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Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?

*Eric T. Johnson**

I. INTRODUCTION

Recently, the United Nations reported that approximately 20 million refugees are fleeing hot spots like Bosnia-Herzegovina,¹ Burundi,² Iraq,³ and Haiti—a tenfold increase in two decades.⁴ Many of those seeking refuge flee oppressive circumstances caused or exacerbated by religious differences.⁵ Nightly, news reports on Serbia and Bosnia-Herzegovina highlight conflicts between Christians and Muslims. Historically, religious differences have been a persistent cause of persecution.⁶ International

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1. See, e.g., Greg McIvor, *Sweden: Swedes Show Their Ugly Side amid a Rising Tide of Refugees*, IPS, July 30, 1993, available in LEXIS, Nexis Library, Inter Press Service File ("The [Swedish] government says it can no longer afford the influx of asylum-seekers which has seen reception centers flooded with 100,000 people from former Yugoslavia alone, in the past 18 months.").

2. *World Food Program to Announce Emergency Fund*, UPI, Nov. 11, 1993, available in LEXIS, Nexis Library, UPI File (describing how, within three weeks, 900,000 refugees flooded into three neighboring countries including soon-to-be war-torn Rwanda).

3. See, e.g., *Gumbol v. INS*, 815 F.2d 406 (6th Cir. 1987) (ruling on refuge from religious persecution in Iraq).

4. *UN-Refugees-Update*, UPI, Nov. 9, 1993, available in LEXIS, Nexis Library, UPI File (relating figures reported by former United Nations High Commissioner for Refugees, Sadako Ogata).

5. See, e.g., *Kashmir Debated*, ECONOMIST, Nov. 28, 1992, available in LEXIS, Nexis Library, The Economist File (explaining that thousands of Muslims and Hindu refugees are "languishing in Indian prisons").

6. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW 27-28* (1983) (referring to persecution of the Huguenots in France in 1685, Nazi persecution of Jews, and more recent persecution of Jehovah's Witnesses in Africa).

Religious freedom has only recently been secured in international law. Until the Reformation, the Western world pursued the notion that all nations should be of one faith, and was willing to enforce this dream with the sword. Just as persistent was the concept that all subjects must be of the same faith as their ruler. It required a century of carnage and persecution, ending in the bloody Thirty Years' War, before reigning

instruments on refugees have long recognized religion as one of the basic grounds for granting refugee status.⁷ Yet, despite history, international instruments, and current events, religious persecution remains an infrequently granted basis for obtaining refugee status in the United States.

This Article examines religious persecution as a basis for granting refugee status in the United States. In the international community and the United States, refugee status bestows desirable legal benefits on its recipients such as housing benefits and the ability to seek employment. Part II reviews the conditions for granting refugee status under the 1951 U.N. Convention Relating to the Status of Refugees (the "1951 Convention"), which Congress has implicitly adopted. Part III discusses U.S. cases in which the applicant has asserted religious persecution as a basis for claiming refugee status. The disfavor of claims of religious persecution that those cases evidence manifests dishar-

monarchs could accept the idea that religious unity among their subjects was not vital. Only after the Peace of Westphalia in 1648 did an individual's right to worship differently from his ruler achieve recognition in international law. Stephen C. Neff, *An Evolving International Legal Norm of Religious Freedom: Problems and Prospects*, 7 CAL. W. INT'L L.J. 543, 549-50 (1977).

Even then the principle was not wholly free from doubt:

Subjects who in 1627 had been debarred from the free exercise of a religion other than that of their ruler were by the Peace granted the right of conducting private worship, and of educating their children at home or abroad, in conformity with their own faith; they were not to suffer in any civil capacity nor to be denied religious burial, but were to be at liberty to emigrate, selling their estates or leaving them to be managed by others. Some ambiguity, however, attaches to the stipulations of the Peace on this head. One passage provides for the patient toleration of subjects not of the rulers' religion; but another seems to imply that, exceptions apart, the ruler may oblige such subjects to emigrate, though without forcibly abducting them or fixing their destination.

A.W. Ward, *The Peace of Westphalia*, in 4 THE CAMBRIDGE MODERN HISTORY 395, 412 (A.W. Ward et al. eds., 1934).

Later, treaties such as the Congress of Vienna of 1815 provided for "the free exercise of religion, and for equality, irrespective of religion, in various cantons of Switzerland and for the equality of the Christian religions in Germany." EGON SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 15 (1964). Montenegro, Serbia, Romania, Greece and Turkey guaranteed religious freedom and equality of rights irrespective of religion in the Treaty of Berlin in 1878. *Id.* at 15-16.

7. The first accords protecting refugees emerged between the First and Second World Wars. These accords were extended to political and religious dissidents in 1935. 16 LEAGUE OF NATIONS O.J. 1681 (1935); see *infra* part II. Immediately following World War II, the provisions protecting those persecuted based on their religion aimed to help the Jewish victims of Nazi persecution. See Judgment of Jan. 15, 1957, Bayerisches Verwaltungsgericht Ansbach [Ansbach Administrative Court], No. 2531 II/56 (F.R.G.).

mony with traditional interpretations of the 1951 Convention. Part III also suggests alternative methods of analysis for judicial or administrative cases dealing with religious persecution that would both harmonize U.S. decisions with the international community and minimize manifestations of bias against religious persecution cases.

II. THE 1951 U.N. CONVENTION ON REFUGEES

The term "refugee," as used by popular media, is broad and loosely defined. In international law, however, "refugee" is a term of art denoting a status that confers special rights and privileges. The predominant definition in international law is contained in the U.N. Convention Relating to the Status of Refugees of July 28, 1951. In addition, the United Nations has developed a detailed handbook which has become the leading guide for applying the principles of the 1951 Convention ("the Handbook").⁸ The 1951 Convention defines a refugee as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable 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 result of such events, is unable or, owing to such fear, is unwilling to return to it.⁹

8. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK OF PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/IP/4/Eng. Rev. 1 (1988) [hereinafter HANDBOOK]. The basis of the Handbook is explained in its foreword:

The explanations given in the Handbook are based on the knowledge accumulated by the High Commissioner's Office since the entry into force of the 1951 Convention on 22 April 1954, including the existing procedures and practices of States in regard to the determination of refugee status, exchanges of views between the Office and the competent authorities of Contracting States, and the literature developed on the subject over this period. . . .
 . . . Use has also been made of the knowledge available concerning the existing procedures and practices of States.

Ghassan M. Arnaout, *Foreword to id.* at 1-2.

Courts of countries that have joined the 1951 Convention commonly rely on the Handbook as persuasive authority. *See, e.g., McMullen v. INS*, 658 F.2d 1312, 1316 n.2 (9th Cir. 1981).

9. Convention Relating to the Status of Refugees, July 28, 1951, art. I(A)(2), 189 U.N.T.S. 137 [hereinafter 1951 Convention].

Hence, a refugee meeting this definition is identifiable based on his or her possession of four characteristics: (1) outside his or her country of origin; (2) without that country's protection; (3) because of a well-founded fear of persecution; (4) on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.¹⁰ Of the four characteristics of a refugee, this Article will focus on the latter three and assume a refugee applicant is outside her country of origin. Of greater importance is whether the applicant is without her country's protection and whether she has a well-founded fear of persecution because of, or on account of, her religion.

