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## Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998

*Craig B. Mousin\**

### I. INTRODUCTION

Fostering liberty and standing with the persecuted, Congress enacted the International Religious Freedom Act of 1998<sup>1</sup> (“IRFA”) to counteract renewed and increased assaults on freedom of religion throughout the globe.<sup>2</sup> IRFA called upon the United States to

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1. 22 U.S.C. §§ 6401–6481 (2000) (enacted 27 October 1988). For an overview of the IRFA, see Steven Wales, *Remembering the Persecuted: An Analysis of the International Religious Freedom Act*, 24 HOUS. J. INT’L. L. 579 (2002); T. Jeremy Gunn, *A Preliminary Response to Criticisms of the International Religious Freedom Act of 1998*, 2000 BYU L. REV. 841, which provide extensive discussion of the new provisions establishing an International Religious Freedom Commission and an Office of International Religious Freedom headed by an Ambassador-at-Large for International Religious Freedom and requiring an Annual Report on International Religious Freedom on the status of religious liberty throughout the world. It also provides a procedure for diplomatic initiatives and presidential sanctions for foreign nations violating religious freedom including designating nations with particularly severe violations as countries of particular concern. This article is limited to IRFA’s reform of asylum law and procedures.

2. See 22 U.S.C. § 6401(b)(5). 22 U.S.C. § 6401(a)(4)–(6) provides in pertinent part:

(4) The right to freedom of religion is under renewed and, in some cases, increasing assault in many countries around the world. More than one-half of the world’s population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, observe, and freely practice the religious faith of their choice. Religious believers and communities suffer both government-sponsored and government-tolerated violations of their rights to religious freedom. . . .

(5) Even more abhorrent, religious believers in many countries face such severe and violent forms of religious persecution as detention, torture, beatings, forced

challenge countries engaging in religious persecution to live up to international protections of religion, belief, and conscience.<sup>3</sup> As an integral part of that policy, Congress also reformed domestic asylum law regarding adjudication of asylum claims in the United States based on foreign persecution on account of religion.<sup>4</sup> Interestingly, although IRFA admires the domestic protection of freedom of religion that “undergirds the very origin and existence of the United States,” it fails to cite the First Amendment as a source of protection.<sup>5</sup> Instead, Congress specifically recognized religious freedom as a fundamental and universal right, listing international instruments that protect freedom of belief, religion, and conscience.<sup>6</sup>

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marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of or practice of their faith. In many countries, religious believers are forced to meet secretly, and religious leaders are targeted by national security forces and hostile mobs.

(6) Though not confined to a particular region or regime, religious persecution is often particularly widespread, systematic, and heinous under totalitarian governments and in countries with militant, politicized religious majorities.

3. *Id.* § 6441(a)(1)(A) (2000) states:

It shall be the policy of the United States—

- (i) to oppose violations of religious freedom that are or have been engaged in or tolerated by the governments of foreign countries; and
- (ii) to promote the right to freedom of religion in those countries . . . .

4. In addition to pointing to international instruments as the norms for evaluating asylum claims based on the protected ground of religion, Congress required new guidelines for use of government interpreters to avoid potential bias and discrimination, ordered studies of the effect of expedited removal on asylum claims, established a new ground of inadmissibility barring foreign government officials who have engaged in particularly serious violations of religious freedom, called for training of Foreign Service Officials who make determinations regarding overseas refugee processing, and mandated new training for asylum adjudicators, immigration judges, and any immigration officers assigned to the expedited removal process. *Id.* § 6473 (2000).

5. *Id.* § 6401(a)(1) (2000) provides:

The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation’s founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.

6. *Id.* § 6401 (a)(2)–(3) provide:

(2) Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United

With reference to those international protections, Congress mandated reform of the U.S. asylum laws and directed the Attorney General in conjunction with the Secretary of State to train asylum officers, immigration judges, and other immigration officials in not only these international instruments, but also in the diverse manifestations of religion and persecution by both governments and non-governmental parties.<sup>7</sup>

Critics have accused the United States of attempting to impose its understanding of religious liberty upon nations with different cultures, histories, and jurisprudence by regulating the relationship between government and religion.<sup>8</sup> However, Congress did not intend to impose United States values upon other nations, but rather intended to hold countries to the international religious liberty treaties and covenants that they have signed.<sup>9</sup>

Less has been written, however, on the impact of interpreting international agreements pursuant to domestic asylum adjudication.<sup>10</sup>

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Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(3) Article 18 of the Universal Declaration of Human Rights recognizes that “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.”. [sic] Article 18(1) of the International Covenant on Civil and Political Rights recognizes that “Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching”. [sic] Governments have the responsibility to protect the fundamental rights of their citizens and to pursue justice for all. Religious freedom is a fundamental right of every individual, regardless of race, sex, country, creed, or nationality, and should never be arbitrarily abridged by any government.

7. See *id.* § 6473 (a)–(c) (calling for reform of asylum policy); *id.* § 6471 (requiring immigration judges and consular, refugee, and asylum officers to use the Annual Report on International Religious Freedom “in cases involving claims of persecution on account of religion”).

8. Dominique DeCherf, Religious Freedom and Foreign Policy: The U.S. International Religious Freedom Act of 1998, at 9 (unpublished manuscript, on file with the BYU Law Review). *But see* Gunn, *supra* note 1, at 846.

9. Senator Orrin G. Hatch, *Religious Liberty at Home and Abroad: Reflections on Protecting This Fundamental Freedom*, 2001 BYU L. REV. 413; see also Gunn, *supra* note 1, at 846–47.

10. Indeed, not only has there been a lack of scholarship, but a search of the electronic databases reveal that no court has cited IRFA in the context of a claim for asylum based on persecution on account of religion.

IRFA requires reevaluation of asylum adjudication on both legal and factual grounds. Most significantly, it reveals congressional frustration with previous asylum and refugee adjudications. To address the problem, it points not to domestic United States law but to international declarations and covenants as critical guidelines for analyzing violations of religious freedom in the asylum context.<sup>11</sup> Further, it emphasizes not just additional training but also stresses specific training “on the internationally recognized right to freedom of religion, the nature, activities, and beliefs of different religions, and the various aspects and manifestations of violations of religious freedom.”<sup>12</sup>

This paper proposes that IRFA calls for adjudicating asylum claims on account of religion through the lens of international agreements, with greater sensitivity to the scope of religious persecution in the world. Moreover, this paper maintains that to rectify the neglect or bias in earlier administrative screenings and adjudications, Congress enacted IRFA to employ international protections and guidelines to expand protection against persecution for persons of faith or belief. Therefore, attorneys and advocates for refugees should raise new legal arguments pursuant to IRFA’s engagement of international instruments for determining religious persecution claims in asylum cases. Part II describes the parameters of domestic asylum law prior to IRFA. Part III raises both the legal and cultural issues that make adjudication of religious asylum claims difficult and contribute to the bias or to the lack of information cited by Congress. Part IV discusses how IRFA’s introduction of international law into asylum adjudications and its definitions of violations of religious liberty necessitates reevaluating adjudication of

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11. The House Report on IRFA stated:

The primary impetus behind the immigration provisions of H.R. 2431 is the concern that victims of religious persecution may not be treated fairly by the organizations and individuals responsible for screening applicants for asylum or refugees status and adjudicating their claims. Such unfair treatment could arise from improper biases or from lack of proper training.

H.R. REP. NO. 105-480, pt. 3, at 16 (1998), *reprinted in* 1998 U.S.C.C.A.N. 602, 628. Although Congress made significant changes in H.R. 2431 in enacting IRFA, IRFA retained the mandate for training and eliminating bias and misunderstanding remains in the final bill. *See also* T. Jeremy Gunn, *The United States and the Promotion of Freedom of Religion and Belief*, in *FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK* (Tore Lindholm et al. eds.) (forthcoming 2003).

12. 22 U.S.C. § 4028(a)(1); *see also id.* §4028(a)(2); *id.* § 6473(a)-(c); Gunn, *supra* note 11.

asylum claims on account of religious persecution. Although government training has been commenced on IRFA's impact, no asylum decisions have yet cited IRFA. This section suggests four areas where IRFA can increase asylum protection. First, IRFA first calls for broader comprehension of religious liberty. Second, IRFA requires greater sensitivity to the legal and factual issues involved in credibility determinations. Third, IRFA expands the understanding of religious persecution. Fourth, IRFA recognizes the government's duty to protect against violations of freedom of belief or religion. Part V argues that IRFA asks no more of the United States than the United States asks of its foreign neighbors. If IRFA calls for foreign nations to live up to their international agreements to protect freedom of religion, belief, and conscience, it also seeks reformation of domestic asylum law to live up to the same international commitments it has agreed to with respect to religious liberty, thus, requiring the United States to further liberty while standing with the persecuted.<sup>13</sup>

## II. ASYLUM ADJUDICATION IN THE UNITED STATES

Since 1980, when the Refugee Act<sup>14</sup> was enacted, the United States has adjudicated numerous claims by refugees seeking safe haven and refugee status pursuant to domestic law implementing the provisions of the United Nations Protocol for Refugees<sup>15</sup> ("Refugee Protocol" or "Protocol"). The Protocol, adopted by the United States Senate in 1968, took twelve years to become domestic law.

Under the Refugee Act, persons outside of their nation who have been persecuted or who possess a well-founded fear of persecution can seek asylum in the United States.<sup>16</sup> The Immigration and

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13. See 22 U.S.C. § 6401(b)(5). The Office of International Freedom has stated: "The promotion of religious freedom is therefore an international responsibility—one that falls to all nations—in which we have agreed to hold each other accountable." U.S. DEP'T OF STATE, RELIGIOUS FREEDOM: AN INTERNATIONAL RESPONSIBILITY (2001), available at <http://222.state.gov/g/drl/irf/fs/2264.htm>.

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

15. *Declaration on Territorial Asylum*, G.A. Res. 2312(XXII), 22 U.N. GOAR, Supp. No. 16, U.N. Doc. A/6716 (1967). Although the United States participated in the drafting of the Convention, it has never signed the Convention. It acceded to the Protocol in 1968 which incorporates by reference most of the relevant provisions of the Refugee Convention. See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 2 (3d ed. 1999).

16. 8 U.S.C. §§ 1101(a)(42), 1158 (2000).

Nationality Act (“INA”) requires that the Attorney General set up procedures to determine whether individuals fleeing their native lands based on allegations of persecution are eligible for a grant of asylum.<sup>17</sup> The INA defines a refugee as one who is unable or unwilling to return to her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>18</sup> If past persecution is demonstrated, a presumption arises

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17. United States immigration law actually provides four potential remedies for persons who have been suffered from persecution or torture. 8 U.S.C. § 1157 (2000) establishes an overseas refugee-processing program. Each year the President designates the number of refugees and areas of the world that the United States will process and accept as refugees who will then enter the United States as asylees. Typically, overseas refugees are not represented by attorneys. The administrative process links refugees with volunteer agencies for resettlement in the United States. IRFA calls for training of Foreign Service Officials who work in the asylum determination program. 22 U.S.C. § 4028 (2000). 8 U.S.C. § 1231(b)(3)(a) (2000) addresses the United States’ commitment to the non-refoulement section of the United Nations Refugee Convention and Protocol by establishing the requirements for withholding of deportation, now called restriction on removal. The United States Supreme Court has determined that withholding has a higher burden of proof to determine eligibility, holding that an applicant must show a clear probability of persecution rather than the more generous standard of well-founded fear. *INS v. Stevic*, 467 U.S. 407 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Although the restriction on removal provision is mandatory for the Attorney General, the remedy provides only that the United States will not deport that person to the applicant’s native land. The Attorney General can seek to remove the person to any other nation if agreement can be reached with another nation. Moreover, the individual is not eligible for lawful permanent residence. Finally, individuals who are in danger of being tortured or have been tortured may seek independent relief through the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/RES39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988). See 8 C.F.R. §§ 208.16(c), 1208.17 (2002); see, e.g., *In re G-A-*, 23 I. & N. Dec. 366 (BIA 2002). For the most part, except for the burden of proof difference and the discretionary determination, asylum and removal of restriction both require proof of nexus to one of the enumerated grounds of protection such as religion. This article will address IRFA’s impact on asylum primarily, but its discussion of persecution on account of religion would be relevant to restriction on removal claims as well.

18. 8 U.S.C. § 1101(a)(42)(A) (2000). Persons seeking asylum through the Asylum Office affirmatively apply for asylum. If they do not obtain a grant of asylum, they may be placed in removal proceedings before an immigration judge where they are designated the respondent. If they are denied asylum, they have a right of appeal to the administrative appeals body, the Board of Immigration Appeals (“BIA” or “Board”). If they do not prevail at the Board, they have a right to petition for review in the federal court of appeals whose district includes the city where their initial removal hearing was held. For clarity in this article, I will refer to the person seeking asylum as “applicant” regardless of the stage of the hearing.

In addition, on March 1, 2003, the functions of the Immigration and Naturalization Service (INS) were divided amongst and distributed to several new entities within the Department of Homeland Security including the Bureau of Immigration and Customs Enforcement (BICE), Customs and Border Protection (CBP), and the Bureau of Citizenship

that the applicant has a well-founded fear of future persecution<sup>19</sup> unless conditions in the country from which the applicant fled have changed to such an extent “that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality, or, if stateless, in the applicant’s country of last habitual residence . . . .”<sup>20</sup> Even if the presumption is rebutted, an applicant may still qualify as a refugee based on past persecution alone if she “has demonstrated compelling reasons for being unwilling or unable to return to [her country of nationality] arising out of the severity of the past persecution.”<sup>21</sup> In *INS v. Elias-Zacarias*, the Supreme Court held that the “on account of” language in the refugee definition requires the applicant to prove either a nexus between the persecution or the well-founded fear of persecution and the enumerated ground of protection on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>22</sup> Finally, even if statutorily eligible, the Attorney General must also exercise discretion in determining whether to grant a particular applicant asylum.<sup>23</sup> Congress has also enacted a number of bars that preclude an otherwise eligible asylum applicant from receiving a grant based on criminal acts, persecution of others, and

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and Immigration Services (BCIS). The Asylum Office and its adjudication of affirmative asylum claims will fall within the jurisdiction of BCIS. See *This is the BCIS*, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, at <http://www.immigration.gov/graphics/aboutus/thisisimm/index.htm> (last visited May 24, 2003); *Welcome to Customs and Border Protection*, CUSTOMS AND BORDER PROTECTION, at <http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited May 24, 2003); *Welcome to Bureau of Immigration and Customs Enforcement*, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, at <http://www.bice.immigration.gov/graphics/index.htm> (last visited May 24, 2003). The Executive Office for Immigration Review which contains the Office of the Immigration Judge and the BIA remain within the Department of Justice. This article refers to the INS and its previous role in asylum adjudication and screening, and in producing Training Manuals. The article’s discussion of IRFA’s mandate to reform asylum law and procedure will continue to apply to asylum adjudicators under BCIS as well as to EOIR within the Department of Justice.

