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Theresa Sidebothom

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## Immigration Policies and the War on Terrorism

### Keywords

Immigration Law, Terrorism, War, Human Rights Law, Democracy

# IMMIGRATION POLICIES AND THE WAR ON TERRORISM

*Theresa Sidebothom*

## INTRODUCTION

Beatrice Okum, a Christian woman from Southern Sudan, fled her village during attacks by the Sudanese National Islamic Front.<sup>1</sup> She was separated from her family and has never heard from them again.<sup>2</sup> At age 15, she was forced into slavery in Kenya, where she spent fourteen years.<sup>3</sup> She finally escaped and fled to America.<sup>4</sup>

Upon arrival, she was handcuffed, shackled and taken to a detention facility<sup>5</sup> There she “watch[ed] daily the hopelessness, the ache, the anguish on the faces of fellow inmates as they [we]re filled with fear and uncertainty, because we are subjected to a system where hope often dies before it is realized.”<sup>6</sup> As she suffered flashbacks to her time in slavery she said, “I am only fighting for freedom. I only want to be safe.”<sup>7</sup>

This dream is shared by the rest of America, especially in these times. September 11, 2001<sup>8</sup> marked the United States’ full engagement in the War on Terrorism. That name is given from an American perspective. The terrorism that has been driving refugees to our shores for years now threatens Americans. U.S. interaction with these refugees will be an integral component of winning this war.

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Theresa Sidebothom was raised in Java and graduated summa cum laude from Wheaton College. She and her husband taught English and assisted with development projects in Sumatra for seven years. This paper was originally written for Prof. Ved Nanda’s International Law class at the University of Denver College of Law, for which she received a Scholastic Excellence Award. She would like to thank her husband, Dr. Bruce Sidebothom, for his ideas, inspiration, and feedback.

1. *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*, Lawyers Committee for Human Rights, 11 (2002) at <http://www.lchr.org>.

2. *Id.*

3. *Id.*

4. Media Alert, Lawyers Committee for Human Rights, *Refugee Women Fleeing Persecution Face Unfair U.S. Laws* (Jan. 14, 2003) at [http://www.lchr.org/media/2003\\_alerts/0114.htm](http://www.lchr.org/media/2003_alerts/0114.htm).

5. *Refugee Women at Risk*, *supra* note 1, at 11.

6. Media Alert, Lawyers Committee for Human Rights, *Refugee Women Fleeing Persecution Face Unfair U.S. Laws* (Jan. 14, 2003) at [http://www.lchr.org/media/2003\\_alerts/0114.htm](http://www.lchr.org/media/2003_alerts/0114.htm).

7. *Id.*

8. This was the date when Al-Qaeda hijacked four U.S. airplanes. Suicide terrorists crashed two of the into the World Trade Center into New York City, bringing the two towers down and killing thousands. Another plane crashed into the Pentagon. The last group of terrorists was thwarted when passengers overwhelmed the terrorists, and the plane crashed in a remote area. No passengers or terrorists from the planes survived.

The threat that western secularism poses to Islamic societies may be no more intentional than was wiping out native Americans with measles, but for the survival of fundamentalism in the Muslim world, it is just as deadly. Secularism spreads via satellite dishes, computers, McDonalds, Coca-Cola, multinationals, and air travel.<sup>9</sup> The entertainment industry and globalization are its missionaries. Refugees are often its proponents.

This war began long ago, in a titanic clash of cultures. Secularism, on the one hand, promotes religious plurality and freedom for conscience and expression, but also allows sexual promiscuity, redefines the family and disfavors state established religion. Opposing secularism is fundamentalist seventh century Islam, which features a rigid social structure with clearly defined moral values and state authority that is defined by particular beliefs about God and the after-life.