A. *Without the Country's Protection*

A person's lack of her country's protection may result from governmental action or action by nongovernmental forces that the government knowingly tolerates or is unable to control.¹¹ "It is the lack of protection by their own government which distinguishes refugees from ordinary aliens."¹² In fact, a leading authority on international refugee law, Mr. Goodwin-Gill, explains: "The role for refugee law . . . is to provide a humane and humanitarian alternative in the midst of today's political realities; one that recognizes that inherent dignity and integrity of every individual, and that offers a principled way toward solutions for those in flight."¹³ As such, "[t]he underlying rationale for . . . [refugee] protection activities appears to be necessity; the lack of protection [by a country of origin] creates a vacuum which the international community tries to fill."¹⁴ Typically, only acts for

10. This definition, refined shortly after World War II, is broad enough to encompass victims of genocide. Genocide involves acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such." Genocide is a crime under international law, and is not essentially within the domestic jurisdiction of states whether committed in time of peace or war. States contracting to the Genocide Convention, adopted in 1948, undertake to prevent and punish genocide. SCHWELB, *supra* note 6, at 30.

11. HANDBOOK, *supra* note 8, ¶ 65.

12. *Rajudeen v. Minister of Employment & Immigration*, 55 N.R. 129, 134 (Can. Fed. Ct. 1984).

13. Guy S. Goodwin-Gill, *The Language of Protection*, 1 INT'L J. REFUGEE L. 6, 18 (1989).

14. *Id.* at 12; *see also* S. REP. No. 256, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 141 (stating that the 1980 Refugee Act gives "statutory meaning to our national commitment to human rights and humanitarian concerns").

which the government is responsible or "behaviour tolerated by the government in such a way as to leave the victims virtually unprotected by [its] agencies" suffice as persecution.¹⁵ However, another leading commentator, Mr. Grahl-Madsen, suggests:

There [are] actually valid reasons for contending that even if a government has the best of wills to prevent atrocities on the part of the public (or certain elements of the population), but for some reason or other is unable to do this, so that the t[h]reatened persons must leave the country in order to escape injury, such persons shall be considered true refugees. As a matter of fact, they may be just as destitute, just as much in need of help and assistance as any other group of refugees.¹⁶

A person's lack of her country's protection is seldom the central issue in refugee cases. Rather, courts more often focus on whether the applicant has a well-founded fear of persecution.

B. Well-Founded Fear of Persecution

1. Well-founded fear

The phrase "well-founded fear" was understood by the Ad Hoc Committee on Statelessness and Related Problems (a United Nations committee) to exist when "a person has actually been a victim of persecution or can show good reasons why he fears persecution."¹⁷ Thus, both the applicant's subjective state of mind and his objective environment determine whether a well-founded¹⁸ fear exists.¹⁹

15. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* § 81, at 189-90 (1966).

16. *Id.* at 191.

17. *Report of the Ad Hoc Committee on Statelessness and Related Problems*, U.N. ESCOR, Ad Hoc Comm. on Statelessness and Related Problems, at 39, U.N. Doc. E/1618 (1950).

18. Despite this guidance from international sources, the United States Supreme Court has declined to provide a precise definition of "well-founded fear." However, it has at least indicated that to prove "well-founded" the applicant must show a "reasonable possibility" of persecution. *INS v. Stevic*, 467 U.S. 407, 424-25 (1984). Just what constitutes a "reasonable possibility" is unclear.

The lack of guidance from the U.S. Supreme Court has led to a split among the circuits. *Gumbol v. INS*, 815 F.2d 406, 409 (6th Cir. 1987). As discussed in Part II.B.1, some circuits, such as the Sixth Circuit, require the applicant to show greater objective manifestations of persecution than others. *Gumbol* also acknowledges that even cases within the Sixth Circuit are inconsistent. *Id.* The Ninth Circuit has held that the well-founded fear standard is more liberal than the clear-probability threshold which means

Whether the applicant "fears" persecution is largely a subjective determination. Persecution may muster courage in one person while causing the heart of another to quail. Declarations of fear by the person facing persecution may at times adequately establish the existence of a well-founded fear. However, when it is available, objective evidence that the declared fear is real should also be adduced.²⁰ Indeed, courts often require applicants to do more than simply say they fear persecution; the applicant must show "good reason[s] why he [or she] individually fears persecution."²¹

Objective evidence may manifest that the applicant's claims of fear are well-founded. General information about the country from newspaper articles, public reports, and government data may indicate a general pattern of persecution. However, the applicant must show that the general threat of persecution applies to her individually to establish her well-founded fear.²² Such fear may be based on personal experiences of past persecution.²³ However, it is future persecution that is of importance for deciding refugee status.²⁴ Evidence of past persecution merely establishes prima facie proof that the alien may suffer future persecution if returned to her home country, so long as the elements which persecuted her remain.²⁵

Fear may also stem from the harsh treatment of persons situated similarly to the applicant.²⁶ Persecution of the applicant's family, friends, or other members of her religion may indicate that "sooner or later [s]he also will become a victim of persecu-

"more likely than not." *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *aff'd*, 480 U.S. 421, 443-44 (1987); *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1321 (9th Cir. 1984).

19. HANDBOOK, *supra* note 8, ¶ 38; see *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir. 1987).

20. HANDBOOK, *supra* note 8, ¶ 42; 8 C.F.R. § 208.13(a) (1992); see *Aguilera-Cota v. INS*, 914 F.2d 1375, 1378-79 (9th Cir. 1990); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984). Courts have recognized that aliens, having fled their homes, often are not able to produce objective evidence. See, e.g., *Bolanos-Hernandez*, 749 F.2d at 1323-24.

21. HANDBOOK, *supra* note 8, ¶ 45; see cases discussed *infra* part III.

22. HANDBOOK, *supra* note 8, ¶ 45.

23. *Id.* ¶ 43; Immigration and Nationality Act §§ 101(a)(42)(A), 208(a), 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1994); 8 C.F.R. § 208.13(b)(1) (1992).

24. *GOODWIN-GILL*, *supra* note 6, at 25.

25. *In re Chen*, No. A-26219652, 1989 WL 331860 (B.I.A. Apr. 25, 1989).

26. HANDBOOK, *supra* note 8, ¶ 43.

tion," and that, as a consequence, the fear of persecution is well-founded.²⁷

Administrative and judicial bodies in the United States have typically required objective indicia of persecution in addition to subjective statements of the applicant to establish a well-founded fear of future persecution.

2. Persecution

The scope of conduct amounting to persecution is expressly undefined in the 1951 Convention and its interpretive Handbook.²⁸ However, at its narrowest, persecution is an unjustified threat of serious harm, including a threat to life or freedom.²⁹ Because threats to life or freedom so clearly amount to persecution, refugee applications that allege such threats most easily satisfy the persecution requirement.

Discrimination, though not per se persecution, may rise to the level of persecution when a government imposes restrictions "of a substantially prejudicial nature."³⁰ Thus, serious restrictions on earning a livelihood, practicing religion, or attending normally available educational facilities are recognized forms of persecution.³¹ Similarly, a combination of factors, though not persecution in and of themselves, may cumulatively create persecution.

In the area of religion, mere membership in a religious community is not normally sufficient to justify refugee status; the fear of persecution must individually apply to the applicant.³² Before refugee status can be successfully claimed, the applicant must demonstrate that, due to her membership in a religious community, she is personally imperiled. For example, the applicant may need to show that a family member or a close friend of the same faith has been persecuted. However, when persecution

27. *Id.*

28. *Id.* ¶ 51.

29. *Id.* In the United States the statutory term "persecution" encompasses more than just restrictions on life or liberty. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985), *aff'd*, 480 U.S. 421, 443-44 (1987).

30. HANDBOOK, *supra* note 8, ¶ 54.

31. *Id.*

32. *Id.* ¶ 73.

is directed at all members of a specific religious group, individual peril may be assumed.³³

Certainly some inconveniences faced on account of religion do not amount to persecution.³⁴ The more distant the conduct is from a threat to life or freedom, the less likely it is to be considered persecution on account of religion.