19. 8 C.F.R. § 208.13(b)(1)(i) (2002).

20. 8 C.F.R. § 208.13(b)(1)(i)(A) (2002).

21. *Id.* § 208.13(b)(1)(iii)(A); see *Bucur v. INS*, 109 F.3d 399, 404–05 (7th Cir. 1997); *Pop v. INS*, 270 F.3d 527 (7th Cir. 2001).

22. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). In addition, applicants can adduce evidence that they have been persecuted on account of one or more of the protected grounds. The Board has also stated that they can obtain asylum in mixed-motive cases, where the harm is caused by violence against both a protected ground and a non-protected ground. See *In re S-P-*, 21 I. & N. Dec. 486 (BIA 1996). This article concentrates on issues limited to persecution on account of religion.

23. 8 U.S.C. § 1158(b).

tardiness in applying for asylum.<sup>24</sup> The Refugee Act adopts the principles of the Refugee Protocol requiring all asylum adjudications be made in a geographical and ideologically neutral manner.<sup>25</sup>

Courts, however, face the temptation of ignoring that Refugee Act requirement and instead see foreign policy implications of asylum decisions. Asylum law, however, seeks not to critique a particular country's human rights record. As the Board of Immigration Appeals emphasized:

It is also important to remember that a grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question. When the international community was considering the 1967 Refugee Protocol, the U.N. General Assembly made clear that "the grant of asylum by a State is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any other state."<sup>26</sup>

Despite that noble goal, biases and foreign policy considerations have often resulted in the loss of asylum for otherwise bona fide refugees.

### III. THE LEGAL AND SOCIAL BARRIERS TO OBTAINING ASYLUM

Although Congress did not specifically cite every reason for asylum reform in IRFA, it did stress the need to eliminate bias in interpreting violations of religious freedom. To solve that problem, IRFA invoked not the First Amendment, but international

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24. *Id.* § 1158(b)(2)(A)-(C); see e.g., *Molina-Valladares v. INS*, 2003 WL 683593, at \*1 (9th Cir. Feb. 25, 2003) (finding applicant ineligible for asylum because he engaged in persecution against rebels in Guatemala); *Saleh v. INS*, 962 F.2d 234, 238-39 (2d Cir. 1992) (prosecution for unjustifiable homicide not persecution; bars to asylum enacted in 1990 would have made applicant ineligible for relief).

25. Earlier United States immigration law had demonstrated just the opposite concerns by limiting asylum eligibility both geographically and ideologically, specifically limiting relief to citizens of certain Middle Eastern and communist nations. See ANKER, *supra* note 15, at 2; see also *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) ("[T]he fact that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.").

26. *In re S-P-*, 21 I. & N. Dec. at 492 (citing *Declaration on Territorial Asylum*, *supra* note 15, at 81). The Board further noted, "A decision to grant asylum is not an unfriendly act precisely because it is not a judgment about the country involved, but a judgment about the reasonableness of the applicant's belief that persecution was based on a protected ground." *Id.*; see also Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994).

instruments to protect against persecution on account of religion. It called for greater understanding of international protection of religious freedom and greater understanding of how religions manifest themselves in many diverse ways.<sup>27</sup> Although IRFA does not cite the First Amendment of the Constitution, the development of asylum law with regard to religious cases prior to 1998 reveals that the First Amendment law contributed to diminished protection for refugees seeking relief on account of religious persecution.

*A. The Influence of Religion on the Development of Asylum Law*

Persons fleeing religious persecution, although not constituting a large percentage of asylum cases, nonetheless have dramatically influenced the development of the law. Initially, the 1951 Convention Relating to the Status of Refugees (“1951 Convention”)<sup>28</sup> itself came into force under the tragic legacy of the persecution of the Jews under the Nazis, providing a legal recourse and safe haven for those who physically survived the Holocaust, but could not return to Germany.<sup>29</sup> Moreover, religion was treated differently than the other enumerated grounds during the debate over the 1951 Convention. Although one of the five enumerated grounds of protection, religion “is the only article in the convention where treatment is ‘at least as favorable’ as that accorded to nationals of the contracting states is provided for.”<sup>30</sup> Thus, a nation’s domestic protection of religious liberty establishes a floor for protection of an asylum applicant.

Asylum law calls for adjudication of claims on an individual basis. Lawmakers initially anticipated relatively few cases. But several historical factors, often precipitated by religious conflicts, resulted in large waves of asylum seekers that severely challenged the relatively new refugee law. The exodus from Cuba and Haiti had religious elements. The escalating violence in Central America following the assassination of Salvadoran Archbishop Oscar Arnulfo Romero in 1980, the murder of four North American church women in El

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27. See *supra* notes 13–14.

28. Apr. 22, 1954, 189 U.N.T.S. 147 [hereinafter Convention].

29. See Tuan N. Samahon, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L.J. 2211, 2212 (2000).

30. THE REFUGEES CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED 42–43 (Paul Weis ed., 1995).

Salvador, and the civil war in El Salvador all also resulted in great numbers of Salvadorans fleeing to the United States.<sup>31</sup> Critics complained that, notwithstanding the intent of the Refugee Act, the United States continued to make decisions based on ideological and geographical considerations. Asylum seekers fleeing governments allied with the United States frequently failed to obtain asylum. Asylum applicants who challenged enemies of the United States prevailed in far greater numbers despite similar claims of government violence.<sup>32</sup> In 1991, the Attorney General settled a national class action that had alleged that the United States had discriminated against Salvadoran and Guatemalan asylum applicants. The Attorney General agreed to reopen all denied asylum cases filed by Salvadoran and Guatemalan natives since the enactment of the Refugee Act in 1980.<sup>33</sup> Initially, the *American Baptist Churches* lawsuit alleged violations of the First Amendment when the federal government had prosecuted religious activists who provided public sanctuary and safe haven for Central American citizens fleeing the terror of the death squads in the 1980s.<sup>34</sup> Plaintiff refugee organizations also claimed that discriminatory treatment of those Central Americans by asylum adjudicators led them to offer public sanctuary in their churches due to the failure of the legal process.<sup>35</sup> Finally, individual refugee

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31. See, e.g., ANA CARRIGAN, *SALVADOR WITNESS: THE LIFE AND CALLING OF JEAN DONOVAN* 17, 157–58 (1984). The Refugee Act became effective on March 17, 1980. On March 23, 1980, Archbishop Romero preached a homily calling for all members of the military to lay down their arms and “remember instead the voice of God: ‘Thou Shalt Not Kill!’ God’s law must prevail.” *Id.* at 157. On the very next day, Archbishop Romero was assassinated while giving a memorial mass. *Id.* at 158. On December 2, 1980, Ursuline nun Dorothy Kazel, lay missionary Jean Donovan, and Maryknoll Sisters Maura Clarke and Ita Ford were murdered in El Salvador. *Id.* at 17–29.

32. See, e.g., Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT’L L. 38, 43–44 (1997). Compare *In re A-G-*, 19 I. & N. Dec. 502 (BIA 1987) (holding that Salvadoran who refused to serve in military not persecuted), with *In re Salim*, 18 I. & N. Dec. 311 (BIA 1982) (granting Afghan asylum for refusal to serve in the Soviet controlled Afghan army).

33. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (approving settlement agreement reopening all denied asylum cases from 1980 to 1990 based on allegations of discrimination against class of Salvadoran and Guatemalan asylum applicants during adjudication of original claims).

34. *Am. Baptist Churches v. Meese*, 712 F. Supp. 756, 759 (N.D. Cal. 1989).

35. *Id.*; see also IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* (1985); PENNY LERNOUX, *CRY OF THE PEOPLE, THE STRUGGLE FOR HUMAN RIGHTS IN LATIN AMERICA—THE CATHOLIC CHURCH IN CONFLICT WITH U.S. POLICY* (1982). See generally RENNY GOLDEN & MICHAEL MCCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* (1986).

plaintiffs sought relief from discriminatory treatment of Salvadoran and Guatemalan asylum claims.<sup>36</sup> The First Amendment claims alleging government violations of religious liberty failed, but the discrimination claims became part of the settlement known as the *American Baptist Churches* settlement. Consequently, almost 280,000 asylum applicants were able to reopen their cases and reapply for asylum.<sup>37</sup> The INS has struggled for over a decade to properly process those additional cases as they added to an increasing backlog of cases, forcing the INS and Congress to frequently consider changing asylum law and procedure to catch up.<sup>38</sup> Thus, even when the claims were not necessarily based on religion, the impact of the *American Baptist Churches* settlement greatly influenced asylum law during the last thirteen years.

### *B. First Amendment Religious Jurisprudence and Asylum Law*

Persons fleeing religious persecution and seeking safe haven in the United States have carried a daunting burden placed upon them by two early 1990 decisions of the United States Supreme Court—*Employment Division, Department of Human Resources of Oregon v. Smith*<sup>39</sup> and *INS v. Elias-Zacarias*.<sup>40</sup> In *Smith*, Justice Scalia, writing for the Court, surprised the religious freedom world by holding that a neutral, generally applicable law that did not intentionally discriminate against religion did not violate the First Amendment.<sup>41</sup> In *Smith*, two Native American drug counselors were

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36. *Meese*, 712 F. Supp. at 766.

37. CHARLES GORDON ET AL., 3 IMMIGRATION LAW AND PROCEDURE § 33.09[2] (1996) (reporting that over 240,000 Salvadorans and 40,000 Guatemalans took advantage of the settlement).

38. See, e.g., Craig Mousin, *A Preacher's Teacher: Lessons on Ministry from One Who Proclaims the Word*, in THE HONEYCOMB OF THE WORD, INTERPRETING THE PRIMARY TESTAMENT WITH ANDRÉ LACOCQUE 104, 116–17 (W. Dow Edgerton ed., 2001) (ABC class member still waiting for permanent relief in 2001).

39. 494 U.S. 872 (1990). For a critique of adjudication of religious asylum claims, see Musalo, *supra* note 26; Samahon, *supra* note 29; Eric T. Johnson, *Religious Persecution: A Viable Basis for Seeking Refugee Status in the United States?* 1996 BYU L. REV. 757; Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993).

40. 502 U.S. 478 (1992).

41. *Smith*, 494 U.S. 872. The First Amendment of the U.S. Constitution states, in part, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .” For a particularly interesting examination of the politics behind the *Smith* decision raising questions regarding the neutrality of the enforcement of a law of general

discharged from their employment for having used peyote while participating in their religious services. Otherwise abstaining from all drugs and alcohol, these two individuals sought unemployment compensation as they had been discharged, not for cause, but in violation of their religious freedom. The Supreme Court disagreed and upheld the dismissal against this religious freedom claim.<sup>42</sup> Prior to *Smith*, if a claimant alleged a violation of their religious liberty by government action, the government had to show both a compelling interest in the policy or action and that no less restrictive means were available.<sup>43</sup>

In the face of extensive public and academic outrage at the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (“RFRA”) to correct what was perceived as the eviscerated protection for religious liberty under *Smith*.<sup>44</sup> As its name suggests, RFRA restored the earlier test by shifting the burden to the government to demonstrate a compelling interest necessitating the obstruction of liberty and that no less restrictive means to achieve its goal existed.<sup>45</sup> In effect, Congress sent a message to the Supreme Court that the Congress, not the Court, possessed the correct interpretation of the First Amendment—religious liberty is at risk from government actions and laws that both intentionally discriminate as well as those neutral laws or policies that have the effect of restricting religious liberty.<sup>46</sup>

In the Court’s very next case involving *Smith* issues, the Supreme Court agreed that the First Amendment protected against intentional discrimination.<sup>47</sup> Subsequently, however, in *City of*

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applicability, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998).

42. *Smith*, 494 U.S. at 878–79.

43. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

44. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1994); see also Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1 (1994), Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994); Musalo, *supra* note 26, at 1213.

45. Musalo, *supra* note 26, at 1214.

46. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999, 1001 (1990) (comparing formal neutrality which is closely akin to equal treatment to substantive neutrality which requires government to “minimize the extent to which it either encourages or discourages religious belief, practice or nonpractice, observance or nonobservance”).

47. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

*Boerne v. Flores*, a case involving a historical landmark protection regulation that prohibited a Roman Catholic Church from expanding its house of worship, the Court held RFRA unconstitutional, at least as it applied to the states.<sup>48</sup> In *City of Boerne*, the Court held that the Fourteenth Amendment to the Constitution did not give Congress the power to enact the sweeping changes in First Amendment protections that RFRA entailed.<sup>49</sup> Congress returned to the drafting table and passed the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”),<sup>50</sup> restoring the pre-*Smith* test in limited circumstances. But even RLUIPA faces an uncertain constitutional future.<sup>51</sup> As this battle continues to play out at the federal level, lower and administrative courts, such as the Board, face increased difficulty in fully understanding the parameters of First Amendment protection. Indeed, Dominique DeCherf suggests that one reason Congress turned to international protections of religious liberty in IRFA was because Congress, itself, was uncertain of the scope of protection the First Amendment provided after *Smith*.<sup>52</sup>

While *Smith* and *City of Boerne* carved out new First Amendment law, the Supreme Court was making significant, although remarkably similar, changes to asylum law. In *INS v. Elias-Zacarias*,<sup>53</sup> the Court held that an indigenous young man from Guatemala who was recruited by guerrilla forces failed to meet his burden of proof that the guerrillas would persecute him on account of his political

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48. 521 U.S. 507, 536 (1997).

49. *Id.*

50. 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

51. Fred Gedicks has summarized the bill:

RLUIPA reinstated the exemption doctrine against federal and state land use regulations that burden religious practices, where the burden relates to a program that receives federal funds or affects interstate commerce. . . . [Section 2(a)] also reinstated the doctrine against governmental action that burdens the religious practices of prisoners and other persons in government custody or control. . . . Finally, RLUIPA amended RFRA to clarify that the latter remains valid as applied to federal action.

Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 926 n.5 (2000). Indeed, two courts have already held RLUIPA’s provisions regarding prison inmates unconstitutional. *See* Al Ghashiyah v. Dep’t of Corr., 250 F. Supp. 2d 1016, (E.D. Wis. 2003); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003).