Islam is in crisis because its well-remembered glorious past does not match its present. As Bernard Lewis says, "Compared with its millennial rival, Christendom, the world of Islam had become poor, weak, and ignorant."<sup>10</sup> There is a profound debate within the Muslim world about the causes of decline in the Dar Al-Islam (rule of peace or Islam).<sup>11</sup> The fundamentalists say that what is needed is a restoration of authentic Islam.<sup>12</sup> The modernists see more of a problem in the retention of the old ways, including beliefs and practices that are not successful in the modern world, and they see fanaticism as stifling.<sup>13</sup>

Resurgent or fundamentalist Islam sees itself as the solution to the problem.<sup>14</sup> This type of Muslim fears the West, sees Western culture as corrupt, and believes "Western secularism, irreligiosity, and hence immorality" are "worse evils than the Western Christianity that produced them."<sup>15</sup> Secularism, although perceived by certain Christians as a threat to their religion as well, did in a sense spring out of Christian thought. The early years of persecution by imperial Rome made it clear that a separation of church and state was possible and later conflict between competing traditions eventually persuaded enough Christians that separation of church and state was necessary for peace to give birth to the modern secular state.<sup>16</sup> Christianity now and historically, survives when it is a minority and persecuted religion.<sup>17</sup> This is not true of Islam, which is inexperienced at being a minority religion, and has a theological vision of a religious state.<sup>18</sup>

9. Bruce Sidebotham, *Kingdoms in Conflict: Radical Islam Collides with the American Way*, Dr. Bruce Sidebotham, Operation Reveille Shofar (Sept./Oct. 2001) at <http://www.oprev.org/SepOct01.htm#feature1> [hereinafter Sidebotham 1]

10. BERNARD LEWIS, *WHAT WENT WRONG? WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* 151 (Oxford Univ. Press 2002).

11. *Id.* at 151-156.

12. *Id.* at 156.

13. *Id.* at 157.

14. Sidebotham 1, *supra* note 9.

15. SAMUEL HUNTINGDON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 213 (Simon & Schuster 1996).

16. LEWIS, *supra* note 10, at 96.

17. *Id.* at 96-97.

18. *Id.* at 100-103.

Qutb is probably the greatest of the fundamentalist Muslim thinkers.<sup>19</sup> *In the Shade of the Koran* is his greatest work and Osama bin Laden is his disciple. He hated the West for its schizophrenia in putting religion in one corner and the state in a different one.<sup>20</sup> He hated the split in the sacred and the secular and “wanted Muslims to appreciate that, if God is the only god, God must rule over everything.”<sup>21</sup>

Qutb hated America, not because America did not uphold its principles, but because of the very principles it holds, because it is a liberal society.<sup>22</sup> He and his followers truly feared an annihilation of Islam caused by liberal ideas.<sup>23</sup> Kemal Ataturk and his secular reforms in Turkey in 1924 were a despised example<sup>24</sup> and Osama bin Laden referred to that event in his first video after 9/11 when he said, “Our Islamic nation has been tasting the shame for more [than] eighty years.”<sup>25</sup> Qutb believed that “Islamism’s truest enemy was not a military force but instead, an insidious penetration of cultural influences and ideas, which could exterminate Islam.”<sup>26</sup>

Qutb’s answer is that “Koranic truth, to be grasped properly, requires not just a serious experience of religious commitment, but of revolutionary action on Islam’s behalf.”<sup>27</sup> And so, although Qutb died in an Egyptian jail, his ideas spread and the killing started.<sup>28</sup> The Islamist movement was successful: civil war in Algeria, genocide in the Sudan of up to 2 million, rioting in Nigeria, the Palestinian Hamas, and revolution in Afghanistan.<sup>29</sup> Torture, repression, and death were the fruits which grew in the shade of the Koran as interpreted by the fundamentalists. Although extremist Islam is a splinter group within broader Islam, its use of violence in the form of terror has triggered the current War on Terrorism. An ideological clash like the Cold War, it must be fought with ideological weapons as well as military ones. Soviet style Communism eventually collapsed because of perceived internal moral inferiority. One of the main battlegrounds of the War on Terrorism is the minds of the Muslim majority.<sup>30</sup> Most Muslims are moderate in practice, but unwilling to oppose extremist groups for two reasons. One is their own fear of violent reprisal. The other is that extremist groups correctly articulate fundamentalist Islam; that is, Islam according to the literal meaning of the ancient

19. PAUL BERMAN, *TERROR AND LIBERALISM*, 60 (W W Norton & Co. 2003).

20. *Id.* at 79.

21. *Id.* at 87 Christianity maintains the same conviction, except that because it holds that the Kingdom of Heaven starts with internal transformation of the soul, deficiencies in the expression of faith in society are less threatening.

