant limitations on this goal. Until the adoption of the 1951 Refugee Convention definition in 1980, the United States' discriminatory treatment of refugees placed both geographical and ideological restrictions[56] on who could claim conditional entry.[57] Prior sections of the INA, namely section 203(a)(7), stated that one could attain conditional entry only by fleeing from a Communist or Communist-dominated area or from a "general area of the Middle East," and only if one feared persecution on account of race, religion, or political opinion.[58] After the United States signed the United Nations Protocol Relating to the Status of Refugees ("Protocol"), these provisions were simply not compliant with international obligations under the Protocol. As a result, things needed to change.

The United States seemed to have good intentions when it adopted the Convention definition of "refugee" via the 1980 Refugee Act. The slight difference in wording—changing the phrase "for reasons of" to "on account of"—was insignificant to legislators at the time. In fact, a look at the legislative history suggests that the change was not a point of contention. The new definition, according to the Senate, "basically conform[ed] to that of the United Nations

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

55. S. REP. NO. 96-256, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144. *See also* H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 160.

56. S. REP. NO. 96-256, at 15.

57. Getting conditional entry was essentially gaining refugee status and was the United States' way of fulfilling its obligations to the IRO. *See* CONST. OF THE INT'L REFUGEE ORG., *supra* note 37, pmbl.

58. Immigration and Nationality Act, Pub. L. No. 89-236, § 203(a)(7), 79 Stat. 911, 913 (1965). *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 433 (1987); Rosenberg v. Woo, 402 U.S. 49, 52–53 (1971).

Convention."[59] The House of Representatives went one step further, stating that "[t]he Senate bill incorporated the internationally-accepted definition of refugee contained in the U.N. Convention and [the] Protocol,"[60] despite the slight modification. The interpretation of the new definition was also intended to be consistent with the Protocol, as the latter was the basis for the definition.[61] From all appearances, Congress believed that the version of the definition of "refugee" it adopted was fully compatible with, and equivalent to, the one created by the U.N. The true test, however, came when the definition was interpreted and applied by courts.

Congress intended to create a definition that was equivalent to the U.N.'s definition and one that would be interpreted similarly by courts. And, in the first major case involving the new refugee definition to reach the United States Supreme Court, Congress's desires were realized. *INS v. Cardoza-Fonseca*,[62] decided seven years after the definition was adopted, involved the interpretation of the refugee definition as it related to the standards of proof necessary to establish eligibility for asylum and withholding of deportation.[63] The first requirement in establishing eligibility for either form of relief, however, was proving refugee status.[64] That is, the asylum seeker had to demonstrate that she was a refugee as statutorily defined. In the decision, the Court looked to many sources of international law to determine the correct interpretation of the definition, such as the Protocol, the UNHCR Handbook, and the IRO Constitution.[65] Also, there was no attention given to the slightly different wording in the two definitions; the Court simply acknowledged that the United States' definition is "virtually identical" to the Convention's version.[66] The Court essentially stated that Congress intended the statutory

59. S. REP. NO. 96-256, at 14.

60. H.R. REP. NO. 96-781, at 19.

61. *See* S. REP. NO. 96-590, at 20 (1980) (Conf. Rep.).

62. 480 U.S. 421 (1987).

63. In current law, withholding of deportation is now called withholding of removal or restriction on removal and is governed by 8 U.S.C.A. § 1231(b)(3) (2005). It is the United States' provision equivalent to article 3 of the Refugee Convention governing the concept of *refoulement*. *See* Status of Refugees, *supra* note 30, art. 3. Withholding of removal is required by statute if the requirements are fulfilled while asylum is granted at the discretion of the decision maker.

64. *See* 8 U.S.C.A. §§ 1158(b), 1231(b)(3).

65. 480 U.S. at 436–40.

66. *Id.* at 437.

definition to conform to the definition accepted by the international community, and thus it was proper to look to international law as a guide for the domestic interpretation.[67] The Court in this instance did not deal directly with the nexus requirement, yet its decision remains significant. According to the Court, the United States was under no obligation to create its own test for or interpretation of the definition of "refugee," and should rely on international law as a guide in determining refugee status.

The Supreme Court did eventually consider the nexus requirement in one of its decisions. In *INS v. Elias-Zacarias*,[68] the Court considered the case of a Guatemalan man who was seeking asylum based on political opinion. His basic claim was that he was being pressured to join a guerrilla group opposed to the government.[69] He feared that if he did join, the government would harm him and his family, so he left Guatemala.[70] In an opinion by Justice Scalia, the Court upheld the Board of Immigration Appeals' ("BIA") decision denying asylum and reversed the Court of Appeals, finding that any persecution Elias-Zacarias would face could not be proven to be *on account of* his political opinion.[71] Elias-Zacarias failed to demonstrate that he had a political opinion or that his opinion was the motivating factor behind his persecution.[72] In short, the Court required convincing evidence of the motive of the persecutor, which would (presumably) prove that the asylum seeker was being persecuted *on account of* an enumerated ground.[73] Through this decision, the Court effectively shifted the focus from the fear experienced by the victim to the thoughts and motives of the persecutor. Thus, a two-part test to establish a nexus between persecution and an enumerated ground developed. To pass this test, the asylum seeker must (1) establish that she has a race, religion, nationality, social group membership, or political opinion,[74] and (2) show that the

67. *Id.*

68. 502 U.S. 478 (1992).