52. DeCherf, *supra* note 8, at 10.

53. 502 U.S. 478 (1992).

opinion.<sup>54</sup> Writing for the Court, Justice Scalia first held that it was the applicant's political opinion, not that of the alleged persecutor, that was relevant for purposes of asylum law.<sup>55</sup> The record before the Court failed to indicate that the applicant resisted recruitment due to his political opposition to the guerrillas, and the Court therefore found that "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few."<sup>56</sup> But the Court held that the applicant bears the burden of proving that the alleged persecutor "will persecute him *because of* that political opinion, rather than because of his refusal to fight with them."<sup>57</sup> The Court acknowledged that the law did not require direct proof of a persecutor's motives, but the applicant had to provide some evidence of motive, "direct or circumstantial."<sup>58</sup>

Professor Karen Musalo points out that *Elias-Zacarias* shifted asylum adjudication away from an effects-based test, which focused on the impact of the persecution upon the victim, to an intent-based test—the applicant possesses the belief or characteristic found within the enumerated grounds and the persecutor intended to persecute her on account of that belief—the same shift that *Smith* produced in First Amendment jurisprudence.<sup>59</sup>

Subsequently, in *Canas-Segovia v. INS*,<sup>60</sup> the Ninth Circuit denied the asylum claims on account of religious persecution of a Jehovah's Witness who refused to serve in the Salvadoran army under a universal conscription law.<sup>61</sup> Musalo recognized that in the

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54. *Id.*

55. *Id.* at 481.

56. *Id.* at 482.

57. *Id.* at 483.

58. *Id.*

59. Musalo, *supra* note 26, at 1181.

60. 970 F.2d 599 (9th Cir. 1992).

61. *Id.* The Ninth Circuit refused to hold that religion should be treated differently than political opinion for asylum purposes. Nonetheless, it held that the applicant did prove persecution on account of an imputed political opinion of opposition to the government and therefore granted asylum. *Id.* at 602. Asylum law permits applicants to claim persecution on any of the five enumerated grounds of race, religion, nationality, political opinion or membership in a particular social group. 8 U.S.C. § 1101(a)(42) (2000). Indicating the difficulty of proving persecution on account of religion, some applicants base their claim on one of the other categories. *See, e.g., In re O-Z-*, 22 I. & N. Dec. 23 (BIA 1998) (basing claim on Jewish nationality rather than religion). In addition, the Board has set forth a standard

“metaphorical marriage” of the *Smith* and *Zacarias* decisions, the asylum applicants lost because they were not being persecuted but only prosecuted under a neutral law of general applicability that all young Salvadoran men faced.<sup>62</sup> The dovetailing of *Smith* and *Elias-Zacarias*, as seen in *Canas-Segovia*, has led to numerous denied asylum cases, especially forced conscription cases where neutral laws of general applicability have oppressed or hindered religious belief or practice yet precluded bona fide refugees from relief in the United States.<sup>63</sup>

### C. The Societal Barriers

In addition to these legal barriers, persons seeking asylum on account of religion also face societal barriers that have influenced the determination of the extent of harm necessary to constitute persecution and the role of religion in modern life. Asylum applicants fleeing persecution on account of religion do so in light of shifting understandings of religion and the state. When the founders drafted the early state constitutions and implemented the federal constitution, God and God’s impact on conscience entered into their thinking about the laws and why people obeyed them.<sup>64</sup> But as the Enlightenment began to dominate intellectual life and immigration led to greater pluralism, secularization of thought and society diminished the role of religion in public life.<sup>65</sup> Post-modernism and secularism deny a God active in the world’s events or monitoring

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when a persecutor may have mixed motives involving a protected ground and a non-protected ground. *See, e.g., In re S-H-*, 21 I. & N. Dec. 486, 495 (BIA 1996).

62. Musalo, *supra* note 26, at 1225.

63. *See, e.g., Sheviakov v. INS*, 2 Fed. Appx. 877 (9th Cir. 2001); *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (denying asylum to applicant despite persecution for refusing to join guerilla army based on Roman Catholic belief prohibiting murder and thus suffering torture at the hands of the guerillas); *Dobrican v. INS*, 77 F.3d 164 (7th Cir. 1996). Where an applicant can clearly demonstrate that religion was the basis of the persecution, the Board has granted asylum. *See, e.g., In re S-A-*, 22 I. & N. Dec. 1328 (BIA 2000).

64. James M. Washington, *The Crisis in the Sanctity of Conscience in American Jurisprudence*, 42 DEPAUL L. REV. 11, 28 (1992); *see also* Craig B. Mousin, *State Constitutions Within the United States and the Autonomy of Religious Institutions*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY, 401, 412–15 (Gerhard Robbers ed., 2001).

65. Martin E. Marty, *The Widening Gyres of Religion and Law*, 45 DEPAUL L. REV. 651, 664–65 (1996); Robert T. Handy, *The Voluntary Principle in Religion and Religious Freedom in America*, in VOLUNTARY ASSOCIATIONS: A STUDY OF GROUPS IN FREE SOCIETIES 127, 137 (1966).

citizen's lives.<sup>66</sup> Laws come from the state, not a deity. Moreover, under Establishment Clause doctrine, governments cannot adopt a religious purpose or perspective.<sup>67</sup> Judges are prohibited from defining orthodoxy within a religion or choosing sides between two competing groups claiming to be the ones holding the truth for that particular religion.<sup>68</sup> Some suggest, therefore, that society has lost all understanding of religion and even the competency to understand it.<sup>69</sup> Secularism pigeonholes religion as a private, interior force. But if hidden away, its invisibility may preclude accurate understandings of the extent violations of freedom of religion or belief may constitute religious persecution. Secular minimization of religion may also diminish the plausibility of religious claims. This conclusion rings especially true when persons of faith from minority or non-traditional religions attempt to explain how their faith required them to face persecution rather than convert or give up.<sup>70</sup> Justice Jackson predicted long ago that "When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him."<sup>71</sup>

Yet as society has lost faith in a God of love and grace, society has still kept faith with human efforts to maintain order. Whether it

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66. Washington, *supra* note 64, at 28; *see also* FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995); FRANKLIN I. GAMWELL, *DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD* 265 (2000).

67. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996).

68. *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *see also* *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) ("The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."); *Mejia-Paiz v. INS*, 111 F.3d 720, 729 (9th Cir. 1996) (Ferguson, J., dissenting) ("A judge violates the First Amendment when he bases his decision not on objective facts but on his personal conclusions as a 'lay theologian.' Whether a person is a devout member of his church is not for the government to decide. It involves religious stereotyping that clouds all rational thinking.").

69. *See generally* RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

70. *See, e.g.*, MARTIN E. MARTY, *RELIGION AND REPUBLIC: THE AMERICAN CIRCUMSTANCE* 74 (1987); *see also* Mousin, *supra* note 38, at 112–13.

71. *United States v. Ballard*, 322 U.S. 78, 93, (1944) (Jackson, J., dissenting); *see* Kent Greenawalt, *Five Questions About Religion Judges Are Afraid to Ask*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH, RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 196, 203–04 (Nancy L. Rosenblum ed., 2000).

be crime, disorder, or terrorism, United States society has placed an inordinate faith in the power of the state to protect citizens from harm.<sup>72</sup> But, as we seek security, we may turn a blind eye towards the violence of the state in our midst. On one level, as Robert Cover has pointed out, society gives judges exceptionally violent power.<sup>73</sup> The legal system authorizes judges to rend families and communities through imprisonment.<sup>74</sup> Immigration judges reveal the extreme power they wield as they can deport and banish from our land individuals who may leave behind United States citizen spouses, children, or other loved ones.<sup>75</sup>

At the same time, immigration judges, asylum adjudicators, and attorneys, live in a violent world that diminishes sensitivity to persecution. Adjudicators and immigration judges listen to tragic stories of torture and physical persecution each day. It is most understandable that trying to compare levels of harm between applicants calls for great amounts of wisdom. But current events reveal an even greater insensitivity to violence by the state and its citizens in preserving order. Increasingly, cases of police brutality and torture force confessions from innocent persons in the United States.<sup>76</sup> Police brutality knows no geographic boundaries.<sup>77</sup> Nor

72. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat 272 (codified in scattered sections of U.S.C.).

73. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

74. See generally *id.*

75. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) (“[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that often times most severe and cruel.”).

76. John Conroy, *Town Without Pity*, CHICAGO READER, Jan. 12, 1996, at 14 (naming over fifty-nine women and men who were tortured, beaten, or physically abused by Chicago police officers over an eighteen year period.); JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE, THE DYNAMICS OF TORTURE (2000) (revealing the extensiveness of such government abuse by examining how ordinary people become torturers); see also Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1276 (1999).

77. Bandes, *supra* note 76, at 1276; see also *Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. GAOR Comm. Against Torture, 24th Sess., 424th, 427th, 431st mtgs., ¶¶ 175–80 (Concluding Observations/Comments), U.N. Doc. A/55/44 (2000), available at <http://wwwl.umn.edu/humanrts/usdocs/torturecomments.html> (Committee’s concerns include, in part, “[t]he number of cases of police ill-treatment of civilians, and ill-treatment in prisons. . . . [a]lleged cases of sexual assault upon female detainees and prisoners by law enforcement officers and prison personnel. Female detainees and prisoners are also very often held in humiliating and degrading circumstances.”);

does there seem to be a limit to the human imagination and capacity to inflict harm and suffering upon another; it is stunning to find the similarities existing between occurrences of torture, whether in prison cells in Chicago or El Salvador.<sup>78</sup> Former Illinois Governor Ryan, in pardoning four men on that state's death row, described how police would force involuntary confessions by "bagging" defendants—placing plastic covers over the head to asphyxiate defendants until they talked, a technique also known in El Salvador as "la capucha."<sup>79</sup> Moreover, as police torture has come to light throughout the United States, Amnesty International reports that police have become more "sophisticated" by increasingly employing psychological torture—harming the victims but allegedly leaving no

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*see also* AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2001: UNITED STATES OF AMERICA (2001), *available at* <http://web.amnesty.org/web/ar2001.nsf/webamrcountries/UNITED+STATES+OF+AMERICA> ("torture and ill-treatment were reported in prisons, jails and juvenile detention facilities. Abuses included beatings and excessive force; sexual misconduct; the misuse of electro-shock weapons and chemical sprays; and the cruel use of mechanical restraints, including holding prisoners for prolonged periods in four-point restraint as punishment."); HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), *available at* <http://www.hrw.org/reports98/police/index.htm> (presenting reports from fourteen United States cities from all parts of the nation documenting torture, severe beatings, fatal chokings, and rough treatment and stating, "Our investigation found that police brutality is persistent in all of these cities [and] that systems to deal with abuse have had similar failings in all the cities . . .").

78. *See* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L. L. 1, 6, 15 (1997) (noting that the drafters of the Refugee Convention did not specifically define persecution due to their "awareness that the ingenuity of evil knows no predictable limits" (citing Atle Grahl-Madsen, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 193 (1966))).

79. Governor George H. Ryan, Address at the DePaul University College of Law (January 10, 2003) (summary on file with the DePaul University College of Law). In his book, Conroy cites *People v. Banks*, 549 N.E.2d 766, 771 (Ill. App. Ct. 1988), which noted that "we are seeing cases . . . involving punching, kicking and placing a plastic bag over a suspect's head to obtain confessions." CONROY, *supra* note 76 at 238. Using a hood to force asphyxiation was also a common practice in El Salvador. *See also* RAYMOND BONNER, *WEAKNESS AND DECEIT, U.S. POLICY AND EL SALVADOR* 328, 350–53 (1984) (describing common torture practices in El Salvador: "One [practice] was to put a hood over the prisoner's face, then throw lime inside 'so when the person tries to breathe, they inhale lime,' . . . Electric shock was also common."); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1492 (C.D. Cal. 1988) (providing a chilling description of torture by Salvadoran officials and finding that "persecution includes the following: arbitrary arrest, short term detention, torture including use of electric shock, *capucha*, beatings, rape, 'disappearance', extra-judicial executions, abductions, threats against family members, intimidation, forced ingestion of food, false imprisonment, mock-executions, sleep deprivation, mass killings, and forced relocations").

tell-tale physical marks.<sup>80</sup> Such violence by government agents is not limited to the local municipality or city. Human Rights Watch alleges that the United States government sends detainees from the Afghanistan War back to their native countries where interrogators, not bound by the United States' Bill of Rights, use torture to extract information that will be helpful to the allies' cause.<sup>81</sup> If our governments so willingly trespass on human rights, how can we discern persecution abroad, or protect those fleeing persecution abroad?

Blame cannot fall solely on government officials, for as Bandes suggests, no police brutality "could thrive without the complicity of the society [the] police serve."<sup>82</sup> More critical, all of us as citizens who know and condone such state-permitted violence share responsibility. As Conroy writes about the Chicago experience, "torture is something we abhor only when it is done to someone we like, preferably someone we like who lives in another country."<sup>83</sup>

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80. Edwin Dobb, *False Confessions: Scaring Suspects to Death*, AMNESTY NOW, Winter 2002, [http://www.amnestyusa.org/amnestynow/false\\_confessions.html](http://www.amnestyusa.org/amnestynow/false_confessions.html).

81. Press Release, Human Rights Watch, United States: Reports of Torture of Al-Qaeda Suspects, Dec. 27, 2002, available at <http://www.hrw.org/press/2002/12/us1227.htm>; Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9 ("Human Rights Watch also objected to the alleged U.S. practice of turning over some captives for interrogation by countries such as Jordan, Egypt and Morocco, which have been criticized by the State Department for using torture."); Dana Priest & Barton Gellman, *U.S. Sources Reveal Tactics Used on Al-Qaeda Captives*, CHI. TRIB., Dec. 27, 2002, at 20 ("While the [U.S.] government publicly denounces the use of torture, each of the current national security officials interviewed defended the use of violence against captives as just and necessary. . . . 'If you don't violate someone's human rights some of the time, you probably aren't doing your job,' said one official who has supervised the capture and transfer of accused terrorists."); Katharine Q. Seelye, *A Nation Challenged: Prisoner—U.S. Treatment of War Captives Is Criticized*, N.Y. TIMES, Apr. 15, 2002, at A12 ("[Amnesty International's report] cites news reports that the United States has transferred dozens of prisoners from Afghanistan to Egypt, where, it says, they could be subject to torture during interrogation."). The Pentagon has previously admitted that it had published and distributed training manuals for soldiers and military police in South and Central America that taught soldiers how to torture and execute citizen opponents. See Steven Lee Myers, *U.S. Army Training Manuals; Be All That You Can Be: Your Future as an Extortionist*, N.Y. TIMES, Oct. 6, 1996, § 4, at 7.

82. Bandes, *supra* note 76, at 1287–88.

83. CONROY, *supra* note 76, at 240. Conroy summarizes the dilemma in trying to stop such practices by stating that despite court proceedings documenting police torture:

The citizens of Chicago were unmoved. The clergy showed no leadership; with the exception of a few mostly low-ranking ministers, religious officials were silent. In the absence of any clamor, politicians showed no interest. Reporters, hearing no complaint, conducted no investigations, and editorial writers launched no crusades.