22. *Id.* at 89.

23. *Id.* at 91.

24. *Id.* at 91.

25. *Id.* at 117

26. *Id.* at 183.

27. *Id.* at 67.

28. *Id.* at 101-104.

29. *Id.* at 111-12.

30. Fatima Sayyed, *Bush Nominates Daniel Pipes to Board of US Institute of Peace: Moderate Muslims Welcome the Appointment*, PAKISTAN TODAY (April 15, 2003) at <http://www.paktoday.com/pipes.htm>.

writings. The modernists, who hold moderate and liberal strains of theological thought within Islam, interpret problematic texts figuratively or as limited in application to an ancient historical context.<sup>31</sup> For instance, Mahmud Muhammad Taha, founder of the Republican brothers in the Sudan, was hung in 1985. He had called for a "liberal, openly-debated, and humanistic revision of Shari'a, and had a vision of a democratic state."<sup>32</sup> He was executed for heresy on hearsay evidence.<sup>33</sup> In large part, world peace depends upon which interpretation of the religion captures the minds of the Muslim world.

This ideological war will be partly waged at America's own borders. The primary human intersection of America and the Muslim world is where people from Muslim countries (whether Muslim, Christian or other minority) immigrate to this country. American immigration policies and how they are applied, particularly to refugees, will affect the War on Terrorism. This paper discusses several aspects of international refugee law and U.S. immigration law with respect to refugees from Muslim countries. It makes recommendations related to the dual goals of respecting human rights and furthering the U.S. objectives in the War on Terror, with respect to both specific issues and overarching policy considerations.

## I. HISTORY OF INTERNATIONAL AND U.S. REFUGEE LAW

*And if a stranger dwells with you in your land, you shall not mistreat him. The stranger who dwells among you shall be to you as one born among you, and you shall love him as yourself; for you were strangers in the land of Egypt.*<sup>34</sup>

The United States has been a nation of immigrants and refugees from its beginnings. Its entire history has been marked and marred with the tension between the principles of human rights and the ingrained human tendency to dislike and persecute those outside one's own group. In 1783, George Washington said, "the bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions."<sup>35</sup> The League of Nations, which the United States helped to form in 1921 but ultimately did not join, established the position of High Commission for Refugees.<sup>36</sup> America's own immigration laws of 1924 were "designed to exclude

31. "The commandment to 'slay the pagans where you find them' in verse 9:5 speaks of the hostile Arab tribes surrounding Medina. When sincere scholarship and exegesis is applied, it becomes quite clear that verse 9:5 is one of self-defence and not a carte blanche to kill all non-believers. *Distortion of Islam*, THE INDEPENDENT (BANGLADESH), Nov. 21, 2001.

32. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV. 139, 151-52 (1996).

33. *Id.*

34. Leviticus 19:33-34.

35. *Is This America? The Denial of Due Process to Asylum Seekers in the United States, I. The Asylum Tradition and Expedited Removal*, Lawyers Committee for Human Rights, ¶ 1, (Oct. 2000) at [http://www.lchr.org/refugees/reports/due\\_process/due\\_process.htm](http://www.lchr.org/refugees/reports/due_process/due_process.htm). (hereinafter *Is This America?*)

36. Kenneth Regensburg, *Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States*, 29 CORNELL INT'L L.J. 225, 229 (1996).

Asians and restrict immigration from southern Europe” but had exemptions for people fleeing political and religious persecution.<sup>37</sup>

During the 1930s, the United States sharply limited the number of refugees from Nazism, and in 1939, more than 900 Jewish refugees aboard the *St. Louis* were turned away within sight of Miami.<sup>38</sup> Hundreds who were refused entry died in the concentration camps.<sup>39</sup> During the 10 years of 1933 to 1943, the “refugee quota from European countries dominated by the Nazis was underfilled by more than 400,000 places.”<sup>40</sup>

The United States, ashamed of its failure towards the Jews, admitted 350,000 people displaced by World War II.<sup>41</sup> It also led the effort to establish the United Nations and a concept of universally recognized human rights.<sup>42</sup> The General Assembly established the United Nations High Commission for Refugees (UNHCR).<sup>43</sup> America, during the following years, gave asylum to more than one million refugees, especially those fleeing Communism.<sup>44</sup>