69. *Id.* at 480.

70. *Id.* at 479–80.

71. *Id.* at 483.

72. *Id.* at 482–83.

73. *Id.*

74. Imputed grounds are also sufficient for establishing eligibility for asylum. So long as the asylum applicant can establish that her persecutor *thought* she had a particular race, religion, etc., and was persecuting her for that reason, she has satisfied the nexus. *See In re* S-P-, 21 I. & N. Dec. 486, 489 (B.I.A. 1996).

persecutor was motivated by that race, religion, etc.[75] Proving the persecutor's motive is often difficult, if not impossible, and courts have subsequently encountered significant difficulties in applying *Elias-Zacarias*'s holding.[76]

B. *The Nexus Requirement and Religious Claims in the United States*

The Court in *Elias-Zacarias* strayed from the original intentions of adopting a new refugee definition, which were compliance with international obligations and protection of refugees. The Court never once referred to international law, as was done in *Cardoza-Fonseca*, and instead placed a new obstacle before potential refugees: proving the persecutor's motive. This element is particularly difficult for those seeking refugee status in the United States based on religious grounds. In the United States, this is partly due to the peculiar American mentality regarding the concept of "religious freedom." The United States promotes the acceptance of religious freedom both domestically and internationally.[77] Yet, courts tend to make distinctions regarding exactly which aspects of religious freedom must be protected; they differentiate between prosecution and persecution—finding that religious belief must be respected, but the practice of that belief can be regulated.[78] In the context of freedom of religion, the United States has a tendency to discourage domestic laws that actively restrict religion, but courts often turn a blind eye to neutral laws that simply have the consequence of regulating religion.[79] This mentality is extremely dangerous for asylum seekers who assert religious grounds. In a sense, it allows the kind of activity that refugee and

75. Shayna S. Cook, *Repairing the Legacy of* INS v. Elias-Zacarias, 23 MICH. J. INT'L L. 223, 228 (2002).

76. *Id.* at 232–41.

77. *See* U.S. CONST. amend. I; Int'l Religious Freedom Act (IRFA), 22 U.S.C. § 6401 (2000).

78. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (holding constitutional a ban on an individual's use of peyote, a restricted substance, because the law did not actively restrict religious belief), *superseded by statute as stated in* Cutter v. Wilkinson, 544 U.S. 709 (2005); City of Boerne v. Flores, 521 U.S. 507 (1997) (finding the Religious Freedom Restoration Act, enacted in response to Employment Div. v. Smith, unconstitutional), *superseded by statute as stated in* Spratt v. Wall, No. C.A. No. 04-112 S, 2005 U.S. Dist. LEXIS 33266 (D.R.I. Nov. 21, 2005). See also Craig B. Mousin, *Standing With the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, for a discussion of *Smith*, *Flores*, and religious freedom in the asylum context.

79. *See Smith*, 494 U.S. 872. *See also* Am. Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808 (9th Cir. 1991); *In re* Faulkner, 165 B.R. 644 (Bankr. W.D. Mo. 1994).

asylum law was meant to protect against. Persecution of a person because of her religious beliefs thus appears permissible, so long as the nation allows freedom of religious belief and frames the persecution in terms of legal prosecution. The asylum seeker may find it difficult to prove the necessary motive of the persecutor when, for all intents and purposes, the nation from which she is fleeing tolerates her religion and is simply prosecuting her for violating a valid law.[80]

While the United States' interpretation of religious freedom likely impacts religious asylum claims, the requirements of the nexus test itself—namely the necessity of proving the intent of the persecutor—also present a substantial obstacle. Interestingly, the primary issue that arises regarding the nexus test in religious-based claims also appears in the controversial area of gender claims based on membership in a particular social group.[81] Briefly considering the difficulty of establishing the motivation of the persecutor that has recently developed in gender cases clarifies the precise problem with the nexus test as it applies to religious claims.

Establishing the motivation of the persecutor is fatal to many gender-based asylum claims. *In re R-A-*,[82] demonstrates clearly and concisely this troubling aspect of the nexus test. In that case, a woman from Guatemala sought asylum in the United States based on her membership in a particular social group. The IJ granted relief and identified her social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[83] The applicant had been brutally abused and tortured by her husband in Guatemala and, after many years of abuse, fled to the United States.[84] The BIA, while sympathetic to her case, denied asylum because she failed to establish a nexus between her persecution and a protected ground.[85] She could not demonstrate that her husband was motivated by a personal animosity toward all women in her claimed social group, only that he focused on abusing her because she was his wife.[86] The Board stated

80. *See* Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992).

81. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996); Musalo, *supra* note 53.

82. *In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).

83. *Id.* at 917 (internal quotation marks omitted).

84. *Id.* at 908–09.

85. *Id.* at 923.

86. *Id.* at 921.

that it understood the nexus test to "direct an inquiry into the motives of the entity actually inflicting the harm."[87] This was contrary to the IJ's inquiry, which focused on whether the Guatemalan government could, or was willing to, protect the applicant. Because the government did not protect her, the IJ found that there was a sufficient basis for asylum.[88] The BIA disagreed with the analysis and effectively stated that if one cannot establish that the persecutor was motivated by one of the protective grounds, then one cannot establish eligibility for asylum.[89]

In re R-A- demonstrates the difficulty of establishing a nexus between persecution and a protected ground. This difficulty, however, is not limited to gender claims. The often impossible task of proving the motive of the persecutor, combined with the United States' desire to protect religious freedom while upholding laws that do not actively restrict religion, place religion-based asylum seekers in a perilous position. United States courts fall into the trap of drawing a line between prosecution and persecution, which can have disastrous results.

A recent Fifth Circuit case, *Li v. Gonzales*,[90] received a great deal of attention for making this distinction between prosecution and persecution. In *Li*, the petitioner was a Chinese citizen seeking asylum based on his persecution as a member of an underground Christian church.[91] Chinese law requires that all churches be registered with the State, and unregistered churches are often targeted by police forces.[92] The IJ granted Li's claim for withholding of removal, but the BIA reversed, finding that "Li was punished for violating the law regarding unregistered churches and not because of his religion."[93] Li could not prove the motivations of his persecutor, much like the applicant in *R-A-*, despite the fact that religious

87. *Id.* at 923 (citation omitted).

88. *Id.* at 921–22.

89. *Id.* at 927–28.

90. Li v. Gonzales, 420 F.3d 500 (5th Cir. 2005), *vacated as moot*, 429 F.3d 1153 (2005). Although this case involves withholding of removal, the court's distinction is still significant because that provision utilizes the same refugee definition as asylum. *Id.* at 507.

91. *Id.* at 503–04.

92. *Id.* at 505. *See also* 1 U.S. DEP'T OF STATE, 109TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2004, at 684 (Joint Comm. Print 2005).

93. *Li*, 420 F.3d at 506.

persecution is a protected ground, and thus he could not demonstrate eligibility for withholding.[94]

The Fifth Circuit agreed with the BIA and applied the nexus test from *Elias-Zacarias*, determining that the true question was "whether China was motivated, at least in part, by Li's religion in punishing Li."[95] The court concluded that Li was punished because of religious activities, but "it does not necessarily follow that Li was punished because of his religion."[96] It claimed that the Chinese government approved of Li's religion and was only punishing the unregistered aspects of his practice.[97] As a result, the court claimed that no nexus existed between Li's persecution and his religion.[98] There was no evidence that the government was motivated by Li's religion and, as such, he did not satisfy the nexus requirements because prosecution for violating a law is not a protected ground.[99]

The Fifth Circuit's decision provides the perfect example of a religious asylum seeker failing to satisfy the nexus requirements because of an inability to establish the persecutor's motive.[100] In the *Li* decision, the Fifth Circuit seemingly approved of the Chinese government enacting whatever persecutory laws it wished, so long as the laws did not actively persecute on religious bases. Fortunately for Li, numerous domestic organizations and scholars were outraged and vigorously advocated on his behalf to have the decision reversed. Several groups, such as the Harvard Immigration and Refugee Clinic[101] and a group of immigration and asylum law scholars and clinicians,[102] submitted amicus briefs in support of Li. These groups argued that even neutral laws of general application can be persecutory in nature, thus "criminalizing nonconforming practice

94. *Id.* at 510.

95. *Id.* at 509.

96. *Id.* at 510.

97. *Id.*

98. *See id.* at 510–11.

99. *See id.*

100. There are many examples of courts distinguishing between prosecution and persecution. *See, e.g.*, Shardar v. Ashcroft, 382 F.3d 318, 323 (3d Cir. 2004); Fisher v. INS, 79 F.3d 955, 962 (9th Cir. 1996); Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992).

101. Brief of *Amici Curiae* Harvard Immigration and Refugee Clinic in Support of the Petitioner's Motion for Rehearing En Banc, Li v. Gonzales, 420 F.3d 500 (5th Cir. 2005) (No. 03-60670).