Thus, advocating for refugees and adjudicating their claims becomes increasingly difficult in a culture that fails to eradicate this violence to maintain its own order.<sup>84</sup>

IRFA's impetus arose from the concern that protection for persons of faith or belief abroad had been neglected by the foreign nations and the United States.<sup>85</sup> In addition to the neglect, bias, or lack of training perceived by Congress, the *Smith* and *Elias-Zacarias* decisions led to fewer religious liberty cases succeeding as both the Board and the lower courts upheld the difficult burden of proving religious persecution on account of general rules regarding military conscription.<sup>86</sup> IRFA was a wake-up call because it requires the Departments of State and Justice, as well as the New Department of Homeland Security, to take claims of persecution on account of religion more seriously.<sup>87</sup> Although initially many perceived IRFA as a clarion call by conservative U.S. Christians to protect Christians overseas, Congress instead stressed the universal and fundamental rights of belief and conscience and called upon adjudicators and judges to be trained in international protections of belief and religion

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State and federal prosecutors, feeling no pressure from the press or the public, hearing no moral commentary from the religious quarter, prosecuted no one. Judges, seeing no officer indicted and hearing no officer speak against his comrades, could therefore comfortably dismiss claims of torture, and with few exceptions, they did.

*Id.*

84. John Conroy concludes his book describing the difficulty democracies face in prosecuting police and security officers for torture. The difficulties of prosecuting these cases, the denial of the torture, the minimization of abuse, the status of the victims, the diffusion of blame shared by so many in maintaining order, and perhaps even the confession that it was "effective or appropriate under the circumstances," all make it difficult to eliminate torture completely. *Id.* at 242-56.

85. The House Report stated, "The primary impetus behind the immigration provisions of H.R. 2431 is the concern that victims of religious persecution may not be treated fairly by the organizations and individuals responsible for screening applicants for asylum or refugee status and adjudicating their claims. Such unfair treatment could arise from improper biases or from lack of proper training." H.R. REP. NO. 105-480, pt. 3, at 16 (1998), *reprinted in* 1998 U.S.C.C.A.N. 602, 628.

86. *See, e.g.,* *Sevoian v. Ashcroft*, 290 F.3d 166 (3d Cir. 2002).

87. *Id.*; *see also* INS ASYLUM OFFICERS BASIC TRAINING MANUAL: IMMIGRATION OFFICER ACADEMY 3 (Nov. 20, 2001) ("IRFA addressed perceived problems within our own system—specifically with the Department of State (DOS) and the Immigration and Naturalization Service (INS) that may lead to diminished attention to the problems of religious persecution.").

to reverse the trend of persecution.<sup>88</sup> Given the mandate to reform asylum procedures, it remains surprising that no published asylum cases have cited IRFA.<sup>89</sup> Although that training has commenced, the Training Manuals do not fully implement congressional intent.<sup>90</sup> Moreover, refugee advocates need to call upon these international protections in litigating asylum cases.

#### IV. THE NEW PROTECTIONS OFFERED BY THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998

To encourage recognition of these international protections, this article suggests at least four areas where exploration may lead to greater protection for refugees. First, IRFA suggests that religious claims have been neglected. Therefore by invoking international protections, IRFA recognizes that legal analysis of these claims is distinctive from the other enumerated grounds under the Refugee Act. Second, IRFA calls for greater sensitivity to the wide diversity of religion in credibility determinations. Third, IRFA expands the understanding of religious persecution, affording greater protection than has previously been granted. Finally, IRFA offers new legal arguments for those persons of faith or belief fleeing mob violence and civil strife. These are proposed as a means of meeting congressional concerns to eliminate the neglect or bias of past cases.

##### *A. Religion as Providing a Distinctive Remedy Under the Asylum Laws*

Congressional perception that freedom of religion and belief faced a renewed and increasing assault in many countries provided

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88. Gunn, *supra* note 1, at 841. IRFA did not reflect the narrow support of a particular group, “but refers instead to the touchstone ‘international’ and ‘universal’ standards . . . as the guiding norms for IRFA.” *Id.* at 853.

89. The House Report stated, “The immigration provisions, as amended by the Committee, are intended to improve the processing of refugee and asylum claims based on religious persecution. . . .” See H.R. REP. NO. 105-480, pt. 3, at 16.

90. See, e.g., IMMIGRATION & NATURALIZATION SERV., INS ASYLUM OFFICER BASIC TRAINING, IMMIGRATION OFFICER ACADEMY (Nov. 20, 2001) [hereinafter INS TRAINING MANUAL] (stating that in addition to Asylum Officers and immigration judges, more than 4,500 Immigration Inspectors and 2,500 Detention and Deportation Officers will receive training on IRFA’s mandates); see BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS AND FREEDOM REPORT 2002 app. D (2002), available at <http://www.state.gov/g/drl/rls/irf/2002/14090.htm>.

the impetus for IRFA.<sup>91</sup> Congress found that “[m]ore than one-half of the world’s population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, observe, and freely practice the religious faith of their choice.”<sup>92</sup> To challenge other nations as well as the United States itself to redress these violations of religious liberty, Congress cited international declarations, covenants, and agreements protecting religion, belief, and conscience. IRFA mandates the consideration of international conventions and protections that recognize a broader protection for religion and belief than the religious liberty protections of the First Amendment.<sup>93</sup>

Significantly, Article 2 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, acknowledges that neutral laws can improperly obstruct freedom of religion or belief. Article 2 states, in part, “the expression ‘intolerance and discrimination based on religion and belief’ means any distinction, exclusion, restriction or preference based on religion or belief and *having as its purpose or as its effect* nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”<sup>94</sup> Moreover, international agreements stress that due to the wide diversity of manifestations of belief (both religious and non-religious), protection for non-traditional claims is mandatory. International instruments protect both individual rights exercised alone or in

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91. 22 U.S.C. § 6401(a)(4) (2000); *see* Gunn, *supra* note 1, at 841.

92. 22 U.S.C. § 6401(a)(4).

93. Derek H. Davis, *The Evolution of Religions Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 217, 233 (U.S. courts should examine religious liberty in “the broader context of a developing, collective world understanding.”); David Little, *Does the Human Right to Freedom of Conscience, Religion, and Belief Have Special Status?* 2001 BYU L. REV. 603, 604 (“As to the relation of religious freedom to other human rights, it seems clear that existing human rights documents and recent international jurisprudence do give the right to religious freedom a certain kind of special status.” (emphasis omitted)); Musalo, *supra* note 26, at 1215; *see also* INS TRAINING MANUAL, *supra* note 90 (“In the text of IRFA, Congress evokes the language of the Universal Declaration of Human Rights proclaiming freedom of ‘thought, conscience, and religion’ in its findings. This notion of ‘religion’ as including an individual’s thought, conscience, beliefs, etc. *allows for a broad interpretation of the protected ground in asylum applications.*” (emphasis added)).

94. G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981) (emphasis added).

community with others.<sup>95</sup> But before examining the specific ways IRFA can influence asylum adjudication, it must be asked whether Congress can single out religion for distinctive treatment in the INA's asylum provisions.

As Natan Lerner has noted, "Historically, the protection of religious freedom preceded the protection of other rights."<sup>96</sup> The Department of State in its May 2002 International Religious Liberty Report, concurs, calling religious liberty "one of those 'unalienable rights' . . . a right not granted by governments, but rather the birthright of every human being, in every nation and every culture."<sup>97</sup> Religion played an important role in the development of other human rights.<sup>98</sup> The Office of International Religious Freedom began its work by naming religion and belief as a constitutive element of all other human rights.<sup>99</sup> Strong historical evidence suggests that religious liberty is indeed this nation's first liberty.<sup>100</sup>

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95. ARCOT KRISHNASWAMI, STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES, U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60.XIV.2 (1960), *reprinted in* RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 18 (Tad Stanke & J. Paul Martin, eds., 1998).

96. Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. REV. 905, 908; *see also* W. Cole Durham, Jr., *Religious Liberty and the Call of Conscience*, 42 DEPAUL L. REV. 71, 81 (1992); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 974 n.48 (1991).

97. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002: INTRODUCTION (2002), <http://www.state.gov/g/drl/rls/irf/2002/13607pf.htm>.

98. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); MAX L. STACKHOUSE, CREEDS, SOCIETY, AND HUMAN RIGHTS: A STUDY IN THREE CULTURES 58-65 (1984); *see also* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM FOR 1999: INTRODUCTION (1999), *available at* [http://www.state.gov/www/global/human\\_rights/irf/irf\\_rpt/1999/irf\\_intro99.html](http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_intro99.html) [hereinafter ANNUAL REPORT FOR 1999: INTRODUCTION] ("At the heart of universal human rights lies a powerful idea. It is the notion of human dignity—that every human being possesses an inherent and inviolable worth that transcends the authority of the State. Indeed, this idea is the engine of democracy itself.")

99. ANNUAL REPORT FOR 1999: INTRODUCTION, *supra* note 98 ("Thus while religion can be a source of conflict, religious freedom—the right to pursue one's faith without interference—can be a cornerstone of human dignity and of all human rights. To protect religious freedom is to protect a human endeavor that directly addresses the foundation of human dignity."); *see also* MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS, FOUR INQUIRIES 11 (1998); GAMWELL, *supra* note 66, at 231.

100. THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 21 (2001) ("Free exercise of religion is an inalienable right reserved to the people—not a gift of government, but the sovereign right to be left alone, untroubled by any

Moreover, carving out distinct protection for religion or belief does not grant it a higher status in the pantheon of rights. Jeremy Gunn contests the critique that IRFA creates a hierarchy of rights by placing religion at the pinnacle. Instead, Gunn suggests that the neglect and diminution of religion required congressional action to bring the right of freedom of religion or belief back to a status comparable to that of other enumerated rights.<sup>101</sup> Congress found that asylum adjudication had failed to protect freedom of belief or religion. Given the uncertainty of First Amendment protection, reliance upon international instruments was the only way to combat the neglect and diminution of protection. Through IRFA, Congress singled out religious liberty for distinctive protection, both internationally through the Department of State and domestically through reform of asylum law and procedure.<sup>102</sup> Its call for reform of the asylum laws revealed a concern that bona fide refugees were being turned back to nations that would continue to persecute them.<sup>103</sup> Congress, through IRFA, reunited asylum law with its international law roots. By initially incorporating the basic language of the Refugee Protocol into the INA, Congress brought U.S. immigration law into accord with international protections of refugees.<sup>104</sup> This is especially critical because the BIA has held that Congress has incorporated international law into our domestic law in the INA itself. Therefore, adjudicators and judges must look to the INA, not international law, for assistance in deciphering eligibility for asylum relief. For example, neither immigration judges nor the

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incursions of the state into religious matters.”). The congressional findings assert that the nation’s founders “established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion.” 22 U.S.C. § 6401(a)(1). Compare Gunn, *supra* note 1, at 846–47 (stating that Congress intended the international rights instruments be the guiding norms instead of the more narrow separation of church and state model under the First Amendment), with DeCherf, *supra* note 8, at 10 (explaining that Congress is still uncertain of the ramifications of the *Boerne* case that held RFRA unconstitutional and is therefore hesitant to specify the First Amendment in IRFA).

101. Gunn, *supra* note 1, at 857.

102. Congress has often protected distinctive rights with different tests. See, e.g., Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L. REV. 1, 31 (2000) (demonstrating that under the U.S. Constitution, we frequently single out different rights with different tests providing different levels of protection).

103. See H.R. REP. NO. 105-480, pt. 3, at 16 (1998), reprinted in 1998 U.S.C.A.N. 602, 628.

104. See Fitzpatrick, *supra* note 78, at 3; Blum, *supra* note 32; see also ANKER, *supra* note 15, at 171–76.

BIA could provide relief based on the Geneva Convention or international customary law that protected war refugees.<sup>105</sup> Thus, it has been difficult, if not impossible, to specifically employ international law principles in United States asylum proceedings.<sup>106</sup>

International law, however, has had some influence on the development of asylum law.<sup>107</sup> In fact, the United States Supreme Court has held that the United Nations High Commissioner for Refugee's Handbook for Criteria for Determining Refugee Status provides "significant guidance," but is not controlling in refugee adjudications.<sup>108</sup> Lower courts have frequently ignored that guidance

105. *In re Medina*, 19 I. & N. Dec. 734, 747 (BIA 1988) ("[N]either the Fourth Convention [the General Convention Relative to the Protection of Civilian Persons in Time of War] nor customary international law provides potential relief from deportation that can be sought by individual aliens in deportation proceedings above and over that which is provided by the Immigration and Nationality Act, as implemented by regulation."). The Board noted that Congress specifically contemplated and rejected legislation that might consider displaced persons as refugees under the 1980 Act. *Id.* at 740; *see also Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) ("where a controlling executive or legislative act does exist, customary international law is inapplicable"); *Am. Baptist Churches v. Meese*, 712 F. Supp. 756, 771 (N.D. Cal. 1989).

106. *See, e.g.*, Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L. L. 1 (1992).

107. Deborah Anker has shown how principles of international law have brought new understanding to asylum adjudications as a gap filler in protecting claims based on gender—because gender is not one of the five protected grounds. Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133 (2002). The Immigration and Nationalization Service has also on occasion turned to international law for assistance in gap filling. *See, e.g.*, *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (Noonan, J., dissenting) (pointing out that the INS had relied on international law principles in drafting the Guidelines on Gender.).

108. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). More recently, however, the Court has downplayed the importance of the U.N. High Commissioner for Refugee's Handbook ("UNHCR Handbook") finding that it "provides some guidance in construing the provisions [added to the INA by the Refugee Act]." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). One benefit of IRFA might be reclaiming the importance of the Handbook in asylum adjudication. U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979), *available at* <http://www.hrea.org/learn/tutorials/refugees/Handbook/hbpart1.htm> [hereinafter UNHCR HANDBOOK]. The UNHCR Handbook contains three paragraphs suggesting how to examine religious persecution:

(c) Religion:

71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

72. Persecution for "reasons of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of

by looking strictly to domestic law. IRFA reveals congressional intent to now use international agreements in the adjudication and protection of refugees fleeing violence against religion and belief.<sup>109</sup> Significantly, congressional enactment of IRFA opens new possibilities for engaging international law principles into adjudication of asylum applications from refugees fleeing religious persecution.