III. PERSECUTION ON ACCOUNT OF RELIGION

Persecution on account of religion is an express basis for claiming refugee status under the 1951 Convention.³⁵ The 1951 Convention was designed in part to provide relief to Jewish victims of Nazi persecution.³⁶ Regardless of the express religious basis, courts have historically analyzed claims of persecution on account of religion in a restrictive manner.³⁷ While restrictive analysis may be consistent with a common policy to limit refugee influx,³⁸ such practices run the risk of perpetuating the biases that the 1951 Convention was intended to relieve. This is especially true when claims of religious persecution are given more severe scrutiny than claims of persecution on account of race or politics.

A. Defining Religion

The 1951 Convention protects not only religious beliefs, but also religious manifestations. The religious freedoms of the 1951

33. *Id.* ¶ 79.

34. See *INS v. Stevic*, 467 U.S. 407, 418 (1984); *Berdo v. INS*, 432 F.2d 824, 847 (6th Cir. 1970); *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Minwalla v. INS*, 706 F.2d 831 (8th Cir. 1983) (holding that denial of a government job based on religious affiliation was insufficient to amount to persecution).

35. 1951 Convention, *supra* note 9, art. I(A)(2).

36. Jack I. Garvey, *Toward a Reformulation of International Refugee Law*, 26 *HARV. INT'L L.J.* 483, 483 (1985); see Judgment of Jan. 15, 1957, Bayerisches Verwaltungsgericht Ansbach [Ansbach Administrative Court], No. 2531 II/56 (F.R.G.).

37. *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 502 U.S. 1086 (1992); Jennifer A. Rosenfeld, *Immigration Law—Religious Conscientious Objectors—Ninth Circuit Holding Supports United States' Commitment to United Nations Protocol*, 15 *SUFFOLK TRANSNAT'L L.J.* 390 (1991); see, e.g., *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984) (denying refugee status to Iraqi nationals of Christian faiths); *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969) (denying refugee status to a Yugoslavian who feared religious discrimination would prevent his obtaining employment).

38. See, e.g., *RELUCTANT HOSTS: EUROPE AND ITS REFUGEES* 71 (Danible Joly & Robin Cohen eds., 1989); Melvor, *supra* note 1.

Convention have their genesis in Article 18 of the Universal Declaration of Human Rights.³⁹ Freedoms protected in the 1951 Convention include the right to freedom of thought, conscience, and religion, which includes the freedom to have or adopt a religion or belief of choice and the freedom to manifest such religion or belief in public or private.⁴⁰ The U.N. would include "theistic, non-theistic and atheistic beliefs" in the scope of religion.⁴¹ Such a concept of religion is broad indeed.

Courts struggle with defining *religion*; it is difficult to encapsulate the noble sentiments of humanity. The history of religion in U.S. courts provides an apt example. The Framers of the U.S. Constitution understood *religion* to refer to theistic notions of divinity, morality, and worship.⁴² This understanding provided a core definition, but it was narrow and has since been recognized as too limited.⁴³ Perhaps the simplest expansion was to use traditional religions as a yardstick by which to evaluate other less traditional beliefs.⁴⁴ This "analogical approach," however, does not capture all forms of devotion and has not been accepted as a definitive concept of religion.⁴⁵ At times, U.S. courts have relied

39. HANDBOOK, *supra* note 8, ¶ 71. The Declaration reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., pt. 1, art. 18, U.N. Doc. A/810 (1948).

40. HANDBOOK, *supra* note 8, ¶ 71; *cf.* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 221 (recognizing the freedom to change religion or belief).

41. *Elimination of All Forms of Religious Intolerance: Note by the Secretary-General*, U.N. GAOR, 25th Sess. ¶ 8, U.N. Doc. A/8330 (1971) [hereinafter *Religious Intolerance*].

42. See *Davis v. Beason*, 133 U.S. 333, 342 (1890) (defining religion as "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will"), *overruled on other grounds as noted by Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1179 (2d ed. 1988).

43. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 254 (1989).

44. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 786 (1984).

45. Ingber, *supra* note 43, at 273.

on broader definitions, but courts continue to vacillate when confronted with non-traditional beliefs.⁴⁶

One source of uncertainty may be that judges are uncomfortable commenting on religious beliefs unfamiliar to them. An example, in the refugee context, is found in *In re Maria*,⁴⁷ where a Haitian woman sought refuge in the U.S. claiming a well-founded fear of religious persecution in Haiti on account of her practice of voodoo.⁴⁸ The administrative judge expressly assumed, without deciding, that voodoo may be a religion. Despite uncontradicted evidence that voodoo practitioners had been burned at the stake, killed, and, like the applicant's family, forced to flee their homes, the court decided that the applicant had not proven a well-founded fear.⁴⁹ The judge's declination to confront whether voodoo practices merit the protections religions enjoy manifests a discomfort with an issue central to the case. This discomfort is also demonstrated by the fact that the judge assumed voodoo merited the status of religion but did not capitalize the word as one does traditional religious practices such as Christianity, Catholicism, and Judaism.

A factor to consider when confronting non-traditional beliefs is that religious belief is grounded in devotion to a force outside oneself and outside mortal man—or its inverse: the belief that there is no such force. Devotion to other men is the realm of families and politics, and yet liberties traditionally granted to religious freedom would lead to anarchy if extended to self interests.

The threat of insincerity compounds the task of evaluating non-traditional beliefs. For example:

Since 1993 close to 200 lawsuits have been filed [in the United States] by inmates defending on religious grounds practices ranging from masturbation to playing reggae music. In one case, a Texas inmate claimed that his religion required that once a week he be served chateaubriand, an expensive cut of beef.⁵⁰

46. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Welsh v. United States*, 398 U.S. 333 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961); PAUL TILLICH, *DYNAMICS OF FAITH* 1-2 (1957); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 599 (1982). These sources suggest different ways in which *religion* has been or can be defined.

47. No. A-24773447, slip op. (B.I.A. 1991).

48. *Id.* at 2.

49. *Id.*

50. Tony Mauro, *Officials Balk at Inmate 'Religious' Lawsuits*, USA TODAY, Sept.

The novelty of such practices as religious devotion and their overwhelming self-satisfaction make their sincerity dubious.

A case confronting the genuineness of belief is *Bastanipour v. INS*,⁵¹ in which an Iranian claimed to have converted from Islam to Christianity while in the United States. Conversion from Islam is a capital offense under Islamic religious law.⁵² The Board of Immigration Appeals ("B.I.A.") found that Bastanipour had "not established that he [had] in fact converted to Christianity" because he never formally joined a church and, while detained, he had requested a pork-free diet (consistent with Islamic faith).⁵³ The Seventh Circuit vacated and remanded, stating that the issue was whether an Iranian religious judge would find that Bastanipour had apostatized.⁵⁴ The circuit court concluded that Bastanipour's renunciation of Islam for Christianity, as reported by witnesses, established a well-founded basis for his fear of persecution and perhaps death on account of his professed religion if he was returned to Iran.⁵⁵ While the Seventh Circuit did not expressly consider whether Bastanipour was acting opportunistically, it suggested that an insincere claim of faith may be grounds for denying refugee status.⁵⁶ *Bastanipour* suggests that, despite some evidence to the contrary, substantial deference should be given claims of religion.

Like *Bastanipour*, the Handbook suggests it is valid to consider sincerity of belief. The Handbook requires a refugee fearing persecution for military desertion or draft evasion on account of religion to demonstrate that his convictions are genuine.⁵⁷ Manifestations of a belief prior to being drafted are significant evidence of sincerity.⁵⁸ In addition, under the Handbook's broad concept of religion, a genuineness inquiry for claims of novel religious belief seems desirable where the claim is manifestly self-serving.