102. Brief of *Amici Curiae* Immigration and Asylum Law Scholars and Clinicians in Support of the Petitioner's Petition for Rehearing En Banc, Li v. Gonzales, 420 F.3d 500 (5th Cir. 2005) (No. 03-60670).

and belief."[103] Further, the amici curiae argued that, as a party to the Convention and the Protocol, the United States should look to international law when determining such complex nexus issues, rather than only to domestic law. Had the court done so, it very well may have reached a much different result.[104]

The amicus briefs were influential in the eventual resolution of the *Li* decision. The Fifth Circuit vacated its decision following the public outcry. The United States Commission on International Religious Freedom[105] also issued a letter condemning the Fifth Circuit's decision. This letter stated that China "criminalizes religious activities in violation of China's commitments under international law" and specifically requested that the Fifth Circuit reconsider its decision.[106] Following this letter, the government withdrew its appeal of the BIA decision.[107] After the BIA's dismissal of the case,[108] the Fifth Circuit vacated its decision as moot.[109]

While it is encouraging to see the outcry caused by Li's case, it is also disturbing that a court could make such a decision. Drawing a fine line between prosecution and persecution flies in the face of the intention underlying asylum law. Decisions like *Li* make it nearly impossible for an asylum seeker to satisfy the portion of the nexus requirement proving a persecutor's motive. Simply because a nation purports to tolerate a religion does not mean that it will not use its criminal laws to persecute those who do not quite fit within the desired mold. *Li* also demonstrates how difficult it is to establish a nexus between persecution and a protected ground in the United States. The motive of the persecutor is not easily proven, and when a country claims to tolerate religious belief, establishing motive is further complicated.

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103. *Id.* at 7.

104. *See id.* at 2–5.

105. The Commission was created by IRFA, 22 U.S.C. § 6431 (2000), and is an independent entity whose purpose is to provide recommendations to the President and Congress. REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 35 (4th ed. 2005).

106. Letter from Michael Cromartie, Chair, U.S. Comm'n on Int'l Religious Freedom, to Peter D. Keisler, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice (Sept. 30, 2005), *available at* http://www.uscirf.gov/mediaroom/press/2005/october/10032005_china.html.

107. Government's Motion to Reopen and Withdrawal of Appeal, Li v. Gonzales, 429 F.3d 1153 (5th Cir. 2005) (No. 03-60670).

108. Li, Case No. A76 942 606 (B.I.A. Oct. 6, 2005).

109. Li v. Gonzales, 429 F.3d 1153 (5th Cir. 2005).

C. *The International Community*

Although the United States requires a high standard to establish a nexus between persecution and an enumerated ground, several members of the international community have specifically rejected such a rigorous standard.[110] These nations have refused to adopt the same type of dangerous reasoning that the Fifth Circuit utilized in *Li*, whereby supposedly neutral laws can be used to persecute persons on the basis of religion.[111]

There are several examples of foreign courts explicitly rejecting a distinction between prosecution of religious actions and persecution of religious beliefs. For instance, a Canadian court in *Irripugge v. Canada (Minister of Citizenship and Immigration)*[112] refused to accept China's laws prohibiting underground churches as discrimination and not persecution.[113] The *Irripugge* court relied on an earlier decision, *Fosu v. Canada (Minister of Employment and Immigration)*,[114] in which Jehovah's Witnesses in Ghana were arrested for public religious practice. The court found that this type of law was persecutory in nature and not merely punitive.[115]

Australian courts have also refused the distinction between prosecution and persecution. In *SBBG v. Minister for Immigration and Multicultural and Indigenous Affairs*,[116] the appellant's wife and daughter, both of whom were Mandaean, were forced to wear the chador[117] under Iranian law.[118] The tribunal that originally heard the case concluded that this provision of Iranian law was one of general

110. *See, e.g.*, Wang v. Minister for Immigration and Multicultural Affairs (2000) 105 F.C.R. 548, 555 (Austl.); Okere v. Minister for Immigration and Multicultural Affairs (1998) 87 F.C.R. 112 (Austl.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1989, 81 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 58 (F.R.G.); Brief of *Amici Curiae* Harvard Immigration and Refugee Clinic, *supra* note 101, at 2–5.

111. See materials cited *supra* note 110.

112. Irripugge v. Minister of Citizenship and Immigration, [2000] 182 F.T.R. 47 (Can.).

113. *Id.* at 56.

114. *Id.* at 57; Fosu v. Le Ministre de l'Emploi et de l'Immigration du Canada, [1994] 90 F.T.R. 182.

115. *Fosu*, 90 F.T.R. at 184–85.

116. SBBG v. Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 A.L.R. 281 (Fed. Ct.) (Austl.). *See also* Wang v. Minister for Immigration and Multicultural Affairs (2000) 105 F.C.R. 548, 555 (Austl.).

117. The chador is a black, open garment that a woman wraps around her head and body, holding it in place with her hands.

118. *SBBG*, 199 A.L.R. at 283.

application and could not constitute persecution.[119] The Federal Court, however, disagreed and stated that "when an apparently general obligation in fact imposes a requirement reflecting discrimination for a Convention reason it is not a 'general requirement.'"[120] The court further held that whether the discrimination resulting from the law constitutes persecution depends on the circumstances of each case.