IRFA's concern about the INS and Department of State's neglect of religious liberty and its perceived lack of protection of human rights was not the first time Congress had tinkered with the refugee definition over a perceived lack of protection for human rights. Prior to 1965, the Attorney General's authority to withhold deportation, the United States equivalent of Article 33 of the 1951 Convention, required the applicant to prove the probability of physical persecution.<sup>110</sup> With the enactment of the 1965 INA, Congress deleted the adjective "physical" from the word persecution.<sup>111</sup> Similarly, when Congress incorporated the Refugee Protocol definition of refugee into domestic law, it protected applicants who had been persecuted and those who had fled due to a well-founded fear of persecution.<sup>112</sup> More recently, concerned that bona fide refugees were being denied asylum, Congress ensured protection for persons fleeing the Republic of China's involuntary sterilization program who could prove persecution under that nation's population planning program.<sup>113</sup> IRFA now calls upon the

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religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

*Id.*

109. See Gunn, *supra* note 1, at 847.

110. Kovac v. INS, 407 F.2d 102, 105 (9th Cir. 1969).

111. *Id.* at 105-06.

112. See ANKER, *supra* note 15, at 40 n.153 (Refugee Act definition includes past persecution and a well-founded fear of persecution, whereas the Convention's definition "only refers to a 'well-founded fear of persecution.' See Convention . . . , art. 1(A)(2).").

113. Congress amended the definition of refugee to include those fearing persecution on account of China's one child policy:

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or

Departments of Homeland Security, Justice, and State to cease neglecting those persons fleeing serious violations of religious liberty.

Finally, the question might be raised whether Congress violated the Establishment Clause in enacting IRFA. Michael McConnell argues the Constitution does not violate its own Establishment Clause prohibitions when it singles out religion for distinctive treatment in the First Amendment nor does Congress when it seeks to protect religious liberty.<sup>114</sup> Moreover, the majority opinion in the *Smith* decision specifically invited legislatures to carve out exemptions or protections for religious liberty.<sup>115</sup> IRFA represents legislative protection of broader religious liberties than the First Amendment might protect.<sup>116</sup> Thus, IRFA is an example of Congress

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subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.  
8 U.S.C. § 1101(a)(42) (2000).

114. McConnell, *supra* note 102. In addition to the text of the Constitution, McConnell also notes religion's distinctive role in society encompasses many elements that call for different protections than for other human or civil rights—institutional, private, identity, locus of community and response to the “ultimate and transcendent questions.” *Id.* at 42; *see also* Laycock, *supra* note 67, at 316 (stating that the Constitution cannot decide whether religion is an idea or an identity: “religion plainly includes both”).

115. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 889–90 (1990).

116. Should IRFA be attacked on Establishment Clause grounds, the status of asylum applicants seeking entry into the United States should largely be a matter of congressional power to decide. The Supreme Court has consistently upheld the plenary power of Congress to decide how to make decisions about entry of non-citizens into the United States. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.”). Although the recent case of *Zadvydas v. Davis* raises questions regarding the current strength of the plenary power doctrine, the doctrine itself has not been overruled. 533 U.S. 678 (2001). Moreover, the *Zadvydas* Court also stressed that the executive has great discretion in carrying out the laws enacted by Congress: “Ordinary principles of judicial review in this area recognize primary Executive Branch responsibility. They counsel judges to give expert agencies decision-making leeway in matters that invoke their expertise. They recognize Executive Branch primacy in foreign policy matters.” *Id.* at 700; *see also* *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) (“As an unadmitted alien present in the United States, Albathani’s due process rights are limited. *See* *Kaplan v. Tod*, 267 U.S. 228, 230 . . . (1925) (presence in the country immaterial because excluded alien ‘was still in theory of law at the boundary line and had gained no foothold in the United States’). As a result, many constitutional protections are unavailable to Albathani. *See* *Zadvydas v. Davis*, 533 U.S. 678, 693 . . . (2001); *see also* *Shaughnessy v. United States ex rel. Mezei*, 245 U.S. 206, 212 (1953) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”) (internal quotation omitted)). *See*

expanding the protection of those seeking refuge from persecution through its plenary power and the invitation of the *Smith* Court.

*B. Credibility Determinations*

Many asylum applicants lose their cases based upon negative credibility findings. Religious applicants face especially difficult burdens of demonstrating the sincerity or plausibility of the harm they face.<sup>117</sup> IRFA calls for greater sensitivity to the wide diversity of belief and for greater understanding of the claims. Justice Robert Jackson penned some of the most poignant and powerful words ever written in the cause of protecting liberty of belief or religion:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.<sup>118</sup>

Yet asylum adjudications are fraught with credibility decisions of the applicant's identity, religious identity, and the alleged persecution. Adjudicators and judges must make life or death decisions based on belief in the applicant's testimony and supporting documentation. When the fact finder finds an individual not believable because she appears not to be of the faith or belief claimed, that decision raises serious First Amendment questions.<sup>119</sup>

Requiring judges to peer into the heart of the professed believer is alien to the First Amendment. The Supreme Court dealt with this directly in a fifty-year old case, *United States v. Ballard*, in which the Ballards were criminally prosecuted for fraud based on claims that they had distributed literature and solicited money by means of false and fraudulent representations, pretenses, and promises.<sup>120</sup> The trial court instructed the jury to consider only whether the Ballards were

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*generally* Stephen H. Legomsky, *Ten More Years of Plenary Power, Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

117. See Samahon, *supra* note 29, at 2226.

118. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (footnote omitted).

119. See Samahon, *supra* note 29, at 2217, 2226.

120. 322 U.S. 78, 79 (1944).

sincere in their beliefs.<sup>121</sup> It ordered the jury not to consider whether their beliefs were true, for that would violate the First Amendment.<sup>122</sup> But if they were not sincere, the court said the jury could find them guilty. Justice Douglas, in upholding the convictions, stated that the framers of the Constitution knew that the extreme views of diverse religious sects had frequently led to violence.<sup>123</sup> The First Amendment prohibited the state from inquiring into a person's relationship with his or her God. By recognizing one's right to worship as one pleased, the government could not name the truth of his or her religious views.<sup>124</sup>

But as Kent Greenawalt points out, although Douglas “eloquently evokes a tradition of religious liberty reaching the most unorthodox views, Douglas formally gives the unorthodox less protection.”<sup>125</sup> Similarly, the First Amendment may “eloquently” set forth an aspiration of liberty, but during the last two hundred plus years, it has frequently failed to protect religious minorities and unorthodox beliefs or faiths.<sup>126</sup>

Asylum cases pose significant problems in applying the *Ballard* sincerity test. As Justice Jackson concluded in his dissent, it is not easy, or even possible, to distinguish between sincerity and truthfulness.<sup>127</sup> Judges have used their own personal knowledge to deny sincerity and truth because applicants have not been orthodox enough—a conclusion that both *Barnette* and *Ballard* enjoined.<sup>128</sup>

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121. *Id.* at 81–82.

122. *Id.*

123. *Id.* at 87.

124. *Id.*

125. Greenawalt, *supra* note 71, at 203.

126. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878); *Minersville Sch. Dist. v. Gobotis*, 310 U.S. 586 (1940); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 889–90 (1990); *see also* Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Haverwas*, 42 DEPAUL L. REV. 167, 171 (1992).

127. *United States v. Ballard*, 322 U.S. 78, 92 (1994) (Jackson, J., dissenting).

128. *See, e.g.*, *Mendoza v. INS*, 28 Fed. Appx. 586, 587 (8th Cir. 2002) (BIA did not credit applicant's testimony, in part, because he “lacked basic knowledge about Mormonism despite claiming to have belonged to the Mormon church, where his father was a minister . . . yet never attended a Mormon church here because he could not find one; and he managed to find and chose to attend a church of the Catholic faith, the faith of his alleged persecutors.”); *Khanuja v. INS*, 11 Fed. Appx. 824, 826 (9th Cir. 2001) (applicant did not bear traditional earmarks of his faith); *Mejia-Paiz v. INS*, 111 F.3d 720, 724 (finding that applicant's “willingness to swear under oath undermined his claimed that he was a Jehovah's Witness. Based on his past experience with Jehovah's Witnesses, the [immigration judge] took judicial notice that Jehovah's Witnesses were prohibited from swearing under oath.”). Tuan

Moreover, as Justice Jackson predicted, prosecutions of persons for false religious statements “easily could degenerate into religious persecution.”<sup>129</sup>

In the asylum context, IRFA blames those shortcomings, in part, on the failure to recognize the wide diversity and manifestations of belief.<sup>130</sup> Among the international agreements raised up by IRFA, Article 18 of the Universal Declaration of Human Rights (“UDHR”) protects the “freedom to change [one’s] religion or belief, and freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief in teaching, practice, worship, and observance.”<sup>131</sup> Article 18(1) of the International Covenant on Civil and Political Rights (CCPR) recognizes that “[e]veryone shall have the . . . freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”<sup>132</sup> Both the UDHR and the CCPR stress the choice of the individual to adopt a religion and manifest that religion. Both recognize that individuals and communities change beliefs and manifest religion in non-traditional ways.<sup>133</sup> Moreover, few individuals know all the rules of a belief or faith system, follow these rules consistently, or know the theological justifications. Conversion can occur in community worship, at a meal with friends, on a road to Damascus, at an upstate New York farm, or under any number of circumstances. Conversion may occur without education about all

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Samahon suggests it may even be a violation of the First Amendment for a judge to deny an asylum claim based on disbelief of an applicant’s claim to be a member of a faith tradition. *See* Samahon, *supra* note 29, at 2226.

129. *Ballard*, 322 U.S. at 95 (Jackson, J., dissenting).

130. *See supra* note 117–18.

131. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); *see also* 22 U.S.C. § 6401(a)(3) (2000).

132. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1996, 999 U.N.T.S. 171, art. 18, *available at* [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); *see also* 22 U.S.C. § 6401(a)(3).

133. The United States religious experience has resulted in many new religious groups breaking away, evolving, and mingling with other religious experiences, constantly raising questions of what is orthodox—questions for believers to settle, not the courts. *See, e.g.*, ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988); MARTY, *supra* note 70, at 72–76.

the tenets of the faith.<sup>134</sup> The extensive ways that religion and belief manifest themselves require all the greater sensitivity to judging credibility on traditional or limited understandings of orthodoxy.

But decisions still must be made as to eligibility for asylum. As Fred Gedicks offers, when one is seeking a benefit from the government, some test of sincerity needs to be applied.<sup>135</sup> Although asylum claims raise special urgency, both for the applicant as well as the nation, they are not without additional safeguards. Applicants who claim a fear of persecution if deported place themselves at risk if their claims are denied. In some cases, claiming a faith or belief may put them in greater danger if they lose their case than if deported without a public record of claiming to be part of a persecuted religious group.<sup>136</sup>

The INS, in its training manual for asylum officers, reveals a certain sensitivity to these credibility issues and acknowledges that IRFA raises the bar from a previous lack of sensitivity.<sup>137</sup> But the manual fails because it simply looks to *Ballard's* First Amendment analysis rather than seeking illumination from IRFA's guiding norms of international law. The INS still assumes that judges and adjudicators can accurately discern the difference between sincerity and truthfulness. IRFA suggests that judges have not accurately discerned in the past and calls for greater deference to the wide manifestations of belief, religion, and conscience.

Asylum adjudications do not permit an easy answer to the sincerity problem.<sup>138</sup> When one is seeking asylum, some test of sincerity needs to be applied.<sup>139</sup> Any decision about relief based on whether the applicant is truly a Sikh, a Jehovah's Witness, a Mormon, an atheist in a theocratic society, or any other

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134. See *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715, (“Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that more sophisticated person might employ.”); see also Laycock, *supra* note 67, at 334–36 (listing the many manifestations of faith understandings that would not pass muster under an orthodox test, but nevertheless, witness to a faith or belief that must be protected).

135. Gedicks, *supra* note 51, at 949–50.

136. See, e.g., *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (finding that the INS made no effort to conceal deportation, thus Christian convert faced death penalty because of apostasy upon return).

137. See INS TRAINING MANUAL, *supra* note 90.

138. Samahon, *supra* note 29, at 2226.

139. Gedicks, *supra* note 51, at 949–50; see also Greenawalt, *supra* note 71, at 204.

manifestation of the holy must be sensitively approached. IRFA calls for that sensitivity in its mandate for reform.

IRFA's concern that the wide manifestation of religions, beliefs, and non-beliefs be recognized suggests another way of looking at the problem. For example, the Board looks to whether fear is reasonable in light of the circumstances of the applicant's state of mind.<sup>140</sup> Given IRFA and the First Amendment's prohibition in determining the truth or falseness of a religious belief, judges and adjudicators should first examine the claim as if the faith claim is true. First Amendment law suggests that the person or organization's self-definition should control, absent clear evidence of fraud.<sup>141</sup> Would someone in the applicant's circumstances as a person of faith or belief possess a reasonable fear of persecution? If no, then the burden will not be met and asylum would be denied. If yes, then the fact finder can look into the sincerity of that belief, but only with the utmost caution under both the Constitution and IRFA and with sensitivity to the many manifestations of belief or faith. To help monitor error, the Board could adopt a balancing test as they have in a different situation in *In re Pula*.<sup>142</sup> In that case, in light of strong negative discretionary factors, the Board held that a finding of a well-founded fear of persecution is an especially strong favorable discretionary factor that can overcome other negative discretionary factors.<sup>143</sup> Under IRFA, once persecution or a well-founded fear of persecution is found, an analysis similar to *Pula's* should be employed. In examining the sincerity of the applicant's faith or belief, the fact finder should balance the positive factor that persecution awaits if returned with the fact finder's doubt about sincerity of belief.

Moreover, IRFA now requires fact finders to explore the potential manifestations of faith or belief, the lack of formal training, and the impact of different cultures on an individual's faith or belief before finding an individual not credible because of a lack of

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140. *In re Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989); *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); *see also Bastanipour*, 980 F.2d at 1133.

141. *See, e.g.*, W. Cole Durham, Jr. & Elizabeth Sewell, *Definition of Religion, in* STRUCTURES OF AMERICAN CHURCHES: AN INQUIRY INTO THE IMPACT OF LEGAL STRUCTURES ON RELIGIOUS FREEDOM (James A. Serritella ed., forthcoming 2003) (on file with the BYU Law Review).

142. *In re Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987) (“[T]he danger or persecution should generally outweigh all but the most egregious of factors.”); *accord In re Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996); *In re H-*, 21 I. & N. Dec. 337, 347 (BIA 1996).

143. *In re Pula*, 19 I. & N. Dec. 467.

symmetry with a traditional understanding of a particular faith or belief. Advocates representing applicants, moreover, need to understand how distinct manifestations of faith or belief may impact credibility and be prepared to rebut perceptions that an applicant's departure from a perception of orthodoxy derails credibility. Undoubtedly, claims on account of religious persecution pose difficult credibility issues, but IRFA and its international norms offer aid to the applicant to at least explain the belief or faith that he or she holds.