30, 1996, at 1A.

51. 980 F.2d 1129 (7th Cir. 1992).

52. *Id.* at 1131.

53. *Id.* at 1132.

54. *Id.*

55. *Id.* at 1133.

56. *Id.* at 1132-33.

57. HANDBOOK, *supra* note 8, ¶ 172.

58. *Id.* ¶ 174.

The Handbook identifies forms of religious persecution, but it does not outline how to determine if persecution is religiously motivated.⁵⁹ The next section of this Article discusses cases that address different forms of persecution and reveals several manifestations of judicial bias against claims of persecution on account of religion. The Article then suggests unbiased criteria for determining whether persecution is on account of religion.

B. Bias in Determining Persecution on Account of Religion

1. Bias in required level of proof

In the past decade, the Sixth Circuit has considered a number of cases in which the applicants claimed persecution on account of public manifestations of religion.⁶⁰ The cases share remarkable similarities and reveal substantial bias against religious persecution claims through increased requirements of proof. Each case involved Christian Iraqis who feared persecution from the majority political party if returned to Iraq. In each case the applicants publicly manifested religious belief and declined to join the ruling Ba'ath Party.

In *Dally v. INS*,⁶¹ the court consolidated three appeals and held that in none of the three had a clear probability of persecution been established. The first applicant submitted a number of media articles concerning human rights violations by the Iraqi government and asserted that a similarly situated cousin had been harassed for his refusal to join the Ba'ath Party. The court found that this did not demonstrate a well-founded fear of persecution on the applicant's part because the threat of harm did not apply to him individually.⁶² This holding ignored the Handbook's guidance that "well-founded fear may be created by harsh treatment of similarly situated persons."⁶³

In the second appeal, an applicant asserted that he had been detained and severely beaten for refusing to join the Ba'ath

59. This grants wide latitude to contracting countries, allowing them to give a very narrow interpretation to refugee status and to exclude many otherwise deserving applicants.

60. See *Gumbol v. INS*, 815 F.2d 406 (6th Cir. 1987); *Yousif v. INS*, 794 F.2d 236 (6th Cir. 1986); *Dally v. INS*, 744 F.2d 1191 (6th Cir. 1984); *Shamon v. INS*, 735 F.2d 1015 (6th Cir. 1984); *Nasser v. INS*, 744 F.2d 542 (6th Cir. 1984).

61. 744 F.2d 1191 (6th Cir. 1984).

62. *Id.* at 1196.

63. HANDBOOK, *supra* note 8, ¶ 43.

Party. The court denied his application because it claimed his assertions were unsubstantiated and self-serving.⁶⁴ This denial disregarded the Handbook's instruction that personal past persecution creates a prima facie case of future persecution⁶⁵ and that often the victim's own statements must be relied upon without more.⁶⁶

In the third appeal, an applicant asserted that he and his family had been the victims of repeated government harassment. The applicant's father had been seized, interrogated, and "pushed around" for refusing to join the Ba'ath Party. Two months later, his father had been discharged from his employment of seventeen years. The abusers also threatened to jail the applicant's father in order to force his oldest sister to join the youth division of the party. Despite the proximity of the persecution to the applicant, refugee status was denied because no independent evidence confirmed his assertions.⁶⁷ The Sixth Circuit suggested that an applicant submit affidavits from relatives or other documentary evidence corroborating individual episodes of persecution.⁶⁸

Applicants in subsequent cases before the Sixth Circuit attempted to satisfy the burdens required of the applicants in *Dally*. In *Nasser v. INS*,⁶⁹ the Iraqi Christian applicant asserted that he had been arrested and beaten for not joining the Ba'ath Party and that his father had been killed for the same reason.⁷⁰ This treatment demonstrated the particularized persecution required in *Dally*, but the majority disregarded it here as self-serving.⁷¹ The dissent felt the evidence should not have been disregarded because it was uncontradicted and particularized to the applicant and his family.⁷²

In *Yousif v. INS*,⁷³ the Iraqi Christian applicant asserted that he was oppressed by the Ba'ath Party and that his brother had been imprisoned for fifteen days for refusing to read the Koran,

64. *Dally*, 744 F.2d at 1196.

65. GRAHL-MADSEN, *supra* note 15, § 77, at 176.

66. GOODWIN-GILL, *supra* note 6, at 25.

67. *Dally*, 744 F.2d at 1197.

68. *Id.*

69. 744 F.2d 542 (6th Cir. 1984).

70. *Id.* at 545.

71. *Id.*

72. *Id.*

73. 794 F.2d 236 (6th Cir. 1986).

the holy Muslim writ.⁷⁴ In addition, an affidavit from his sister described Yousif's beating for not joining the Ba'ath Party, his being forced to read the Koran, his being threatened with death, and his father's being beaten for failure to join the Ba'ath Party.⁷⁵ The court held that the particularized persecution, asserted by Yousif and corroborated by his sister, was insufficient because it was not supported by other documentation and because the State Department felt that Christians as a group were no longer at risk of being persecuted in Iraq.⁷⁶ This establishes the unbalanced proposition that documentation of general persecution is insufficient to prove particularized persecution,⁷⁷ but documentation of a lack of generalized persecution is sufficient to disprove the probability that an individual was persecuted. The sister's affidavit, rather than adding weight to Yousif's claim, damaged his claim before the court because it alleged persecutions that Yousif himself had not claimed.⁷⁸ Apparently, supporting documentation is unbelievable if it presents more compelling facts than those asserted by the applicant himself.

In *Gumbol v. INS*,⁷⁹ an applicant again mustered evidence to satisfy the burdens the Sixth Circuit had previously enunciated. The Iraqi Christian applicant asserted that he had been beaten for not joining the Ba'ath Party. His particularized claims were corroborated by an affidavit stating that shortly after the attack, the affiant observed that the applicant's face was badly bruised.⁸⁰ In addition, the affidavit stated that Iraqi Christians in general were persecuted by the Ba'ath Party.⁸¹ Both generalized and particularized persecution were asserted and corroborated by documentation. The Sixth Circuit, citing inconsistencies between the affidavit and the applicant's testimony with respect to the date of the incident and the identity of the assailants, found that a probability of persecution was not established.⁸² Again, a close degree of corroboration was required.

74. *Id.* at 239.

75. *Id.* at 240.

76. *Id.* at 239.

77. *Dally v. INS*, 744 F.2d 1191, 1193 (6th Cir. 1993).

78. *Yousif*, 794 F.2d at 240.

79. 815 F.2d 406 (6th Cir. 1987).

80. *Id.* at 407.

81. *Id.*

82. *Id.* at 408.

The Sixth Circuit's heavy burdens of proof alone do not establish a bias against religion as a basis for claiming refugee status. However, bias is manifest where each successive applicant appeared to satisfy the burdens previously declared by the Sixth Circuit but was denied refuge when more onerous proofs were newly required. This bias is especially evident when the burdens are so challenging that an applicant will rarely be able to satisfy them. Under these cases, to prove religious persecution the applicant must document persecution particularized to himself and the corroborating documentation must closely follow his allegations, or it will be rejected. This level of proof is contrary to the guidance of the Handbook and authorities in the field, which acknowledge that such proof will often be unavailable to the applicant.⁸³ Obtaining documentation of religious persecution is difficult. Public records of such events are rarely kept and it is unlikely that an individual applicant's plight will be reported in the news media.⁸⁴ Requiring the burdensome proof of particularized persecution by documentation in the face of guidance to the contrary casts doubts on our courts' commitment to protect religious expression. It suggests that religion is a disfavored basis for claiming refugee status.⁸⁵

Admittedly, not all cases have required such onerous burdens. In *In re Chen*,⁸⁶ a decision of the B.I.A., the applicant's own statements of past persecution suffered by himself and his family members were sufficient to establish religious persecution. Perhaps the applicant's self-serving and uncorroborated statements were accepted as sufficient because the Chinese government was openly opposed to Western religions of which the applicant and his family were members. The applicant's own testimony was also sufficient to show religious persecution in *In re*

83. See HANDBOOK, *supra* note 8, ¶¶ 37, 40-41; GOODWIN-GILL, *supra* note 6, at 25.

84. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1325 (9th Cir. 1984).