Not only does foreign case law support the rejection of the determination of prosecution versus persecution, international handbooks and guidelines also support the claim that religious persecution can be carried on even if the religion is technically accepted. The UNHCR Handbook for Determining Refugee Status notes that persecution can take many forms, such as "prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community."[121] The Handbook, which many nations rely on when determining asylum claims, readily accepts that generally applied laws can be persecutory in nature. One must also note, however, that the Handbook refers to persecution "for reasons of religion," which is not the United States' phrase.[122] One could argue that because the language in the two definitions is different, the Handbook should not apply to United States claims. This argument, however, ignores the fact that United States asylum law is rooted in the Convention and the Protocol and also ignores the overall relation of United States law to international law.[123]

The United States has taken a different path than a large part of the international community in its application of asylum law. Although the Convention and the Protocol form the basis of international asylum law, the United States is making distinctions that other members of the international community have explicitly rejected. In the United States, the creation of nearly insurmountable

119. *Id.* at 288.

120. *Id.*

121. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 72, U.N. Doc. HCR/1P/4/Eng./REV.2 (1992).

122. *Id.*

123. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 438–40 (1987) (utilizing international law in interpreting the term "refugee").

obstacles that prevent rather than encourage protection has obscured the original intention of the protection of asylum seekers.

III. THE REAL ID ACT AND THE FUTURE OF RELIGIOUS ASYLUM CLAIMS IN THE UNITED STATES

In 2005, the United States enacted the Real ID Act[124] in an attempt to codify existing case law and create new provisions to protect the United States from terrorist threats. The Act has a significant impact on asylum law, but also implements a host of other measures such as a national identification card system[125] and the facilitation of building border fences.[126] Supporters of the Act claim that it will have little impact on asylum claims since it simply codifies existing case law, particularly law regarding credibility determinations.[127] In reality, however, asylum seekers, including those seeking protection on religious grounds, will be negatively affected by the new provisions.

A. *The New Burdens on Asylum Seekers*

Section 101 of the Real ID Act places new requirements on establishing eligibility for asylum. The title of this section is "Preventing Terrorists from Obtaining Relief from Removal,"[128] essentially stating that these provisions will deter terrorists from abusing the asylum system.[129] While these provisions may help protect the nation's borders, they also place a heavy burden on many legitimate asylum seekers. Prior to the enactment of Real ID, some of the most crucial asylum law was established in case law. The case

124. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 and 49 U.S.C.). For a concise summary of the Act, see Brian Murphy, *The Real ID Act of 2005: Tightening the Burden on Asylum Seekers, Federal Standards for Driver's Licenses, and Patching a Hole in a Border Fence at the Cost of Other Legislation*, 19 GEO. IMMIGR. L.J. 191 (2004).

125. Real ID Act § 202.

126. *Id.* § 102(c)(1).

127. *See id.* § 101(a)(3)(B)(ii)–(iii) (codifying the existing case law on credibility). *See also*, Minutes from Asylum HQ/NGO Liaison Meeting (July 12, 2005) (on file with the Ave Maria Law Review).

128. Real ID Act § 101.

129. Many opponents of the Real ID Act argue that terrorists are unlikely to utilize the asylum system because of its many safeguards. For the basic arguments, see generally Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 376–77 (2005).

law regarding credibility and corroboration was particularly significant. One of the most important aspects of adjudicating an asylum application is the credibility determination made by the adjudicator.[130] As the grant of asylum is discretionary, if an asylum officer or IJ does not find the applicant credible, he can deny the claim.[131] Credibility is a threshold determination, often made by the IJ,[132] who considers numerous factors such as inconsistencies in the applicant's story and application, the omission of facts or events, or the improbability of the testimony.[133]

Another crucial element of an asylum determination, entwined with the concept of credibility, is the requirement for corroboration.[134] An asylum seeker must have sufficient corroborating evidence to establish the legitimacy of her claim. Corroboration connects with credibility when the applicant's testimony is not particularly credible. In that instance, corroboration is necessary, and without it, the asylum seeker fails in her claim.[135]

The case law requirements regarding credibility and corroboration placed a heavy, but not insurmountable, burden on the asylum seeker. Case law, after all, can be overruled. The Real ID Act, however, codifies these provisions into statutory law, essentially setting them in stone.[136] Under these new provisions, an IJ can make a negative credibility determination based on "the applicant's demeanor, candor, responsiveness, or inconsistency with any

130. *See, e.g.*, *In re* Rafipour, 16 I. & N. Dec. 470, 471 (B.I.A. 1978); Michael Kagan, *Is Truth in the Eye of the Beholder?: Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367–68 (2003); Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 971 (2001).

131. *See, e.g.*, *In re* Mogharrabi, 19 I. & N. Dec. 439, 445 (B.I.A. 1987); Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1438 (1998).

132. *See, e.g.*, *In re* O-D-, 21 I. & N. Dec. 1079, 1081 (B.I.A. 1998).