### *C. Persecution*

Distinguishing between persecution that makes one eligible for asylum and other forms of violence such as discrimination, harassment, civil strife, or random violence has remained one of the most difficult areas of asylum law in this nation. The world remains a very violent place. Courts have expressed concern that too generous a definition of persecution would flood the nations' shores, administrative agencies, and courts with individuals who were victims of violence but not necessarily persecution.<sup>144</sup> The INA and case law also suggest that two different standards exist for persecution depending on whether one is claiming relief based on past persecution or because of a well-founded fear of future persecution.<sup>145</sup> IRFA's recognition of this nation's failure to recognize bona fide refugees fleeing religious or faith-based persecution calls for all involved in the process to reevaluate how

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144. *See, e.g.*, *Bucur v. INS*, 109 F.3d 309, 403 (7th Cir. 1997) (“[T]he statute was designed as a filter, and the mesh would be too broad if every foreign victim of discrimination in his homeland were eligible for asylum. There is discrimination even in the United States; many thousands of judicial and administrative claims are filed every year complaining of discrimination because of race, ethnicity, sex, or religion, and while many of the claims do not have merit many others do. There is much worse discrimination against minorities in many other countries. . . . The difference between persecution and discrimination is one of degree, which makes a hard and fast line difficult to draw.”). But this concern should be less relevant after IRFA. Congress found that more than half the world's population suffered from violations of their rights of religion and belief. Moreover, Congress found that bona fide refugees fleeing violence on account of religion were denied asylum, and therefore, Congress enacted reform of asylum procedure. *See supra* note 84.

145. *See In re Chen*, 20 I. & N. Dec. at 18–19; *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991); *Bucur*, 109 F.3d at 405 (“[T]here is a double standard at work in asylum cases: if the applicant is not in danger of being persecuted if he is deported, he will not be granted asylum unless the persecution from which he fled was especially heinous.”); *see* 8 C.F.R. § 208.13(b)(1)(ii) (2002).

persecution is defined for persons seeking refuge based on their faith or belief.

### *1. Defining persecution*

The wide diversity of violations against freedom of religion and belief suggest that IRFA can broaden protection for refugees by expanding the definition of persecution. Congress did not define persecution when it passed the Refugee Act of 1980.<sup>146</sup> As discussed above, it has tinkered with how the United States will define persecution under its interpretation of the 1951 Convention and the Refugee Protocol.<sup>147</sup> Congress left it to the BIA and the courts to define persecution. The United Nations High Commissioner for Refugees Handbook (“UNHCR Handbook”) provides guidance stating that a “threat to life or liberty on account of . . . religion . . . is always persecution.”<sup>148</sup> Generally, the courts have stated that any loss of life or liberty may be persecution although, in contrast to the Handbook, threats to life or liberty may not be sufficient.<sup>149</sup>

As courts have struggled to specifically define persecution, these general conclusions have led different Circuit Courts of Appeal to describe the distinctive levels of harm necessary to qualify as persecution. The Ninth Circuit has held that “[p]ersecution’ means ‘the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.’”<sup>150</sup> In contrast, the Seventh Circuit has held that “[p]ersecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.’ On the contrary, in order to be an act of persecution, the behavior in question must threaten death, imprisonment, or the infliction of substantial harm or suffering.”<sup>151</sup>

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146. See, e.g., *Bucur*, 109 F.3d at 402; *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996); *In re Acosta*, 19 I. & N. Dec. 211, 220 (BIA 1985).

147. See *supra* notes 102–05 and accompanying text; *Kovac v. INS*, 407 F.2d 102 (9th Cir. 1969); *In re G-C-L-*, 23 I. & N. Dec. 359, 360 (BIA 2002).

148. UNHCR HANDBOOK, *supra* note 108, ¶ 51.

149. See *Kovac*, 407 F.2d at 107.

150. *Ladha v. INS*, 215 F.3d 889, 897 (9th Cir. 2000) (citation omitted) (omission in original).

151. *Sharif v. INS*, 87 F.3d 932, 935 (7th Cir. 1996) (citations omitted); see also *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir. 1990) (holding that persecution “encompass[es] more than just restrictions or threats to life or liberty” (alteration in original)).

Neither discrimination nor harassment constitutes persecution under those definitions.<sup>152</sup>

Persons of faith or holding beliefs, for which they suffered, have had difficulties meeting their burdens of proof because violence against faith or belief may violate their conscience but fails to leave any physical scars. Crimes against the spirit or conscience may be harder to prove and harder to demonstrate than the equivalent harm of physical torture.<sup>153</sup> IRFA does not specifically attempt to define persecution, but it does list both “[p]articularly severe violations of religious freedom”<sup>154</sup> and “[v]iolations of religious freedom.”<sup>155</sup>

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152. *See, e.g.*, *Bucur v. INS*, 109 F.3d 309, 402 (7th Cir. 1997); UNHCR HANDBOOK, *supra* note 108; *see also* *Yadegar-Sargis v. INS*, 297 F.3d 596(7th Cir. 2002); *Regneantu v. Ashcroft*, 248 F.3d 1159 (7th Cir. 2001) (denying claim as being, at most, mild harassment); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir.) (“Persecution is an extreme concept, which ordinarily does not include ‘discrimination on the basis of race or religion, as morally reprehensible as it may be.’”). Significantly, however, the Handbook while agreeing that discrimination does not usually constitute persecution, states, “It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on . . . his right to practice his religion . . .” UNHCR HANDBOOK, *supra* note 108, ¶ 54.

153. The Board has held that a persecutor need not prove subjective intent to constitute persecution. *See In re Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996); *see also In re C-Y-Z-*, 21 I. & N. Dec. 915, 924 (BIA 1997) (Rosenberg, concurring). These cases are especially helpful in areas of belief or religion where a party harming another may think that the intent is for the good of the one being harmed.

154. 22 U.S.C. § 6402(11) provides:

The term “particularly severe violations of religious freedom” means systematic, ongoing, egregious violations of religious freedom, including violations such as—

- (A) torture or cruel, inhuman, or degrading treatment or punishment;
- (B) prolonged detention without charges;
- (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or
- (D) other flagrant denial of the right to life, liberty, or the security of persons.

155. 22 U.S.C. § 6402(13) provides:

The term “violations of religious freedom” means violations of the internationally recognized right to freedom of religion and religious belief and practice, as set forth in the international instruments referred to in section 6401(a)(2) of this title and as described in section 6401(a)(3) of this title, including violations such as—

- (A) arbitrary prohibitions on, restrictions of, or punishment for—
  - (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;
  - (ii) speaking freely about one’s religious beliefs;
  - (iii) changing one’s religious beliefs and affiliation;
  - (iv) possession and distribution of religious literature, including Bibles; or
  - (v) raising one’s children in the religious teachings and practices of one’s choice;

Nonetheless, the congressional intent to rectify an apparent lack of concern for religious freedom and the need to reform asylum policy necessitates that adjudicators, judges, and attorneys pay specific attention to the kinds of violations that constitute persecution on account of religion.<sup>156</sup> This problem is exacerbated when contrasting the obvious visible scars or disfigurement caused by physical torture against the invisible harm resulting from violence against the spirit when matters of faith or belief are attacked. Similarly, choosing not to follow a religious call or vocation if civil law, societal pressure, or punishment discourages manifestations of that faith or belief leaves little physical evidence. When combined with secular skepticism that compliance with civil law or societal pressure does not constitute harm, religious applicants face a difficult burden.<sup>157</sup> Although Congress eliminated the necessity of proving “physical” persecution, the physicality of torture and violence and its ubiquity in many societies diminishes the perceived harm of other forms of persecution. Some courts have seemingly permitted an unwritten requirement of physical violence to seep into their decisions by denying claims based on persecution on account of religion.<sup>158</sup>

IRFA does not distinguish between physical harm and harm to conscience or belief. Historically, religion has raised thorny issues in defining persecution. Roger Williams, a Baptist minister who

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(B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

156. *Compare id.* § 6401(a)(4) (listing the types of violations that appeared to go unremedied: “Among the many forms of such violations are state-sponsored slander campaigns, confiscations of property, surveillance by security police, including by special divisions of “religious police”, severe prohibitions against construction and repair of places of worship, denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws, prohibitions against the pursuit of education or public office, and prohibitions against publishing, distributing, or possessing religious literature and materials.”); *with id.* §§ 6402(11),(13) (listing the actual definitions of the two types of violations of religious liberty).

157. *See supra* notes 71–78 and accompanying text; *see, e.g.*, *Belkhos v. INS*, 47 Fed. Appx. 405, 407 (7th Cir. 2002) (finding that one incident of electric shock standing alone constituted past persecution.).

158. *See, e.g.*, *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir 1990); *see also* Wendy B. Davis & Angela D. Atchue, *No Physical Harm, No Asylum: Denying a Safe Haven for Refugees*, 5 TEX. F. ON C.L. & C.R. 81, 111 (2000) (finding no cases where an applicant received asylum based on past persecution absent a finding of physical harm).

contributed to the development of colonial New England's understanding of religious freedom, equated violation of conscience with physical rape.<sup>159</sup> Judge Posner has attempted to divine the fine line, finding that "[i]f in fact the communist regime forbade Jehovah's Witnesses to practice their religion, just as the Roman Empire until Constantine forbade Christians to practice their religion, that would be persecution; it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it."<sup>160</sup>

By listing particularly severe violations of religious freedom and violations of religious freedom in the context of asylum reform and by recognizing that religious persecution was increasing worldwide, IRFA provides specific guidelines for examination of the facts of each case before cavalierly dismissing the harm as discrimination or mere harassment. The INS reads IRFA differently:

[IRFA] does not effect the persecution analysis of an asylum adjudication in any way. Whether or not a particular violation of religious freedom (either particularly severe or not) could be considered persecution on account of religion depends upon the degree of harm imposed. Just because a particular type of harm appears in IRFA as a violation of religious freedom does not mean it rises to the level of persecution. Similarly, the omission from IRFA of a type of harm does not mean that it cannot amount to persecution.<sup>161</sup>

IRFA implies the validity of the last sentence,<sup>162</sup> but the INS interpretation sends the wrong message to adjudicators. True, the extent of the harm is often critical to a determination of persecution.<sup>163</sup> But the INS statement that IRFA does not affect the

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159. ROGER WILLIAMS, *THE BLOODY TENENT IN PERSECUTION FOR THE CAUSE OF CONSCIENCE* 7 (Richard Groves ed., Mercer University 2001) (1867); *see also* MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

160. *Bucur v. INS*, 109 F.3d 309, 405 (7th Cir. 1997).

161. *See* INS TRAINING MANUAL, *supra* note 90.

162. 22 U.S.C. § 6471 (2000) provides:

The Annual Report, together with other relevant documentation, shall serve as a resource for immigration judges and consular, refugee, and asylum officers in cases involving claims of persecution on the grounds of religion. Absence of reference by the Annual Report to conditions described by the alien shall not constitute the sole grounds for a denial of the alien's claim.

163. *See* ANKER, *supra* note 15.

analysis of persecution in “any way” ignores congressional concern that the INS was wrong in the past. The list alluded to in this section of the training manual includes torture, murder, execution, enslavement, rape, mutilation, and beating on account of religion or belief—all of which constitute persecution.<sup>164</sup> What IRFA also adds, however, is to equate other arbitrary violations of liberty of belief, religion, or conscience as serious—and so should the asylum adjudicators, and judges. The listing of these violations together in the same list does impact adjudication and raises these violations of conscience and community as serious violations of great harm. The harm analysis does not disappear, but the fact finder needs to take more seriously the harm caused when an applicant offers evidence of any of the listed violations.

Moreover, too often adjudicators and judges ignore that the personal fear of persecution is judged by a reasonableness standard of the applicant herself, not a secular judge or even a United States citizen.<sup>165</sup> For example, the Board held in *In re Mogharrabi*, that the burden was upon the applicant to show that “a reasonable person *in his circumstances* would fear persecution.”<sup>166</sup> IRFA recognizes that there is no single manifestation of belief or religion.<sup>167</sup> Given the

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164. Courts have found all of these violations of the person, standing alone or in conjunction with other violent acts persecution. *See, e.g.*, *Aron v. INS*, 51 Fed. Appx. 254, 255 (9th Cir. 2002) (beatings, lengthy incarceration and rape); *Belkhos v. INS*, 47 Fed. Appx. 405, 409 (7th Cir. 2002) (torture); *Alhori v. Ashcroft*, 22 Fed. Appx. 737, 739 (9th Cir. 2001) (arrest and torture); *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000) (physical violence and threats); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) (murder of uncle in context of other violence against family); *Sharif v. INS*, 87 F.3d 932, 935 (7th Cir. 1996) (“Torture qualifies as persecution.”); *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992) (execution); *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987), *rev’d on other grounds*, *Fisher v. INS*, 73 F.3d 955, 963 (9th Cir. 1996) (“Persecution is stamped on every page of this record. Olimpia has been singled out to be bullied, beaten, injured, raped and enslaved.”); *In re A-N- & R-M-M-*, 22 I. & N. Dec. 953 (BIA 1999) (imprisonment and execution); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997) (abortion and sterilization); *In re Kasinga*, 21 I. & N. Dec. 357, 361–62 (BIA 1996) (female genital mutilation); *In re D-V-*, 21 I. & N. Dec. 77, 78–79 (BIA 1993) (rape and severe beating).

165. Recall Justice Jackson’s fear of unbelieving judges denying claims based on religious belief. *See United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting).

166. 19 I. & N. Dec. 439, 445 (BIA 1987) (emphasis added); *see also* *Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999) (“[A]n individual can demonstrate such a fear by showing that a reasonable person in like circumstances would fear persecution.”); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986).

167. In directing training for foreign service officials, including any member of the service who may assess requests for consideration for refugee admissions, IRFA mandates, “(1) instruction on the internationally recognized right to freedom of religion, *the nature, activities,*

wide variety of religions, beliefs, or other manifestations of faith, belief, or conscience, IRFA requires finders of fact to be more sensitive to the “reasonable person in his or her circumstances.”<sup>168</sup> IRFA, by listing psychological harms with physical harms like torture and beating, suggests that Congress did not mean to distinguish between harms.<sup>169</sup> If asylum adjudicators and judges will not recognize that congressional intent, attorneys and representatives need to raise IRFA to fulfill Congress’s goal of remedying past bias against those fleeing violations of religious liberty.