The concept of asylum, deriving from the Latin counterpart of the Greek “asylon,” means freedom from seizure.<sup>45</sup> Sacred places have provided a refuge from ancient times.<sup>46</sup> The Universal Declaration of Human Rights, Article 14(1) says the individual has a right “to seek and to enjoy in other countries asylum from persecution.”<sup>47</sup> Article 13(2) says that “everyone has the right to leave any country, including his own.”<sup>48</sup> However, this is only a right to seek asylum, not to receive it, because “an individual has no right to asylum enforceable vis-a-vis the state of refuge.”<sup>49</sup>

In 1951, the United Nations Convention Relating to the Status of Refugees defined a refugee for the first time.<sup>50</sup> The United States did not sign this convention, but did sign the 1967 Protocol which strengthened it.<sup>51</sup> The Refugee Act of 1980 adopted the same definition of refugee, that of a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” could not or did not

37. *Is This America?*, *supra* note 35, at ¶ 4.

38. *Id.*

39. *Id.*

40. *Id.* at ¶ 5.

41. Regensburg, *supra* note 36, at 229.

42. *Is This America?* *supra* note 35, at ¶ 6. *The Denial of Due Process to Asylum Seekers in the United States, I. The Asylum Tradition and Expedited Removal*, Lawyers Committee for Human Rights, ¶ 6, (Oct. 2000) at [http://www.lchr.org/refugees/reports/due\\_process/due\\_process.htm](http://www.lchr.org/refugees/reports/due_process/due_process.htm).

43. Regensburg, *supra* note 36, at 229.

44. *Is This America?* *supra* note 35, at ¶ 7

45. Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT'L L. 1, 2 (1994) [hereinafter Boed 1].

46. *Id.* at 3.

47. *Id.* at 9.

48. *Id.* at 7.

49. *Id.* at 9.

50. A. Roman Boed, *Past Persecution Standard for Asylum Eligibility in the 7<sup>th</sup> Circuit: Bygones are Bygones*, 43 DEPAUL L. REV. 147, 154-55 (1993) [hereinafter Boed 2].

51. *Id.*

want to return to his/her country of origin.<sup>52</sup> The Committee drafting the 1951 Convention said that "well-founded fear" means the person has either actually been a victim of persecution or can show good reason why he/she fears persecution.<sup>53</sup> Persecution is not defined in the Convention or Protocol.<sup>54</sup> The High Commissioner said in a UN Handbook that a "threat to life or freedom on account of race, religion, nationality political opinion or membership of a particular social group is always persecution. Other serious violations of human rights for the same reasons would also constitute persecution."<sup>55</sup> The Supreme Court's comment on the Handbook accepting this definition, is that the Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform."<sup>56</sup>

When there have been changes in the country of origin, a person is generally no longer eligible for asylum.<sup>57</sup> The 1951 Convention does exempt those who are "able to invoke compelling reasons arising out of past persecution,"<sup>58</sup> for the reason that there may not be a complete change either in local attitudes at home or in the mind of the refugee.<sup>59</sup>

The principle of *non-refoulement* in Article 33(1) of the 1951 Convention is that states are not to return a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion."<sup>60</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also prohibits refoulement with respect to anyone who would be in danger of torture.<sup>61</sup> As Paul Weis, Legal Division Director of UNHCR says, Asylum entails admission, residence and protection; non-refoulement is a negative duty, not to compel a person to return to a country of persecution."<sup>62</sup> However, a state may send a person to another country where he would not be persecuted.<sup>63</sup> The reason there is no express duty to allow asylum seekers to enter is that "states have a legitimate interest in the control of their borders and in the maintenance of internal safety two areas affected by the arrival of aliens."<sup>64</sup>

Whether the principle of non-refoulement has become part of customary

52. *Id.* at 155.

53. *Id.*

54. *Id.* at 157.

55. *Id.*

56. *Id.*

57. *Id.* at 159.

58. *Id.* (citing United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259).

59. *Id.* at 160.

56. Ved P Nanda, *Introduction*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 8 (Ved P Nanda ed.) (Greenwood Press, NY 1989).