133. *See, e.g.*, *In re* Pula, 19 I. & N. Dec. 467, 470–71 (B.I.A. 1987); *In re* Favela, 16 I. & N. Dec. 753, 755 (B.I.A. 1979) (observing that the IJ determined that implausible testimony is not worthy of belief and is thus not credible).

134. *See* Abdulai v. Ashcroft, 239 F.3d 542, 554 (3d Cir. 2001) ("[T]he BIA may sometimes require otherwise-credible applicants to supply corroborating evidence in order to meet their burden of proof.").

135. *See, e.g.*, *In re* Y-B-, 21 I. & N. Dec. 1136, 1139 (B.I.A. 1998); *In re* E-P-, 21 I. & N. Dec. 860, 863 (B.I.A. 1997); *In re* Dass, 20 I. & N. Dec. 120, 124–25 (B.I.A. 1989).

136. The Real ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302, 303 (2005) (codified in scattered sections of 8 and 49 U.S.C.), codifies the case law regarding corroboration, and section 101(a)(3)(B)(iii) codifies the law concerning credibility determinations.

statement made at any time to anyone."[137] The Act also makes it possible for the judge to deny an asylum claim when he believes that corroborating evidence should have been provided, even if the testimony offered by the asylum applicant was credible.[138]

The Real ID Act also addresses, indirectly, the nexus requirement. Previously, eligibility for asylum required that the asylum seeker satisfy the definition of a refugee found in INA section 101(a)(42)(A).[139] The Act adds another requirement for establishing refugee status. The applicant must prove that the ground on which she is relying (race, religion, etc.) is a *central reason* for which she has suffered or will suffer persecution.[140] This requirement places an additional obstacle in an asylum seeker's path. First, she must establish that she is a refugee by fulfilling the terms of the refugee definition. Under *Elias-Zacarias*, proving refugee status involves establishing that she does in fact fall within one of the enumerated grounds and that her persecutor was motivated by that ground.[141] The Real ID Act further requires her to demonstrate that her persecutor's *central* motivation was her claimed ground.[142] This higher standard will likely eliminate numerous asylum claims. Previously, rules on mixed-motive claims provided that an asylum seeker did not need to prove conclusively why she was persecuted; she simply had to demonstrate that the persecution was motivated in part by a protected ground.[143] With the new requirement from the Real ID Act in place, a partial motivation is no longer sufficient, and the protected ground must be the central motivation.

Perhaps the most alarming section of the Real ID Act relates to judicial review of the administrative decisions. Section 106 of the Act alters and limits the types of claims eligible for judicial review.[144]

137. Nat'l Immigration Forum, *Legislative Analysis: Real ID Act of 2005*, *available at* http://www.immigrationforum.org/documents/PolicyWire/Legislation/REALIDsummary.pdf; *see also* Real ID Act § 101(a)(3)(B)(iii).

138. Real ID Act § 101(a)(3)(B)(ii).

139. 8 U.S.C.A. § 1158(b)(1) (2005).

140. Real ID Act § 101(a)(3)(B)(i).

141. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

142. Real ID Act § 101(a)(3)(B)(i).

143. *In re* S-P-, 21 I. & N. Dec. 486, 494 (B.I.A. 1996) (in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed ground). *See also* Girma v. INS, 283 F.3d 664, 667–68 (5th Cir. 2002).

144. Real ID Act § 106.

Judicial review regarding denials of discretionary relief, which includes asylum,[145] is limited to constitutional claims and pure questions of law.[146] Review by a higher court is critical to asylum claims, which, unfortunately, do not always receive an adequate adjudication at lower administrative levels, due largely to an abundance of claims and a shortage of adjudicators.[147] To adjudicate the many claims that reach the Immigration Court or BIA level, there are currently only 220 immigration judges[148] and 11 Board members.[149] Immigration judges and the BIA are bogged down in asylum claims and cannot be expected to make thorough and reasoned decisions in such a short amount of time.[150] Often, IJs will give an oral decision in a case the same day as the hearing, with little time for review of the claims.[151] Asylum seekers have always been allowed to appeal a decision if they believe that the judge made an incorrect determination, namely, a finding not supported by the evidence.[152] Since 2002, when then-Attorney General John Ashcroft instituted new streamlining procedures for the BIA, the number of immigration cases appealed to the federal courts increased from three percent of the total federal caseload to seventeen percent.[153] Further, the majority of those appeals involved asylum claims.[154] Now, however, the Real ID Act provides for appeal to the federal courts only when there is a constitutional or purely legal issue.[155]

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145. *See* 8 U.S.C.A § 1158(b)(1)(A) (2005) ("[T]he Attorney General *may* grant asylum . . . .") (emphasis added).

146. 8 U.S.C.A. § 1252(a)(2)(B)–(D).

147. In 2003, over 28,000 refugees entered the United States; over 46,000 asylum cases were received by district directors and asylum officers of the United States Citizenship and Immigration Services ("USICS"), including over 42,000 new claims for asylum. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 43, 46 (2004) [hereinafter YEARBOOK].