Applicants also need to present IRFA in cases given the history of persecuted minorities who must nonetheless survive in nations dedicated to eliminating their faith, their faith community, or what is perceived as heretical views to theocratic states. A sense has been creeping into asylum law that if one complies with a law or a custom, then the belief is not a core element of a faith tradition. Therefore, it is not persecution once the person complies with the law.<sup>170</sup> The BIA provides yet another example. In *In re Acosta*, as it defined a particular social group, the BIA described an immutable characteristic defining a group as “one that the members of the group either cannot change, or *should not be required to change* because it is fundamental to their individual identities or consciences.”<sup>171</sup> By posing the question as one of compliance, courts can ignore the *Acosta* test that individuals should not be forced to comply in violence to their faith or belief. Further, they can ignore

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*and beliefs of different religions, and the various aspects and manifestations of violations of religions freedom.”* 22 U.S.C. § 4028(a)(2) (emphasis added).

168. 8 U.S.C. § 1158 (2000).

169. In *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), the Board stated, “We find the well-established doctrine of *eiusdem generis*, meaning literally, ‘of the same kind,’ to be most helpful in construing the phrase ‘membership in a particular social group.’ The doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” IRFA lists specific words such as torture, enslavement, and beating with more general violations such as “arbitrary prohibitions on, restrictions of, or punishment for—speaking freely about one’s religious beliefs; changing one’s religious beliefs and affiliation; [or] possession and distribution of religious literature.” 22 U.S.C. § 6402(13)(A)(ii)–(iv) (2000).

170. *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (finding that forced compliance with laws that are fundamentally abhorrent to a person’s deeply held convictions may constitute persecution, but acquiescence to those laws may provide evidence that such beliefs are not deeply held); *see also* *Yadegar-Sargis v. INS*, 297 F.3d 596, 601 (7th Cir. 2002) (holding that because petitioner complied with dress code laws and was still able to attend church and practice her faith, the dress code was not abhorrent to her deepest beliefs).

171. *In re Acosta*, 19 I. & N. Dec. at 233 (emphasis added).

IRFA's findings that arbitrary restrictions, punishment, and forced conversions all constitute violations of religious freedom.

In certain situations, persons of faith or conscience, may publicly deny their faith but still hold it deep within their very being. The history of religious persecution is replete with underground gatherings of faith from the catacombs of Rome,<sup>172</sup> to African slaves singing spirituals hiding religious messages of resistance,<sup>173</sup> to underground churches in China in the twentieth century,<sup>174</sup> to name just a few. Persons of faith or belief have always had to discern how public to be with faith or belief in persecuting societies.<sup>175</sup> To demonstrate compliance with laws on the outside while resisting in private is one way faith traditions survive. IRFA calls for consideration that such persecution, regardless of compliance, should be recognized and survivors protected.<sup>176</sup>

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172. IVO LESBAUPIN, *BLESSED ARE THE PERSECUTED: CHRISTIAN LIFE IN THE ROMAN EMPIRE*, A.D. 64-313, at 55 (1987) (Christians when faced with the persecution by Rome debated strongly whether to just accept the punishment or continue in underground gatherings. Lesbaupin cites Clement that "Christians will not abandon their faith simply because it disturbs the oppressor, to be sure; but neither ought they add to further provocation . . . for this only occasions repression. . . . And so Christians ought not to expose themselves to danger. . . . They ought to follow certain norms of safety, lest they themselves provide the framework for their persecutors' cruel acts.").

173. KIM & REGGIE HARRIS, *STEAL AWAY: SONGS OF THE UNDERGROUND RAILROAD* (1984).

174. The 2002 International Religious Freedom Report notes that the Government of China, "closed underground mosques, temples, and seminaries, as well as some Catholic churches and Protestant 'house churches' . . ." BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, *INTERNATIONAL RELIGIOUS AND FREEDOM REPORT 2002: CHINA (INCLUDES HONG KONG AND MACAU)* (2002), available at <http://www.state.gov/g/drl/rls/irf/2002/13870.htm>.

175. See Mousin, *supra* note 38, at 114-15. See also BAU, *supra* note 35, at 26-27 (stating that in the United States, refugees working with religious congregations that engaged in resistance through the sanctuary movement often had to choose between "public sanctuary" and "quiet" refuge).

176. As Jeremy Gunn also notes, the increased emphasis on religious persecution and the administrative structures set up in the Department of State make the Annual Religious Freedom Reports superior to the Department's Annual Country Reports on human rights. These added resources should make it easier to prove persecution with this more detailed evidence. See Gunn, *supra* note 11. The Board and the courts already give great deference to State Department Reports. See, e.g., *In re G-A-*, 23 I. & N. Dec. 366, 369 (BIA 2002); see also 22 U.S.C. § 6471 (2000).

## 2. Past persecution

Although the Refugee Act of 1980 modified the 1951 Convention's protection by adding the word "persecuted" to the well-founded fear of persecution requirement in the definition of refugee, cases did not consider past persecution until 1989 when the Board held in *In re Chen* that "it is clear from the plain language of the statute that past persecution can be the basis for a persecution claim."<sup>177</sup> The Board recognized in those situations where there was little likelihood of future persecution, the Attorney General still had the authority to deny asylum as a matter of discretion.<sup>178</sup> Because asylum is a discretionary remedy, the Board determined it did not further the humanitarian goals of asylum to grant asylum if the applicant could return to his or her native land if no future threat existed. The Board held, however, that past persecution established a rebuttable presumption of similar persecution in the future, thus meeting the applicant's burden of a well-founded fear of persecution.<sup>179</sup> For example, in *In re Chen*, the Board noted that "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution. . . . It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate."<sup>180</sup> The Board went on to note that if the evidence in the record revealed that country conditions had so fundamentally changed that the applicant had no future fear, the claim could be denied. Applying these tests, however, have made it difficult for persons of faith or belief to prevail in asylum cases.

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177. *In re Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989). For another perspective, compare the Refugee Convention's, *Declaration on Territorial Asylum*, *supra* note 15, language of "well-founded" fear with the INA's "persecuted or well-founded fear of persecution," INS TRAINING MANUAL, *supra* note 90. The Ninth Circuit Court of Appeals in *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988), had previously recognized that right for all cases arising within its jurisdiction. *See also* ANKER, *supra* note 15.

178. *In re Chen*, 20 I. & N. Dec. at 18.

179. *Id.*

180. *Id.* at 19. The Attorney General has since codified this holding in 8 C.F.R. § 208.13(b)(1) (2002). *See also In re H-*, 21 I. & N. Dec. 337, 346–47 (BIA 1996); *In re N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998).

*a. The Holocaust problem.* Although Chen called for case-by-case adjudication in past persecution claims, the standards prior to IRFA have been extremely high. As one court stated:

The experience of persecution may so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution. Very few of the surviving German Jews returned to Germany after the destruction of the Nazi regime, and it would have been cruel to force them to do so on the ground that bygones are bygones. In such cases the attempted rebuttal fails in lesser cases of past persecution and perhaps even in the most serious cases if the persecuted group has become the ruling group, deportation may not be inhumane.<sup>181</sup>

No doubt the court was correct with regards to the suffering of the Jews, but to suggest that “in lesser cases” than the Holocaust, deportation may not be inhumane ignores the ongoing cruelty of torture.

For example, in *Kumar v. INS*, a Fijian woman was stripped and fondled by soldiers in her home.<sup>182</sup> On one occasion soldiers beat her unconscious after she witnessed them enter her temple, smash religious statues, and burn a holy text and then hauled her out of her temple and ordered her at gunpoint to convert from Hinduism to Christianity.<sup>183</sup> She had also witnessed her parents beaten and incarcerated.<sup>184</sup> The Immigration Judge denied her case, holding that changed country conditions reduced her future fear and the violence she suffered was not so “egregious” as to warrant asylum.<sup>185</sup> The Ninth Circuit agreed, holding that the violence did not rise to the

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181. *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991). The Seventh Circuit has stated this test most starkly, but other circuits have noted the high burden this places on asylum applicants who depend solely on proof of past persecution. *See, e.g., Nazaraghaie v. INS*, 102 F.3d 460, 463 (10th Cir. 1996) (“The quantum of persecution he experienced would not ‘so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of future persecution.’ *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992) (quoting *Skalak v. INS*, 944 F.2d 364, 365 (7th Cir. 1991).”).

182. 204 F.3d 931, 932 (9th Cir. 2000).

183. *Id.* at 933.

184. *Id.* at 932–33.

185. *Id.*

level suffered in *Chen*, and therefore, she did not “warrant a special dispensation of humanitarian relief.”<sup>186</sup>

Courts face the difficulty of discerning whether past persecution has been atrocious or heinous. Judge Posner confessed some hesitation in deciphering the “oxymoron” of “mild persecution” in deciding whether past persecution is severe enough to qualify an individual for a grant even with little likelihood of future persecution.<sup>187</sup> Although IRFA does not define violations of religious freedom as coinciding with persecution, IRFA’s linking of physical with spiritual types of violations calls for judges and adjudicators to be more acute in understanding the extent of harm imposed on persons of faith or belief. Moreover, Congress enacted IRFA because it found many situations of “heinous” violations of religious liberty were not remedied, thus strengthening arguments that these types of harm deserve recognition as valid claims for asylum.<sup>188</sup> In addition, the more detailed reports and work of the Commission should provide attorneys and judges with new sources of evidence documenting the extent of harm when considering past persecution cases.

*b. The forgotten test of the mind of the refugee.* Given the very high burden once the evidence in the record demonstrates that country conditions have changed, cases rarely discuss the personal pain suffered by the refugee in his or her unique circumstances. The Board in *Chen*, when holding that atrocious past persecution alone might be sufficient for relief, noted two factors besides changed country conditions, stating, “even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his

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186. *Id.* at 935. Nine months later, however, in another Indo-Fijian case, the Ninth Circuit recognized its earlier prediction that country conditions had changed for the better proved wrong, suggesting it may have been too quick to find a fundamental change in denying Ms. Kumar’s case. In *Gafoor v. INS*, 231 F.3d 645,647–48 (9th Cir. 2000), the court recognized that despite sending Ms. Kumar home, “in the past several months conditions in country have deteriorated to their lowest point in 13 years.”

187. *Bucur v. INS*, 109 F.3d 399 (7th Cir. 1997). Although the court found that a Jehovah’s Witness had been, “beaten, starved and tortured,” it determined that he only suffered “mild persecution” and, and therefore, did not deserve of asylum relief based on past persecution. *Id.* at 404, 406.

188. Congress found “Though not confined to a particular region or regime, religious persecution is often particularly widespread, systematic, and *heinous* under totalitarian governments and in countries with militant, politicized religious majorities.” 22 U.S.C. § 6401(a)(6) (2000) (emphasis added).

past experiences, in the mind of the refugee.”<sup>189</sup> By simply looking at the change in country conditions, courts have failed to fully examine the mind of the refugee or, for that matter, the attitude of the population.<sup>190</sup> The Board in *Chen* was also not establishing an impossibly high standard that would require asylum applicants to show persecution equivalent to that of the Holocaust, nor did it

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189. *In re Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989).

190. *But see In re H-*, 21 I. & N. Dec. 337, 347 (“Central to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past.”). The Board and courts may also be too quick to applaud the ameliorative impact of a regime change. Little noticed in the facts surrounding the *Chen* case was the Board’s comment that, “However, it is also true that, since the time of the Cultural Revolution, conditions in China have changed significantly. We note in this regard that millions of people suffered during the Cultural Revolution and have since been rehabilitated. . . . While religious freedom as we understand it may still not be enjoyed in China, we are not persuaded by the evidence presented that a reasonable person in the respondent’s circumstances would have a well-founded fear of persecution on account of his religion, if returned to the China of 1989.” *In re Chen*, 20 I. & N. Dec. at 20–21. The Board’s decision in *In re Chen* was handed down on April 25, 1989. *Id.*

China’s pro-democracy protests began in Beijing in April 1989 and the massacres at Tiananmen Square occurred on June 4, 1989, only thirty-nine days after the *Chen* decision. *See* AMNESTY INT’L, TIANAMEN—11 YEARS ON AND STILL NO GOVERNMENT INQUIRY “FORGOTTEN PRISONERS” (May 1, 2000), *available at* <http://web.amnesty.org/library/index/ENGASA170172000>. Amnesty also noted that as of the May 2000 report, 213 persons were still imprisoned or on medical parole since their activities during the Tiananmen Square events. *Id.* The Board’s confidence of its understanding of human rights issues in China as articulated in *Chen* should stand as a tragic warning before rushing to find no future fear of persecution should an applicant be repatriated. Indeed, the 2002 International Religious Freedom Report for China reports that, “The Government continued to restrict religious practice to government-sanctioned organizations and registered places of worship, and to control the growth and scope of activity of religious groups . . . .” BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS AND FREEDOM REPORT 2002: EXECUTIVE SUMMARY (2002), *available at* <http://www.state.gov/g/drl/rls/irf/2002/13608.htm> [hereinafter RELIGIOUS AND FREEDOM REPORT 2002: EXECUTIVE SUMMARY].

More recently, the Ninth Circuit has recognized it may have acted to quickly in finding country conditions changed, to the potential harm of an Indo-Fijian woman. In *Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000), the court reversed the BIA’s denial of asylum to a Fijian of Indian descent on November 3, 2000. It recognized that barely nine months earlier, it had denied asylum to an Indo-Fijian woman because it had agreed with the BIA that despite past persecution, changed country conditions eliminated any future fear of persecution. *Id.* at 647. It now found that “the underlying racial tension between ethnic and Indo-Fijians has persisted, and in the past several months conditions in the country have deteriorated to their lowest point in 13 years.” *Id.*; *see also* *Lal v. INS*, 255 F.3d 998, 1011(9th Cir. 2001), *opinion amended on other grounds*, 268 F.3d 1148 (9th Cir. 2001) (Indo-Fijian eligible for asylum based on past persecution).

delineate the exact circumstances of eligibility, but rather emphasized that it “can best be handled on a case-by-case basis.”<sup>191</sup>

IRFA’s concern with a faulty asylum procedure and the discussion of the types of harm persons of faith, belief, or conscience face provide new legal arguments for rebutting the restrictive standards under *Chen* and *Skalak*. The particularly severe types of torture listed by IRFA present guidelines as to the nature of past persecution that should be considered for relief. Congress has not distinguished between the harms caused by restrictions and punishment of conscience and rape, beatings, and other physical punishment. When considering the harm done by past persecution, IRFA calls for a more careful examination of whether the record involves these types of violations of liberty on account of religion, belief, or conscience listed by IRFA.<sup>192</sup>

Finally, by relying on international instruments as a source of protection for religion, belief, or conscience, IRFA forces all those involved in the protection of bona fide refugees to understand the distinctive nature of persecution on account of religion or belief. Whether courts are willing to adopt Roger William’s claims that violations of conscience are tantamount to physical rape, physical and mental abuse on account of religion such as that abuse Ms. Kumar suffered nonetheless meets IRFA’s concerns and should be sufficient to obtain asylum on past persecution alone.<sup>193</sup> The IRFA’s mandate

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191. *In re Chen*, 20 I. & N. at 22; *see also Lal*, 255 F.3d at 1088 (“the proper approach to the humanitarian exception was to determine whether the petitioner’s persecution was roughly comparable to Chen’s . . . without applying a mechanical ‘minimum showing of ‘atrocious.’” (citations omitted)).