85. The applicants in these cases decided by the Sixth Circuit asserted both religious and political persecution, and both claims were denied in each case. However, bias is manifest in the extreme and unfair burdens of proof required of the applicants. Bias is also manifest in decisions where asylum based on political persecution is granted while asylum based on religious persecution is denied. For further discussion of this bias, see *infra* notes 104-124 and accompanying text.

86. No. A-26219652, 1989 WL 331860 (B.I.A. Apr. 25, 1989).

*Soleimani*⁸⁷ and in a Canadian decision, *Rajudeen v. Minister of Employment & Immigration*.⁸⁸

2. *Bias favoring political claims over religious claims*

Perhaps the form of religious intolerance most often considered by courts is draft evasion. Draft evasion may entail elements of both religious and political persecution. As "not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status,"⁸⁹ the Handbook provides the following guidance in making a draft evasion determination:

Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.⁹⁰

Accordingly, whether intolerance of a religious conviction that avoids military service amounts to persecution depends on the genuineness of the conviction, the alternatives to military service available, and the expected consequences if refuge is denied.⁹¹

Recently, the United States Supreme Court considered draft evasion on account of religious belief against taking up arms in *INS v. Canas-Segovia*.⁹² The Ninth Circuit had found that two El Salvadoran Jehovah's Witnesses had a well-founded fear of persecution based on their religious convictions which prevented them from serving in the military.⁹³ The circuit court found that their religious convictions were genuine, that the Salvadoran conscription policy allowed no exemption for religious reasons,⁹⁴

87. No. A-26157647, 1989 WL 331872 (B.I.A. July 13, 1989).

88. 55 N.R. 129, 133 (Can. Fed. Ct. 1984).

89. HANDBOOK, *supra* note 8, ¶ 171.

90. *Id.* ¶ 172.

91. Judgment of Apr. 1, 1959, Bayerisches Verwaltungsgericht Ansbach [Ansbach Administrative Court], No. 3825 II/58 (F.R.G.).

92. 502 U.S. 1086 (1992).

93. *Canas-Segovia v. INS*, 902 F.2d 717, 727-28 (9th Cir. 1990), *vacated and remanded*, 502 U.S. 1086 (1992).

94. The present constitution of El Salvador states that "[m]ilitary service is

and that because failure to serve would result in imprisonment,⁹⁵ the applicants would suffer religious persecution.⁹⁶ The Supreme Court vacated and remanded for further consideration in light of *INS v. Elias-Zacanas*,⁹⁷ requiring the applicants to present evidence of the persecutors' motives.⁹⁸ The Court required the applicants to prove the persecutors' motives because the United States Code requires the persecution to be "on account of" religion.⁹⁹ The 1951 Convention uses the same language, but unfortunately, the Court did not rely on the Handbook's guidance in applying this standard. The Handbook concludes that proof of the persecutors' motives will rarely be available to a refugee.¹⁰⁰ The burden of proof imposed by the Court is essentially insurmountable. Proving the motive of future persecution is difficult indeed. Direct evidence will not yet exist and circumstantial evidence will not accumulate in the applicant's absence. Perhaps the Supreme Court expects the applicant to obtain an affidavit from her persecutor, an unlikely possibility.¹⁰¹

On remand, the Ninth Circuit unsurprisingly found that the applicants could not prove that the motivation of the potential persecution was on account of the applicants' religion.¹⁰² However, the court granted the applicants refugee status, reasoning that the applicants would suffer persecution for their political

mandatory for all Salvadorans between eighteen and thirty years of age. In case of need, all Salvadorans suitable for performance of military tasks shall be soldiers." CONSTITUCIÓN DE LA REPUBLICA DE EL SALVADOR [Constitution] art. 215 (El Sal.).

95. See Código de Justicia Militar y Ley de Procedimientos Penales Aplicables al Suspendarse Las Garantías Constitucionales [Code of Military Justice and Law of Penal Procedures Applicable to Suspension of Constitutional Guarantees] arts. 137-39 (1989) (El. Sal.) (stating that desertion is punished with six months to fifteen years of imprisonment).

96. *Canas-Segovia*, 902 F.2d at 720 (noting that applicants had also testified of other forms of persecution: an army deserter's arms were chopped off, and a friend who had fled military service was taken away and never seen again after returning to his neighborhood).

97. 502 U.S. 478 (1992) (holding that a guerrilla organization's attempt to coerce a person into performing military service does not necessarily constitute "persecution on account of . . . political opinion" under 8 U.S.C. § 1101(a)(42) and that in order to satisfy § 1101(a)(42), the persecution must be on account of the *victim's* political opinion, not the persecutor's).

98. *INS v. Canas-Segovia*, 502 U.S. 1086 (1992).

99. *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992); see 8 U.S.C. § 1101(a)(42) (1994); 1951 Convention, *supra* note 9, art. I.

100. HANDBOOK, *supra* note 8, ¶¶ 37, 40-41.

101. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1329 (9th Cir. 1984).

102. *Canas-Segovia*, 970 F.2d at 601.

beliefs if returned to El Salvador. The applicants had not presented evidence that their persecutors were motivated on account of political opinion. Instead, the court found a fear of persecution warranted because the El Salvadoran military would mistakenly impute a political basis to the applicants' refusal to fight in a civil war. The rationale of "imputed political opinion" is that a persecutor falsely attributes a political opinion to the victim's conduct and then persecutes the victim on account of that mistaken belief of the victim's views.¹⁰³

This imputation is nothing less than an assumption that circumvents the requirement of proving a persecutor's motive. The court assumed that a political belief would be mistakenly attributed to the applicant and that any persecution feared by the applicant is derived from that mistaken attribution. Such an assumption is essentially a prerequisite to granting refugee status because applicants will rarely be able to provide direct evidence of a persecutor's motives.

The shocking aspect of *Canas-Segovia* is that this court was willing to assume, without evidence, that persecution was on account of political opinions while refusing to find that it was on account of religious beliefs. Bias is manifest in the court's willingness to impute political antagonism as the basis for persecution while refusing to make similar assumptions for religious antagonism.

Canas-Segovia is not an isolated decision. In *Sarkis v. Nelson*,¹⁰⁴ the applicant refused military service based on religious convictions.¹⁰⁵ He was also denied refugee status based on religious persecution but, in similar incongruous fashion, received it based on political persecution.¹⁰⁶

3. *Bias in interpreting "on account of religion"*

Requiring the applicant to show the persecutor's intent, as in *Canas-Segovia*, twists the language of the 1951 Convention in a novel manner. The Handbook, the leading analysis of the 1951 Convention, addresses what persecution for draft evasion "on account of religion" means. The Handbook explains that the per-

103. *Id.* at 602.

104. 585 F. Supp. 235 (E.D.N.Y. 1984).

105. *See id.* at 238.