61. Karen Parker, *The Rights of Refugees under International Humanitarian Law*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 35 (Ved. P Nanda ed.) (Greenwood Press, NY 1989).

62. Boed 1, *supra* note 45, at 17.

63. *Id.*

64. *Id.* at 31.



international law generates disagreement.. In practice, refugees are often rejected at borders.<sup>65</sup> The Immigration and Nationality Act of 1952 gave the Attorney General discretion to withhold deportation where an alien would face “physical persecution” upon return.<sup>66</sup> It also allowed aliens to be paroled temporarily into the United States, and this clause was often used for people fleeing Communist countries.<sup>67</sup> The Refugee Act of 1980 established annual parole programs subject to discretion and influenced by public policy<sup>68</sup> For instance, the Act showed “congressional preference for refugees fleeing states that were hostile to the United States.”<sup>69</sup> The U.S. Supreme Court has interpreted the non-refoulement provision to have no extraterritorial effect, i.e., it is acceptable to reject aliens who have not yet entered the country<sup>70</sup> If refoulement does not apply to these people, there is no barrier to sending them back. The United States accepts non-refoulement in such a limited form that unless non-refoulement is not an accepted principle of international law, the United States is in breach of it.

The Immigration and Nationality Act (INA), of which the 1980 Refugee Act is part, and the regulations under it, govern the asylum process in the United States under the supervision of the Attorney General.<sup>71</sup> The Attorney General delegates the implementation of the INA to the Immigration and Naturalization Service (INS).<sup>72</sup> The Executive Office for Immigration Review (EOIR) is an administrative body in the Department of Justice.<sup>73</sup> It has a trial division, run by Immigration Judges and an appellate division, which is the Board of Immigration Appeals (BIA).<sup>74</sup> From the BIA, an alien may appeal to a federal court, which is a limited review based on the administrative record.<sup>75</sup>

If the alien is granted asylum, he may stay in the United States for one year then be examined for admission as an immigrant.<sup>76</sup> Unless the refugee status has been revoked, the alien can become a lawful permanent resident and remain in the U.S. to qualify for naturalization.<sup>77</sup> The two hurdles are to qualify as a refugee under the definition of the Refugee Act and to obtain a discretionary grant of asylum from the Attorney General.<sup>78</sup> The two grounds for eligibility to qualify as a refugee are “well-founded fear of persecution” or “past persecution.”<sup>79</sup> If an alien no longer qualifies as a refugee (because of changed situations in the country of

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65. *Id.* at 22.

66. Regensburg, *supra* note 36, at 222.

67. *Id.* at 233.

68. *Id.*

69. *Id.* at 234.

70. Boed 1, *supra* note 45, at 2 (*citing Sale v. Haitian Centers Council*, 113 S.Ct. 2549 (1993)).

71. Boed 2, *supra* note 50, at 149.

72. *Id.* at 12.

73. *Id.* at 151.

74. *Id.*

75. *Id.* at 152.

76. *Id.*

77. *Id.*

78. *Id.* at 159.

79. *Id.* at 180.

origin), his/her asylum can be revoked.<sup>80</sup> He/she is still eligible for a claim for past persecution, but the courts have rarely accepted claims based purely on past persecution.<sup>81</sup> If an alien is denied asylum or it is revoked, he/she can only appeal when the INS begins exclusion or deportation proceedings.<sup>82</sup>

A critical U.S. Supreme Court decision in 1987 *I.N.S. v. Cardoza-Fonseca*, explained the difference between asylum and withholding of deportation.<sup>83</sup> The Attorney General must withhold deportation if an alien demonstrates that either life or freedom would be threatened.<sup>84</sup> This is a "clear probability" standard,<sup>85</sup> requiring that persecution is more likely than not, which is controlled by U.S.C. § 1253(h), also called Section 243(h) of the Act.<sup>86</sup> A second type of broader relief, found in 8 U.S.C. § 1158(a) or Section 208(a) of the Act, authorizes the Attorney General to grant asylum "to an alien who is unable or unwilling to return to his home country 'because of persecution or a well-founded fear of persecution.'"<sup>87</sup> As the Court said, "the 'well-founded fear' standard which governs asylum proceedings is different and in fact more generous, than the 'clear probability' standard which governs withholding of deportation proceedings."<sup>88</sup>