192. Moreover, much like how quick courts have been to find changed country conditions, they have been too quick to minimize the long-term harm of physical or psychological torture. *The Chicago Tribune* reported that many Holocaust survivors who are now senior citizens are now having painful recall of the persecution they suffered fifty years ago, making it difficult for caregivers to treat them or even realize the intensity of the pain and suffering they currently experience. One eighty-nine-year-old nursing home resident with Alzheimer disease “relives the horror of the Holocaust as though it were happening now. . . . Their minds can no longer keep buried the tortured memories of concentration camps, gas chambers and loved ones killed before their eyes.” Tom McCann, *Nightmare World Holocaust Survivors with Alzheimer’s Can Suffer Flashbacks of Old Horrors. Nursing Homes Are Learning How to Help Them*, CHI. TRIB., Jan. 24, 2003, at N1. Likewise, many of the violations of religious freedom cited by IRFA have long-term effects that cannot be lightly forgotten or buried in the mind.

193. *Kumar v. INS*, 204 F.3d 931, 932–33 (9th Cir. 2000); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097–98 (9th Cir. 2000) (citing medical studies that find that “rape commonly results in severe and long-lasting psychological sequelae that are complex and

to understand how religion is manifested and how extensive the persecution is combined with *Chen's* emphasis on also examining the mind of the refugee provides a powerful combination. This powerful combination should force all those concerned with meeting our commitment to protecting bona fide refugees to reconsider the *Skalak* test for past persecution as tantamount to proving one suffered similarly to survivors of the Holocaust.

*c. Changed country conditions.* The persistence of religious persecution throughout the globe, both in geography and in time, suggests caution before finding that country conditions have changed so significantly that a refugee does not face a fear of persecution upon her return.<sup>194</sup> The Office of International Freedom has identified at least five categories into which countries that persecute persons of faith, belief, or conscience fit: (1) totalitarian or authoritarian attempts to control religious belief or practice; (2) state hostility toward minority or non-approved religions; (3) state neglect of the problem of discrimination against, or persecution of, minority or non-approved religions; (4) discriminatory legislation or policies disadvantaging certain religions; and (5) stigmatization of certain religions by wrongfully associating them with dangerous "cults" or "sects."<sup>195</sup> As an initial point, each of these categories call for different types of proof to demonstrate a nexus to one of the protected refugee grounds, but at the very least, they each suggest state involvement in persecution or neglect in remedying the violations. The State Department's annual reports will be most helpful when applicants seek evidence about a nation listed in one of the five categories. The third category may prove most helpful in asylum cases involving state neglect or failure to protect minority religions as

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shaped by the particular cultural context in which the rape occurs. . . . Longer-term effects can include persistent fears, avoidance of situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of the abuse, decreased ability to respond to life generally, and difficulty reestablishing intimate relationships.").

194. Congress found, "Though not confined to a particular region or regime, religious persecution is often particularly widespread, systematic, and *heinous* under totalitarian governments and in countries with militant, politicized religious majorities." 22 U.S.C. § 6401(a)(6) (emphasis added).

195. RELIGIOUS AND FREEDOM REPORT 2002: EXECUTIVE SUMMARY, *supra* note 190; *see also* Michael Young, Keynote Speech at BYU Ninth Annual International Law and Religion Symposium (Oct. 9, 2002) (transcript available from the BYU International Center for Law and Religion Studies).

it calls to mind the Board's concern in *Chen* that even with changed conditions in the regime, persecution can continue through mob violence or civil strife, further exacerbating the fear in the mind of the refugee.<sup>196</sup> When combined with the Office's designation of countries of particular concern, advocates will have additional evidence to meet an applicant's burden of proof.<sup>197</sup>

#### *D. Affirmative Duty to Protect*

Finally, IRFA's invocation of international guidelines addresses another problem area involving civil strife. Divining when an individual, a family, or a community of faith are being singled out for persecution instead of being victims of civil strife or random violence has also plagued asylum adjudications involving religious claims.<sup>198</sup> United States asylum law does not offer refuge for those persons fleeing civil strife or random violence. As the Board noted in *In re Acosta*, persecution "does not embrace harm arising out of civil strife or anarchy."<sup>199</sup> The Board reviewed legislative history where Congress considered and then refused to adopt a definition of refugee that included protection for displaced persons who were forced to flee from military or civil violence.<sup>200</sup> Subsequent cases have also held that human rights abuses alone do not qualify an applicant for refuge status.<sup>201</sup> Gaining asylum based on persecution on account

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196. *In re Chen*, 20 I. & N. Dec. at 19.

197. IRFA calls for the Office of International Freedom to designate "countries of particular concern" where it finds particularly severe violations of freedom of religion or belief. 22 U.S.C. § 6412(b)(1)(A)-(B); see also Gunn, *supra* note 1, at 844. In a forthcoming law review article on persecution on account of gender, Karen Musalo argues persuasively that a new test of "harm plus lack of state protection" provides nexus for gender persecution. See Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims*, 52 DEPAUL L. REV. (forthcoming 2003). A similar argument in religion cases might be particularly effective especially for persons fleeing countries of particular concern.

198. See, e.g., *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (denied asylum based on random violence during period of significant strife); *Bradvida v. INS*, 128 F.3d 1009, 1013 (7th Cir. 1997); *Rusu v. INS*, No. 96-3832, 1997 U.S. App. LEXIS 21539, at \*2 (7th Cir. Aug. 7, 1997) (finding that asylum law does not turn isolated beatings or interrogations into a right to remain, "if they did, then no one could be deported, given widespread private prejudice and civil strife").

199. *In re Acosta*, 19 I. & N. Dec. 211, 22 (BIA 1985).

200. *Id.* at 223 & n.10.

201. *In re T-*, 20 I. & N. Dec. 571, 576 (BIA 1992) ("It also appears indisputable that human rights abuses occur on a large scale. This does not mean, however, that these abuses, standing alone, translate into persecution as defined in the Act."); see also *Bradvida*, 128 F.3d at 1013 (generalized civil strife insufficient to support a claim for asylum).

of religion has been particularly burdensome because of the difficulty of distinguishing between civil strife and persecution on account of religion.<sup>202</sup> In addition to the legal grounds, courts have expressed a policy concern that too generous a standard for persecution would open the floodgates to millions of asylum seekers. For example, in *Rusu v. INS*, the court denied asylum despite beatings that the applicant sustained by Securitate after conversion to Pentecostal faith. The court further found that after a regime change in Romania, the threat by private actors to burn down the family house if the family continued to distribute Bibles was not sufficient and the court denied asylum because “the immigration laws do not turn isolated events of this kind into a right to remain in the United States; if they did, then no one could be deported, given widespread private prejudice and civil strife.”<sup>203</sup>

Tragically, Congress found that much of the world suffers religious violence and enacted IRFA to order the State Department and the President to challenge such practices. Congress also voiced concern that religious persecution is especially abhorrent when either “national security forces” or “hostile mobs” engage in religiously-

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202. *Bradvica*, 128 F.3d at 1013; *Petrovic v. INS*, 198 F.3d 1034, 1037 (7th Cir. 2000) (“It is well settled that general, oppressive conditions that affect the entire population of a country do not provide a basis for asylum. . . . [T]his principle has been interpreted to mean that fear of general conditions of ethnic persecution common to all members of an ethnic minority does not constitute the well-founded fear required by statute.” (citations omitted)); *Rostomian*, 210 F.3d 1088; *Rusu v. INS*, 1997 U.S. App. LEXIS 21539, at \*2–3.

203. 1997 U.S. App. LEXIS 21539, at \*2. There has always been tension in the relationship between these holdings and the federal regulation that permits proof of pattern and practice against similarly situated persons. 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B) (2002):

In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

IRFA’s findings and the annual reports should be most helpful in meeting the regulations burden or proof and avoiding dismissal as just random violence or civil strife.

motivated violence.<sup>204</sup> Congress, moreover, cited the need for IRFA to challenge and solve the problem of “renewed” and “increasing” assaults by both government-sponsored and government-tolerated violations of religious freedom.<sup>205</sup> Congress also ordered this nation to reform its asylum laws and procedures to protect refugees fleeing such violence.<sup>206</sup>

IRFA recognizes the internationally agreed upon responsibility of government to protect against those violations.<sup>207</sup> With the introduction of international instruments such as the UDHR, especially Article 18, attorneys, adjudicators, and judges must reevaluate how to analyze claims for asylum on account of religion when dealing with civil strife issues. As Arcot Krishnaswami pointed out, several Articles of the UDHR establish an affirmative duty for the state to protect religious minorities: Article 7 places a duty upon public authorities to protect individuals and groups against discrimination,<sup>208</sup> and Article 18 imposes upon signatories an affirmative duty of protecting religious minorities from mob violence or private vengeance on account of religion.<sup>209</sup> IRFA also points to the CPPR, which the United States Senate ratified in 1992.<sup>210</sup> As Gerald Neuman points out, “[t]he obligations of states-parties to the CCPR are not merely negative. Under CCPR Article 2, each agrees ‘to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be

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204. 22 U.S.C. § 6401(a)(5) (2000). Sadly, these congressional findings relate nothing new. Lesbaupin points out that even the persecutions of early Christians by the Romans began not from government, but from the people. He writes,

The emperors of the first two centuries did not initiate general persecutions. The earliest persecutions were the outcome of local movements and limited popular initiative, with the approval, merely, of the magistracy. It was the people who called for persecution, frequently engaging in it themselves and rendering it more cruel, and incessantly provoking the hostility of the emperors and the magistrates against Christians.

LESBAUPIN, *supra* note 172, at 7.

205. 22 U.S.C. § 6401(a)(4).

206. *Id.* §§ 6401(a)(4), 4028(a)–(b) (2000) (training of foreign service officers, including those making overseas refugee determinations); *id.* § 6473 (2000) (reform of asylum procedures).

207. *Id.* § 6401(a)(3) provides in part: “Governments have the responsibility to protect the fundamental rights of their citizens and to pursue justice for all.”

208. KRISHNASWAMI, *supra* note 95.

209. *Id.*

210. See Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 41–42 (1997).

necessary to give effect to the rights recognized in the present Covenant.”<sup>211</sup> Both the UDHR and the CCPR, therefore, place an affirmative duty upon the government to protect religious minorities, especially in places of civil strife.<sup>212</sup> If governments fail to protect, the resulting harm should meet an applicant’s burden for asylum after IRFA.

Moreover, even if courts refuse to interpret IRFA as making any fundamental changes in domestic asylum law, these international agreements bind the nations where the alleged persecution occurs. The violations of religious liberty cannot be explained away as civil strife because the nation has a duty to protect individuals and communities from that very violence. Karen Musalo has argued that, especially in cases of persecution on account of gender, serious harm plus neglect by the state to protect from that harm suffices to prove a nexus for purposes of United States asylum law.<sup>213</sup> IRFA calls nations to live up to those international obligations that establish this duty of protection against violence on account of religion, belief, or conscience. Moreover, if the Office of International Freedom finds that the nation in question falls into category three, this provides additional evidence of state responsibility to cure the violence. Thus, in cases where it is impossible to prove a state actor persecuted an asylum applicant on account of religion due to civil strife or random violence, IRFA, both through its international instruments and its reporting and investigations, provides all who are concerned about rectifying violence against persons of faith, belief, or conscience or the communities they belong to with new tools to challenge these cases which deny relief based on civil strife or random violence.

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211. *Id.* at 41 (omission in original).

212. Such protection may take many forms whether legislative or judicial. In the United States, after the Supreme Court upheld the requirement of all public school students to stand and state the pledge of allegiance to the flag each day in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), persecution against Jehovah’s Witnesses who refused to recite the pledge resulted in beatings and expulsions from many towns around the nation. See DAVID R. MANWARING, *RENDER UNTO CAESAR, THE FLAG SALUTE CONTROVERSY* 163–86 (1962). Just three years later, the Court reversed itself and exempted persons of conscience from having to recite the pledge. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The violence against the Jehovah’s Witnesses after the *Minersville* case prompted the Court, in part, to revisit and overturn its earlier decision. MANWARING, *supra*, at 201–02. Reform of asylum law could provide a similar resource in protecting persons fleeing violations of religious liberty.

213. Musalo, *supra* note 197.

## V. CONCLUSION

Critics have denounced IRFA as one more example of the United States attempting to impose its will and its laws upon the world. Defenders argue that IRFA only calls the nations of the world to live up to their agreements found in international covenants and declarations. Both sides in the debate, however, have neglected to acknowledge that IRFA calls upon the United States to live up to these very same agreements in adjudicating asylum applications based on persecution on account of religion. Although the INS has commenced the mandated training of officers, there is little evidence that it has grasped the full implications of engaging these international instruments as guiding norms in adjudication.

This article sets forth four areas of domestic asylum law that can provide increased protection to refugees fleeing persecution on account of religion or belief by introducing the legal issues that the international instruments bring to each case. IRFA also provides a second legal argument, should the Board and the courts not fully incorporate these international instruments into domestic asylum law. This second legal argument suggests that the Board and the courts should analyze whether foreign nations have met their respective obligations in protecting belief, religion, and conscience to the extent that they have agreed to be bound to by these international agreements. A nation's refusal or inability to protect victims of violence on account of religion, falls short of the protection they agreed to under these international instruments, thus contributing to the evidence of persecution on account of religion. Advocates have a duty to employ these international provisions in challenging the biases and neglect that have diminished the protection in religious persecution cases.

International law principles, however, provide no panacea to solving violations of religious liberty. History has shown that notwithstanding asylum law's international law roots and the developing protections against persecution, United States domestic asylum law has been slow in recognizing these remedies. In addition, countries have frequently argued for exemptions from their obligations. But given congressional intent to reform asylum law, IRFA calls upon the United States to do no less than it asks of other nations. Having pledged to protect religion, belief, and conscience, the United States should adjudicate asylum claims pursuant to the broader international understanding of liberty of religion and belief

so that those fleeing violations of liberty of belief or religion gain refugee status. Only then will Congress be able to fulfill its intent for this nation to foster liberty and stand with the persecuted.