106. *See id.* at 239-40.

secution is on account of religion if the refugee applicant's motive for refusing to serve in the military is because such service violates his faith or conscience.¹⁰⁷ The Handbook never suggests that the applicant must prove the persecutor's motive for the persecution to be "on account of" a protected classification. If the applicant's actions are motivated by genuine religious convictions and the applicant suffers as a result, the applicant has a sufficient claim for refugee status under the guidelines in the Handbook. By requiring the refugee to prove the intent of the persecutor, U.S. courts have misapplied the 1951 Convention.¹⁰⁸ The bias of this misapplication is manifest by not requiring proof of the same intent when political persecution is alleged.

Of course, U.S. courts may justify requiring proof of the persecutor's motives by claiming that U.S. courts are not bound by the 1951 Convention but are instead following domestic law, found in the 1980 Refugee Act.¹⁰⁹ However, the 1980 Refugee Act is based on the 1951 Convention and the Handbook.¹¹⁰ The stated

107. See HANDBOOK, *supra* note 8, ¶¶ 170-72.

108. The argument that a showing of persecution on account of religion under the 1951 Convention requires that the persecutor's intent be shown is grounded in the idea that the persecutor does not care why the individual is not conforming to the persecutor's wishes. Because the persecutor is unconcerned with the nonconforming person's motives, it follows that the persecutor is not persecuting the nonconforming person on account of religion. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992). This argument ignores the fact that the nonconforming person does not conform on account of religion and that, but for his or her religious conviction, he would conform and avoid the persecution.

109. The 1980 Refugee Act is codified at 8 U.S.C. §§ 1101-1106 (1994) and is controlling. Although the United States is a signatory to the 1967 Protocol, that agreement was not self-executing. See *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. As such, it is controlling only to the extent it is adopted into domestic law.

110. *Canas-Segovia v. INS*, 902 F.2d 717, 722 (9th Cir. 1990), *vacated and remanded*, 502 U.S. 1086 (1992); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987); *INS v. Stevic*, 467 U.S. 407, 421 (1984). The U.N. Protocol binds parties to the substantive provisions of Articles 2 through 34 of the 1951 Convention.

The persuasive value of the Handbook has also been acknowledged by Congress and U.S. courts. See *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (memorandum for David W. Crosland, General Counsel, Immigration and Naturalization Service). Both the Supreme Court and circuit courts have looked to the Handbook for guidance in determining refugee status and consider it to be authoritative on the subject. *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (indicating that the Handbook provides "significant guidance in construing the Protocol"); *Canas-Segovia*, 902 F.2d at 722; *M.A. A26851062 v. INS*, 899 F.2d 304, 312 n.5 (4th Cir. 1990) (en banc).

purpose of the Act is to bring U.S. law into conformity with these documents.¹¹¹ Consequently, U.S. domestic law should reflect the analysis of the Handbook and not require proof of the persecutor's motives.

The Handbook expressly counsels against requiring the applicant to prove the motives of her persecutors.¹¹² Indeed, some U.S. courts have acknowledged that proving a persecutor's motives is often beyond the applicant's ability.¹¹³ Fortunately, U.S. courts have tempered the severity of the requirement to prove that feared persecution is improperly motivated by permitting some motives to be imputed or assumed.¹¹⁴ Imputing motives for some forms of persecution and not others, however, creates bias, especially when done without justification.

Requiring the applicant to prove that the persecutor is motivated by religious bias, while indulging in assumed motives for applications on political grounds, seems especially arbitrary from the applicant's perspective. *Canas-Segovia* is a good example.¹¹⁵ In that case, the single action creating fear of persecution was refusal to serve in the military.¹¹⁶ Without dispute, the reason for the refusal was that the well-known tenets of the applicants' faith prohibited them from taking up arms.¹¹⁷ The applicants did not have or claim any political objection to military service. For the applicants, the persecution was entirely on account of their public manifestation of their religious beliefs. Granted, the religiously motivated refusal did have the political impact of not

111. S. REP. NO. 256, 96th Cong., 2d Sess. 4 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 144 ("[T]he new definition [of 'refugee'] will bring United States law into conformity with our international treaty obligations . . .").

112. HANDBOOK, *supra* note 8, ¶ 66 ("Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail."); *id.* ¶ 67 ("It is for the examiner . . . to ascertain the reason or reasons for the persecution feared."); *id.* ¶ 197 ("The requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.").

113. See *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1324 (9th Cir. 1984) ("Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.").

114. See *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992) (imputed political opinion was sufficient to overcome the requirement of showing persecutors' motives).

115. 902 F.2d 717 (9th Cir. 1990), vacated and remanded, 502 U.S. 1086 (1992).

116. *Id.* at 720-21.

117. *Id.* at 720.

serving in a nation's military during a time of civil strife. However, this impact does not justify assuming that the persecution is therefore on account of political belief. Although most disfavored religious conduct will have a political impact, persecution on account of that conduct remains religious persecution. Refusing to recognize such persecution as religious persecution shows a lack of civil respect for the convictions of others.

Religion is not exclusively a matter of private, inner conviction, but also entails a social concern arising within a community of faith and imposing religious duties on believers. These duties must be exercised within religious communities and in other social contexts. The distinction between the religious motivation of an act and its political impact has no legitimate relevance. By drawing this distinction, U.S. courts relegate religion to a second-rate basis for claiming refugee status.

4. *Suggested criteria for determining whether persecution is on account of religion*

Courts should evaluate applications for asylum similarly, whether based on persecution on account of religious or political beliefs. The heartfelt and fervent nature of both political and religious opinions suggests they should be treated with little distinction. Both inevitably lead to differences among people, and, because minority opinions in both are often persecuted by the majority, both merit similar protections of thought and conscience. International instruments often list the two sources of belief together.¹¹⁸ In fact, the Handbook recognizes the similarity between the two by using them as examples of grounds for refugee status that would be expected to overlap.¹¹⁹ Often, a person's political opinions and affiliations are shaped by her religious beliefs. For example, the political differences in Northern Ireland are widely known to have their roots in the religious differences of the Catholic and Protestant faiths. Likewise, much of the current political turmoil in Bosnia is driven by religious differences

118. In addition to religious and political opinions being listed together in the 1951 Convention, *supra* note 9, art. I(A)(2), the two forms of opinion are also listed together in other international instruments. See, e.g., Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31; Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93.

119. HANDBOOK, *supra* note 8, ¶ 67.

between Christians and Muslims. Because political differences are often grounded in religious differences, only one test should be applied for determining when actions amount to persecution on account of either religious or political opinions.

The Handbook defines when fear of persecution for holding heartfelt beliefs is itself grounds for claiming refugee status.¹²⁰ First, the opinion must come to the attention of the authorities; then, it must not be tolerated by the authorities; and finally, the applicant must possess a subjective fear of persecution as a result of the intolerance.¹²¹ Admittedly, this is the test for persecution on account of political beliefs. However, under most circumstances, it would also be an effective test for publicly manifested religious convictions. To deny a religious conviction protections similar to those granted to political beliefs elevates political beliefs to a higher level of human expression, while denigrating religious beliefs to the level of mere arguable opinion.¹²²

Applying the Handbook's test for persecution of political opinion to persecution of religious convictions would yield consistent results for similar deeply felt feelings and would avoid inadvertently favoring one protected classification over another. The Handbook's political opinion test, as stated above, requires that the opinion come to the attention of the authorities; that the opinion not be tolerated by the authorities; and that the applicant suffer a subjective fear of persecution.¹²³ The facts in *Canas-Segovia* provide an example of how this test could be applied. The genuine religious conviction of the two Jehovah's Witness applicants to refuse to perform military service came to the attention of the authorities when they fled conscription. The au-

120. *Id.* ¶ 80.