In a second critical U.S. Supreme Court decision in 1992, *I.N.S. v. Zacarias*, Zacarias asked for asylum on account of his political opinion and the Court interpreted the phrase "on account of" to require proof of the persecutor's motive or intent.<sup>89</sup> The 1980 Refugee Act had used the international definition, departing from the prior U.S. standards of admitting refugees on a basis of geography or ideology.<sup>90</sup> However, the Board of Immigration Appeals, by adopting an intent based analysis, effectively divorced the U.S. determination of refugee status from international human rights norms.<sup>91</sup> For example, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief is a non-binding declaration which proclaims and promotes religious freedom in international law.<sup>92</sup> An intent based analysis, which makes refugees prove an intent to persecute on the basis of religion, "falls short of providing protection from religious persecution in asylum cases" by making persecution

80. *Id.* at 176-77.

81. *Id.* at 179.

82. *Id.* at 153.

83. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987).

84. *Id.* at 423.

85. *Id.* at 425.

86. The modern version of § 8 U.S.C.S. 1253(h), amended in 1996, reads, "(h) Withholding of deportation or return (1) The Attorney General shall not deport any alien to country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

87. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 423.

88. *Id.* at 425.

89. Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 *MILJIL* 1179, 1180 (1994); *I.N.S. v. Zacarias*, 112 S.Ct. 812 (1992).

90. *Id.* at 1184.

91. *Id.* at 1213.

92. *Id.* at 1218.

much harder to prove.<sup>93</sup>

The United States has made efforts, although imperfectly, to align itself with international law concerning refugees and to develop international and U.S. law in humanitarian directions. America is one of the main havens for refugees in the world. U.S. policy has attempted to balance a concern for human rights with furthering its domestic and foreign policy interests, hence the limitation on immigration and the deliberate preference towards refugees from Communism during the Cold War.<sup>94</sup> Next this paper examines a more recent development in refugee law

## II. EXPEDITED REMOVAL

*If you look at our history and our immigration policy, our best days. have been when we reached out and said, 'Yes. We are this country that is different. The few times in our history when we have turned our back on people who are persecuted. .we have lived to regret it.*<sup>95</sup>

-- Senator Mike DeWine (R-OH), May 1, 1996.

In 1986, Congress passed a law requiring non-citizen workers to have work permits.<sup>96</sup> Illegal aliens who wanted work permits found a loophole.<sup>97</sup> If they made an affirmative asylum application, they were granted a temporary work permit.<sup>98</sup> The number of asylum applications rose, creating an enormous backlog.<sup>99</sup> As the applications were processed so slowly, there was even more of an incentive to make the asylum application so that one could work.<sup>100</sup> Therefore, a system driven by two good motivations, the humanitarian desire to provide asylum on the part of the U.S., and the desire to work on the part of aliens, was out of control by the early 1990s.<sup>101</sup>

In January of 1993, a Pakistani gunman who had filed an affirmative asylum application killed two CIA employees.<sup>102</sup> This was followed by the discovery that one of the perpetrators of the car bomb under the World Trade Center had requested this asylum.<sup>103</sup>

In 1993, the INS began a major administrative overhaul, which both

93. *Id.* at 1219.

94. *Is This America?* *supra* note 35, at ¶ 7 ¶ 7, (Oct. 2000) at [http://www.lchr.org/refugees/reports/due\\_process/due\\_process.htm](http://www.lchr.org/refugees/reports/due_process/due_process.htm)

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at ¶¶ 10-11.

100. *Id.* at ¶ 12.

101. *Id.*

102. *Id.* at ¶ 13.