148. Executive Office for Immigration Rev., U.S. Dep't of Justice, http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Mar. 25, 2007).

149. Executive Office for Immigration Rev., Bd. of Immigration Appeals, U.S. Dep't of Justice, http://www.usdoj.gov/eoir/biainfo.htm (last visited Mar. 25, 2007).

150. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

151. *See* 8 C.F.R. § 1003.37(a) (2006) (permitting oral decisions).

152. *See* Jonathan Su, *Interpretations of Asylum Law in the United States Court of Appeals for the Ninth Circuit in 2000–2001*, 16 GEO. IMMIGR. L.J. 191 (2001) (providing a general summary of the standards of review applied by the circuit courts to B.I.A. decisions).

153. Liptak, *supra* note 150.

154. *Id.*

155. 8 U.S.C.A. § 1252(a)(2)(D) (2005).

Discretionary findings made by the IJ or the Board on determinative issues, such as the critical area of credibility, cannot be appealed.[156]

B. *Religious Claims and Real ID*

All asylum seekers will be negatively affected by the changes enacted by the Real ID Act, but religious claims will be particularly disadvantaged. Religious asylum seekers already have a difficult time establishing a nexus between their persecution and their religion, as demonstrated above.[157] The persecutor's motive is often difficult to prove in general, and it is often impossible to establish the precise motivation for a persecutor's actions. The further "central reason" requirement will only complicate matters more. Also, corroborating evidence is not necessarily easy to come by in religious claims.[158] Countries rarely, if ever, document a person's religion as the motivation for persecutory treatment. The only sorts of corroborating evidence a religious asylum seeker may be able to provide are letters from family members or news articles, neither of which are given the same deference and attention as official documentation.[159]

While religious asylum seekers will be negatively affected by the new legislation regarding corroboration and credibility, the new standards on judicial review pose the most troublesome obstacles. Religious claims are often reversed at the federal level, typically for one of four reasons:

> (1) federal judges disagreed with the immigration judges' inquiry into the nature of the asylum seekers' religious beliefs; (2) federal judges reconsidered evidence that had either been left out or misinterpreted; (3) federal judges found that the immigration judge's disbelief of the applicant's testimony was not supported by the evidence in the record; [or] (4) federal judges discovered that

156. *Id.* § 1252(a)(2)(B)–(D).

157. *See supra* Part II.B.

158. Eric T. Johnson, *Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?*, 1996 BYU L. REV. 757, 771.

159. *See id.* at 769–70; Timothy P. McIlmail, *Toward a More Reasonably Rebutted Presumption: A Proposal to Amend the "Past Persecution" Asylum Regulation—8 C.F.R. § 208.13(B)(1)*, 12 GEO. IMMIGR. L.J. 265, 273 (1998) (recognizing the difficulty in receiving independent sources to corroborate an asylum claim).

> immigration judges had applied the wrong law and had held the testimony of asylum seekers to the wrong legal standard.[160]

With the new requirements in the Real ID Act limiting judicial review to constitutional and legal issues, only one of the listed reversal grounds—that of reversing on the basis of the incorrect application of law—will still be valid. For example, issues like those involved in *Xue v. Ashcroft*[161] could no longer be appealed. In *Xue*, the Ninth Circuit Court of Appeals reversed the decision of the IJ and the BIA to deny asylum. The circuit court found that the IJ based his determination on his own subjective understanding of Xue's Christian beliefs.[162] Essentially, the IJ substituted his subjective understanding for objective evidence, found the respondent not credible, and denied the application for asylum.[163] This sort of determination is discretionary and could not be appealed under Real ID as it does not involve either a question of law or a constitutional issue.[164]

The Real ID Act is a quick fix for a problem that needs serious consideration. The current solution also has serious negative effects on asylum seekers in the United States. While the Act will potentially protect United States borders from terrorists and illegal immigrants, it will also place such a heavy burden on asylum seekers that they will not be able to establish eligibility for relief. In addition, although the restriction on judicial review may lighten the load for the federal courts, it also puts many religious asylum seekers at risk of never receiving adequate and fair adjudications of their claims.

C. *The Makings of a Solution*

Asylum law has experienced its fair share of reforms. Before Real ID, such reforms included the Refugee Act of 1980,[165] the Refugee-

160. HEBREW IMMIGRANT AID SOCIETY, *Introduction* to FAITHFUL BUT FORSAKEN: REAL ID ACT HARMS VICTIMS OF RELIGIOUS PERSECUTION (Apr. 11, 2005), http://www.hias.org/news/docs/faithfulbutforsaken_4-12-05.pdf.

161. Xue v. Ashcroft, 106 F. App'x 606 (9th Cir. 2004).

162. *Id.* at 607.

163. *Id.*

164. 8 U.S.C.A. § 1252(a)(2)(B)–(D) (2005).