121. *Id.*

122. The amount of latitude given to an INS examiner may contribute to this. Bernard P. Wolfsdorf describes this latitude:

[A]sylum/refugee law is made even more complex by the measure of unpredictability arising from the discretion granted to individual I.N.S. examiners in such cases. I could hardly contain my glee, for example, when I recently represented an Armenian Christian religious refugee from Iran before an I.N.S. examiner; as we entered her office at the start of the interview, I noticed a collection of religious artifacts on her desk. There was no problem having the case approved.

Bernard P. Wolfsdorf, *Permanent Immigration Through Political Asylum and Refugee Status*, C505 ALL-ABA COURSE OF STUDY: IMMIGRATION LAW 317, 320 (1990).

123. HANDBOOK, *supra* note 8, ¶ 80.

thorities would not tolerate that religious conviction. The applicants told stories of friends who had resisted military service in El Salvador and suffered dismemberment or had disappeared.¹²⁴ As a consequence, the applicants feared persecution. If this test had been applied in *Canas-Segovia*, rather than the persecutor-motive test, the court most likely would have found that the applicants had a well-founded fear of persecution based on religion as well as on political opinion.

This test would not require applicants to prove persecutors' motives. The test also avoids the almost insurmountable burdens of proof that U.S. courts place on applicants, while conforming with the guidelines given in other sections of the Handbook. Moreover, adopting this test to analyze religious persecution would give guidance to state officials required to determine refugee status who otherwise operate in an ad hoc fashion.¹²⁵

5. *Suggested criteria when persecution is based on membership in a religious group*

The foregoing analytical framework would be effective when considering persecution on account of an applicant's public manifestation of religion, such as conscientiously objecting to military service. However, when persecution is merely on account of an applicant's membership in a religion, another test would be more appropriate. This form of persecution could be suffered by a Jew who does not observe the practices of her faith but is persecuted simply for being a Jew. This type of religious persecution is analogous to persecution based on mere membership in a social group, for which an analytical framework already exists. Thus, these tests can also be applied when the feared persecution is on account of the applicant's religious membership and where the applicant has not publicly practiced her religion. Persecution for mere membership in a religious faith clearly violates the Univer-

124. *Canas-Segovia v. INS*, 902 F.2d 717, 727 (9th Cir. 1990), *vacated and remanded*, 502 U.S. 1086 (1992).

125. See, for example, *In re Chen*, No. A-26219652, 1989 WL 331860 (B.I.A. Apr. 25, 1989), in which the Board found that a son of a Christian minister in China was severely persecuted as was his family, but used no criteria to determine if the persecution was religiously based. Rather, the Board merely seemed able to sense that the persecution was on account of religion.

sal Declaration of Human Rights.¹²⁶ As such, it should be grounds for obtaining refugee status.

What constitutes persecution on account of mere membership in a religious community is often given a narrow interpretation. In *Minwalla v. INS*,¹²⁷ a Pakistani member of the Zoroastrian faith claimed persecution on account of his religious membership based on his systematic removal from government jobs and other economic disadvantages.¹²⁸ The court found that mere economic disadvantage did not amount to persecution and consequently denied refugee status.¹²⁹ In *Youkhanna v. INS*,¹³⁰ an Iraqi Christian asserted that he was persecuted on account of his religion and membership in the Kurdistan Democratic Party.¹³¹ The court found that the applicant had not proven that he had been singled out for persecution and thus denied his claim.¹³² Likewise, in *Osmani v. INS*,¹³³ the B.I.A. found that the applicant, a Muslim in Yugoslavia, had not proven that he was persecuted despite being in the religious minority.¹³⁴ The Seventh Circuit questioned this finding, but affirmed denial of refugee status on other grounds.¹³⁵ The Seventh Circuit took notice that conditions in Yugoslavia today are not what they used to be.¹³⁶ In fact, the current conditions can be contrasted to the conditions of the Yugoslavian Catholic claiming refugee status in *Blazina v. Bouchard*¹³⁷ in 1961 where "those that go to church and worship over there are looked down upon" by the ruling Communist Party.¹³⁸

In some cases, asylum for religious persecution based on mere membership has been granted. In *In re Soleimani*, an Iranian Jew asserted that she would be persecuted because of her religious membership if returned to Iran, and the immigration

126. GRAHL-MADSEN, *supra* note 15, § 89, at 218; see *supra* note 39 for the relevant text of the Universal Declaration of Human Rights.

127. 706 F.2d 831 (8th Cir. 1983).

128. *Id.* at 835.

129. *Id.*

130. 749 F.2d 360 (6th Cir. 1984).

131. *Id.* at 361.

132. *Id.*

133. 14 F.3d 13 (7th Cir. 1994).

134. *Id.* at 14.

135. *Id.* at 15.

136. *Id.*

137. 286 F.2d 507 (3d Cir. 1961).

138. *Id.* at 509.

judge agreed.¹³⁹ Likewise, in *In re Chen*, a Chinese Christian asserted that he had suffered persecution in the past because of his religion, and the immigration judge agreed that the past persecution led to a well-founded fear of future persecution because religious persecution in China had not been eliminated.¹⁴⁰ In Canada, where the 1951 Convention is cited as controlling more frequently than in the United States, a Muslim from Sri Lanka, where his faith is in the minority, sufficiently showed he suffered religious persecution on account of religious membership.¹⁴¹ These cases seem to follow the presumption that where an applicant demonstrates membership in a distinguishable persecuted group, an assumption that the applicant has a well-founded fear of persecution arises.¹⁴² Yet, the facts asserted in these cases, in which religious persecution was found, were no more compelling than in the cases in which religious persecution was found to be lacking. It seems that an unspoken presumption of validity was followed in some cases but not in others, based on an applicant's country of origin.¹⁴³ This highlights the need for applying a consistent method of analysis to cases involving persecution on account of mere membership in a religious community. A consistent analysis can be found in cases involving persecution on account of mere membership in a social group.

In *Sanchez-Trujillo v. INS*,¹⁴⁴ the Ninth Circuit set forth a four-part test to determine eligibility for relief on account of social group membership.¹⁴⁵ The test requires that (1) cognizability

139. No. A-26157647, 1989 WL 331872, at *4 (B.I.A. July 13, 1989).

140. No. A-26219652, 1989 WL 331860 (B.I.A. Apr. 25, 1989).

141. *Rajudeen v. Minister of Employment & Immigration*, 55 N.R. 129, 134 (Can. Fed. Ct. 1984).

142. This presumption for social groups has been explained by Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 60 (1983).

143. Garvey, *supra* note 36, at 492.

144. 801 F.2d 1571 (9th Cir. 1986).

145. *Id.* at 1574-75. The court stated:

First, we must decide whether the class of people identified by the petitioners is cognizable as a "particular social group" under the immigration statutes. Second, the petitioners must have established that they qualify as members of the group. Third, it must be determined whether the purported "social group" has in fact been targeted for persecution on account of the characteristics of the group members. Finally, we must consider whether such "special circumstances" are present to warrant us in regarding mere membership in that "social group" as constituting per se eligibility for asylum

of the group be established; (2) applicants show they are members of the group; (3) the group be targeted for persecution on account of a distinguishing characteristic; and (4) special circumstances be present.¹⁴⁶ The first three prongs of this test appear to be fundamental. What constitutes special circumstances is outlined neither in the Handbook nor the Ninth Circuit's opinion. However, the required "special circumstances" would seem to be that the government persecutes the group because of a distinguishing characteristic. It is likely that what constitutes "special circumstances" will be determined on a case-by-case basis.

The *Sanchez-Trujillo* test is broad enough to encompass many forms of persecution due to membership in a religious community. Many religions create relationships based on voluntary association, which would qualify their members as a cognizable social group. The applicant would need to show membership in the religion, and then, if the applicant could show that the group was targeted for persecution on account of a distinguishing characteristic, a well-founded fear would arise.