103. *Id.*

streamlined the process and canceled the temporary work permit provision.<sup>104</sup> There was an immediate drop in asylum applications and the asylum approval rate was up to 38% by 1999.<sup>105</sup>

Congress, concerned about the same problem, passed the Illegal Immigration Reform and Immigrant Responsibility Act in 1996, also referred to as expedited removal.<sup>106</sup> Congress was also acting on its finding that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S."<sup>107</sup> In an effort to block immigration of criminals, Congress added crimes such as selling marijuana and drunk driving to the list of felonies that were grounds for deportation, and included prior offenses.<sup>108</sup> The law also applies to illegal aliens within the country who have not been physically present for two continuous years.<sup>109</sup>

Here is how the 1996 law works. First an alien seeking entry presents documents at the primary inspection.<sup>110</sup> Any discrepancies, including a suspicion of fraudulent use of facially valid documents, trigger a referral to a secondary inspection.<sup>111</sup> If the officer at the secondary inspection determines that the alien is inadmissible, he/she is subject to either expedited removal or regular removal.<sup>112</sup> Expedited removal is not only more prompt, but bans re-entry for five years.<sup>113</sup> This decision is reviewed briefly by a supervisor, but there is no federal judicial review.<sup>114</sup>

At the secondary inspection, aliens must be given the following information about asylum in a language they understand: "If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance."<sup>115</sup> This is the time when the alien needs to state his/her well-founded fear of persecution.<sup>116</sup> The alien is allowed no representation at this point.<sup>117</sup> Although there is supposed to be an interpreter, it is not guaranteed.<sup>118</sup> The lack of representation is because

104. *Id.* at ¶ 14.

105. *Id.* at ¶ 17.

106. *Id.* at ¶ 19.

107. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 42 (D.C. 1998) (citing H.R. Rep. No. 104-469, pt. 1 at 158 (1996)).

108. Anthony Lewis, *A Bad Time for Civil Liberties*, 5 ANN. SURV. INT'L & COMP. L. 1, ¶ 8 (1999).

109. Thomas J. White, Center on Law & Government, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 ND J.L. ETHICS & PUB. POL'Y 1, 4 (2001).

110. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d at 42.

111. *Id.*

112. *Id.*

113. *Is This America?* *supra* note 35, at ¶ 22.

114. *Id.*, *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d at 56.

115. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d at 43, 44.

116. *Id.*

117. *Is This America?* *supra* note 35, at ¶ 22.

118. *Id.*

the INS conducts more than 10 million [sic] secondary inspections a year.<sup>119</sup>

Aliens who express this fear of persecution are scheduled for a credible fear interview within seven days.<sup>120</sup> Detention is mandatory until the credible fear interview.<sup>121</sup> Applicants are informally allowed to have an attorney at this interview.<sup>122</sup> Credible fear approval rates are about 88%, and Muslim countries overall have high approval rates.<sup>123</sup> Also, if a person is determined not to have a credible fear, he/she may request a *de novo* review by an Immigration Judge, though without a right to representation.<sup>124</sup> Once credible fear has been established, aliens are allowed to apply for asylum.<sup>125</sup>

Mr. A., a 26 year old Algerian, was a member of the Islamic Salvation Front (FIS), a major opposition political party which was outlawed by the Algerian government in 1992.<sup>126</sup> In 1994, he was detained and tortured by the police.<sup>127</sup> In late 1994, the Armed Islamic Group (GIA) abducted him and tried to coerce him to plot to assassinate his employer, a former Algerian president.<sup>128</sup> He fled to a friend's home.<sup>129</sup> Months later, he and his friend were caught by the GIA.<sup>130</sup> Both were beaten and his friend was shot.<sup>131</sup> After being arrested and tortured again by Algerian security forces, he fled to the United States via China and asked for asylum in San Francisco.<sup>132</sup>

He was referred to secondary inspection where he was shackled and placed in a room with a shackled Iraqi man, whom he was afraid of.<sup>133</sup> Mr. A's English was poor.<sup>134</sup> The INS officer seemed angry at him and told Mr. A he would be sent back to China.<sup>135</sup> Mr. A said he would be killed.<sup>136</sup> The INS officer said he did not care.<sup>137</sup>

When the officer left, Mr. A grabbed a coffee cup, smashed it, and stabbed himself in the abdomen with a shard, causing a deep wound.<sup>138</sup> He began slamming his head into the table<sup>139</sup> and had to receive 10 to 15 stitches at the

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119. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d at 54.

120. *Is This America?* *supra* note 35, at ¶ 24.

121. *Id.* at ¶ 77.

122. *Id.* at ¶ 13.

119. White, *supra* note 109, at 60.

124. *Id.* at 7.