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

Escapee Act of 1957,[166] the Immigration and Nationality Act of 1952,[167] and numerous others. Since the founding of the nation, immigration and asylum issues have been an ongoing concern.[168] As asylum issues are so long-standing, their solution demands more than a cursory glance. In fact, a complete revision is in order.

Real ID attempts to lighten the load on federal courts by limiting the grounds of review.[169] The influx of immigration cases into the federal court system, however, is the result of another immigration reform instituted in February 2002, by John Ashcroft. These procedures required the BIA to clear a large portion of its backlogged cases, changed the standard of review in many areas from *de novo* to clearly erroneous, authorized the BIA to affirm IJ decisions without opinion, and reduced the number of Board members from nineteen to eleven.[170] These streamlining procedures did clear up a large part of the BIA's backlog of cases, but they also created a much larger federal caseload. The BIA was no longer providing reasoned decisions, and the number of appeals to the federal courts drastically increased.[171] This left the federal courts to consider cases with little, if any, direction from the BIA and simply shifted the backlog from the BIA docket to that of the courts.

Thus far, the asylum reforms have merely repositioned the backlog. Procedures have been streamlined and revamped at the highest levels of review. The true solution to the problem, however, is reform at the lower levels and individualized adjudications. Asylum officers and district directors are responsible for a significant number of asylum adjudications.[172] If the number of lower-level adjudicators is increased and training for them improved, a larger number of claims could be heard. Also, with more adjudicators

166. Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639 (1957) (codified as amended in scattered sections of 8 U.S.C.).

167. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1503).

168. *See* U.S. DEP'T OF JUSTICE, AN IMMIGRANT NATION: UNITED STATES REGULATION OF IMMIGRATION, 1798–1991 (1991).

169. *See* Liptak, *supra* note 150.

170. Press Release, U.S. Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002).

171. Following the streamlining, federal court appeals increased 600 percent. Claire Cooper, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1, *available at* http://www.usdoj.gov/eoir/press/ImmigrationAppealsSacBee.pdf.

172. In 2003, USCIS district directors and asylum officers completed over 87,000 cases. YEARBOOK, *supra* note 147, at 47.

available, claims could be assessed on a more individualized basis, thus ensuring a more reasoned and fair conclusion. The number of BIA members should also be increased. There are over 220 immigration judges, and every appeal from one of those decisions goes to an eleven-member board. There is simply no realistic way for a fair review of every case with so few Board members available for reviewing. Reform must begin at the bottom and spread to the top for there to be a truly lasting and positive effect.

Reforming the system, however, still may not solve the problem. That which lies beneath the system—the law—must be addressed. True, immigration reforms have attempted to address the legal flaws, but none of them have actually gone to the source of the problem. They use what currently exists rather than seeking a return to the origin of asylum and immigration laws. Reforms like the Real ID Act codify case law and update existing law, but they do not question the conclusions in the case law they codify or the impact the codification will have.[173] Case law, as seen in *Elias-Zacarias*, that adds additional obstacles for asylum seekers simply leads to statutory law that does the same.[174] The original purpose of the asylum system and the refugee definition was positive,[175] and that must be the touchstone for reform. The United States was trying to abide by its international obligations and adopt a standard approved by the United Nations when it looked to the Convention and the Protocol.[176] It is only in the interpretation and application of those standards that the United States strayed. Returning to the law's original intention and applying it in accordance with international application would potentially relieve the burdens on the current asylum system and protect those most in need.

173. *See supra* note 136 and accompanying text.

174. INS v. Elias-Zacarias, 502 U.S. 478, 482–83 (1992) (requiring convincing evidence of persecutor's motive). *See also In re* Mogharrabi, 19 I. & N. Dec. 439, 445–46 (B.I.A. 1987).

175. *See* Refugee Act of 1980 § 101, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (describing the United States' humanitarian concerns for refugee law); Refugee Act of 1979, S. REP. NO. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141 (stating that the purpose of the bill is to give "statutory meaning to our national commitment to human rights and humanitarian concerns").

176. S. REP. NO. 96-256, at 4; H.R. REP. NO. 96-781, at 19 (1980) (Conf. Rep.).

CONCLUSION

An asylum seeker in the United States faces a daunting task upon her arrival. Not only must she flee her home attempting to find safety, she must also prove her persecution was on account of her race, religion, nationality, social group, or political opinion. To do this, she must demonstrate the subjective intention of her persecutor—a difficult and often impossible task, particularly if she is a religious asylum seeker who cannot easily corroborate her claim. She is in an even more precarious situation if her religion is purportedly tolerated in her home country. The obstacles that the United States has created for asylum seekers have a purpose, which is to effectively weed out many illegitimate claims. Unfortunately, many legitimate claims are eliminated as well. New legislation intended to assist with immigration reform in the form of the Real ID Act merely provides a quick fix with dangerous results for asylum seekers. True reform for the asylum system and a return to the original purpose of asylum law is the only way to bring the United States back into conformity with international obligations, and provide refugees with the protection they deserve.