This test seems to comport with the findings in *In re Soleimani*, *In re Chen*, and *Rajudeen*. In each of those cases, the applicant demonstrated that he or she was a member of a religion cognizable from the general public and targeted for persecution in his or her country. Applying the *Sanchez-Trujillo* test to *Youkhanna*, in which refuge was denied,¹⁴⁷ would likely have resulted in a grant of refugee status. In *Youkhanna*, the applicant established that he was a member of a Christian religion, which is cognizable in Muslim-controlled Iraq, his country of origin. He also established that members of his Christian religion and his political party were being persecuted in Iraq.¹⁴⁸ Because similarly situated members of his religion (social group) were being persecuted, the applicant would have been granted refugee status under the *Sanchez-Trujillo* test. What is uncertain is whether the "special circumstances" element would be interpreted to follow the guidance of the Handbook and the presumption that arises when the first three elements are demonstrated, or whether the final element would be interpreted to require the

Id. (citations omitted).

146. *Id.*

147. *Youkhanna v. INS*, 749 F.2d 360, 360 (6th Cir. 1984).

148. *Id.* at 361.

applicant to demonstrate that he or she will be "singled out for persecution" like the court actually did in *Youkhanna*.¹⁴⁹

Applying analogous, previously developed tests to determine whether persecution is religiously motivated is effective when the form of persecution is based on religious manifestations or mere membership. However, a higher level of protection is appropriate and necessary when persecution is simply for religious beliefs.

6. *Need for criteria when persecution is based on religious beliefs*

The international community accords absolute protection to religious beliefs.¹⁵⁰ This position is widely shared by many nations.¹⁵¹ An example of persecution for religious beliefs is not allowing an individual to change religious convictions. Fear of persecution for changing religious beliefs was the basis for claiming refugee status in *Bastanipour*.¹⁵² Bastanipour was an Iranian Muslim in the United States who claimed to have converted to Christianity, an action for which the penalty is death in Iran.¹⁵³ Bastanipour was granted refugee status based on his fear of religious persecution.¹⁵⁴ *Soleimani* offers another example of persecution for religious belief, also occurring in Iran.¹⁵⁵ Soleimani was a Jew living in Iran. She had left and returned to Iran on seven previous occasions, but after Iran became an Islamic religious state, she left and claimed refugee status, which was granted.¹⁵⁶

No clear test has been set forth by U.S. courts for analyzing claims of persecution for religious belief. Clear cases such as those coming from Iran are easily detected because religious autonomy is openly denied. Where religious autonomy may be verbally espoused, but actions deny it, covert or inadvertent reli-

149. *Id.*

150. *Universal Declaration of Human Rights*, *supra* note 39, art. 18; 1951 Convention, *supra* note 9, art. I(A)(2); HANDBOOK, *supra* note 8, ¶ 71.

151. Currently more than 100 nations are signatories to the 1951 Convention and/or the 1967 Protocol. Ghassan M. Arnaout, *Foreword* to HANDBOOK, *supra* note 8, at 1; see also *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

152. *Bastanipour v. INS*, 980 F.2d 1129, 1131 (7th Cir. 1992).

153. *Id.*

154. *Id.* at 1132.

155. No. A-26157647, 1989 WL 331872 (B.I.A. July 13, 1989).

156. *Id.* at *8.

gious persecution may pass undetected. Unveiling such clandestine and unwitting persecution is difficult, but it requires understanding the source of biases against religion.

C. *Why Biases Exist*

Why biases against religious persecution exist is not clear. Some prejudices against religion, like those in Iran, are themselves generated by religious zeal. These biases are open and easily detected and explained. Most biases, especially in nations espousing religious freedoms, are hidden,¹⁵⁷ never expressly acknowledged, and are presumably unintentional. As a consequence, the causes of such biases are not brought to light. One person's explanation is probably as valid as the next person's.

Current subtle biases in cases considering religious persecution may be an overcorrection for earlier favoritism shown to religion. Historically, biases in favor of traditional Western notions of deity existed.¹⁵⁸ Today, the international community espouses a more neutral position including nontheistic and atheistic beliefs.¹⁵⁹ However, in an effort to root out past discriminatory practices favoring some religious beliefs, a slight overcorrection may have occurred. The trap of overcorrection was seen in *Welsh v. United States*,¹⁶⁰ in which the U.S. Supreme Court acknowledged some secular belief systems as constituting religion, although the Court has since shrunk from that position.¹⁶¹ This tendency to overcorrect when moving toward a neutral position is exemplified in some current cases wherein religious persecution is alleged.

Another explanation for subtle discrimination in religious persecution cases is simple unfamiliarity. Some jurists, not religious themselves, may be unfamiliar with the depth of conviction that religious beliefs engender. As a result, they fail to comprehend the effects that religion has in the lives of the faithful and

157. Some officials, for example, feel that religion is not as valid a voice in social policy as other considerations. MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 182 (1988). For a more thorough discussion of this theme, see generally KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

158. See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890), *overruled on some grounds as noted by Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

159. *Religious Intolerance*, *supra* note 41, ¶ 8.

160. 398 U.S. 333 (1970).

161. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

the consequences that flow from that faith. An example of unfamiliarity is illustrated in *Canas-Segovia* in which the two Jehovah's Witnesses fled El Salvador because conscientious objection to military service would result in persecution, but was mandated by their faith.¹⁶² Rather than classify this as religious persecution, the court imposed a burden of proof that only allowed the treatment to be classified as persecution of political opinion.¹⁶³ It is difficult for a position to be kept free from injustice by someone unfamiliar with that position. That unfamiliarity may hinder justice in the face of subtle biases has been a justification for extending key positions to racial minorities and is an underpinning for some affirmative action programs. Officers who are more aware of the impact of religious persecution may be more favorable to refugees who claim it.¹⁶⁴ For a judge who cannot be familiar with all of the world's religions, it is truly difficult to overcome the biases that unfamiliarity inherently carries.

A third reason that biases may be evident in religious persecution cases is a more general bias against refugees. This bias is spreading and is increasingly manifest in politics and judicial decisions.¹⁶⁵ Narrowly construing how refugee status may be obtained, even for religious persecution, satisfies the broader objective of reducing the raw number of refugee applicants. Thus, refugees claiming religious persecution must overcome two biases. It may be that just as some individuals are prejudiced against religion so also some judges allow personal biases to influence their decisions. Certainly, some officials feel that religion is not as valid a voice in social policy as some other considerations.

IV. CONCLUSION

Religious persecution is seldom used successfully in the United States as a basis for claiming refugee status. This is true in part because courts exhibit a bias against claims of persecution "on account of religion" by placing onerous burdens of proof on applicants claiming religious persecution; favoring political claims over religious ones; and interpreting "on account of religion" to require proof of an antireligious motivation of the perse-

162. *Canas-Segovia v. INS*, 902 F.2d 717, 720 (9th Cir. 1990).

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

164. See *supra* note 125.

165. See *supra* notes 1-5 for examples.

cutors. The Handbook does not specifically outline any criteria for analyzing religious persecution, but its policies are squarely contradicted by the practice of many U.S. courts. This Article therefore proposes criteria for determining whether persecution for public manifestations of religion or persecution for membership in a religious community should be recognized. Because persecution for public manifestations of religion is so similar to persecution for expressing political opinions, a similar analytical framework should be used. Moreover, because persecution for membership in a religious community is analogous to persecution for membership in a social group, the same analysis should be used. Applying these analytical frameworks should help eliminate the bias that is manifest when claims of persecution on account of religion are rejected while claims of persecution on other grounds are granted.