125. *Is This America?*, *supra* note 35, at ¶ 24.

126. White, *supra* note 109, at 71.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 71-72.

133. *Id.* at 72.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

hospital.<sup>140</sup> His medical report said that he was “alert, “cooperative, and “in handcuffs.”<sup>141</sup> He was finally interviewed in Arabic.<sup>142</sup> Mr. A was referred to a credible fear interview and two weeks later he was found to have a credible fear.<sup>143</sup>

INS policy only requires shackling when an officer has “reasonable, articulate facts, such as known criminal behavior, observed dangerous or violent behavior, or other indicators of risk of escape or assault to support the decision to restrain.”<sup>144</sup>

Rita Joy Martins-Beckley, a married Sudanese woman fleeing religious and political persecution, was ordered deported although she expressed a fear of persecution.<sup>145</sup> Her husband had come through separately and gotten his credible fear interview, She however, was sent to detention pending her expedited removal.<sup>146</sup> After a pro bono lawyer and the husband’s lawyer intervened on the wife’s behalf she eventually received asylum.<sup>147</sup>

INS policy requires that Any applicant for admission who expresses a fear or concern about physical or psychological harm from any individual or organizations, or who mentions past physical or psychological harm” should be referred for credible fear, as well as any “applicant who exhibits any non-verbal clues—such as crying, hysteria, trembling, unusual behavior, or fear of harm”<sup>148</sup>

Mr. C, a 25 year old Egyptian Coptic Christian who worked as an accountant and baked bread for his Coptic Christian Church in Egypt in his spare time, had been harassed and assaulted many times, including one serious beating.<sup>149</sup> He came to the United States on a tourist visa and went home when his extension expired.<sup>150</sup> While home in his country a Muslim group tried to make him convert or pay a fee.<sup>151</sup> He fled back to the United States to ask for asylum and entered at JFK airport in 1999<sup>152</sup>

He was referred to secondary inspection and shackled for eight hours to a bench.<sup>153</sup> He tried to explain the problems he had from Muslims in Egypt.<sup>154</sup> The

140. *Id.* at 72.

141. *Is This America?* *supra* note 35, at ¶ 30.

142. White, *supra* note 109, at 73.

143. *Id.*

144. *Id.* at 74 (citing Memorandum from the INS, Expedited Removal Regional Training P III (H) (4) (1998)).

145. *Is This America?* *supra* note 35, at ¶ 19.

146. *Id.*

147. *Id.*

148. White, *supra* note 109, at n21 *Expedited Removal Study: Report* (citing Memorandum from the Office of Program, INS, Supplemental Training Materials on Credible Fear Referrals 1-2 (Feb. 6, 1998)).

149. *Id.* at 79.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 80.

154. *Id.*

INS officer said, "I am a Muslim. What is your problem with Muslims?"<sup>155</sup> Mr. C was told the INS would contact his government, which frightened him so he said he wasn't seeking asylum and was not referred for a credible fear interview.<sup>156</sup> He called his sister in Egypt from detention and was told it was not safe to return.<sup>157</sup> From solitary confinement, "he wrote a desperate note to an INS asylum officer, which finally prevented his deportation" and was eventually granted asylum.<sup>158</sup>

The International Religious Freedom Act of 1998 bars the INS from using interpreters "with potential biases against individuals on the ground of religion, race, nationality. etc."<sup>159</sup> The INS has been told to avoid the use of airline interpreters wherever possible, but to improve the use of contracted interpreter services.<sup>160</sup> INS also requires training for its officers "on the nature of religious persecution abroad, including country-specific conditions"<sup>161</sup> and training in internet research access.<sup>162</sup>

Mahamoud Farah, an asylum seeker from Somalia, arrived at JFK in 1997.<sup>163</sup> He was insulted, cursed, pushed over backwards, and had his ear pulled.<sup>164</sup> His wrists and ankles were shackled to a chair while he was in a bent over position.<sup>165</sup> He watched others being kicked and spent fourteen hours in chains without food, water, or a bathroom break.<sup>166</sup> Then he had to discuss his fear of returning "with the same people who were being abusive to [him]."<sup>167</sup>

The INS says it is "committed to ensure that all claims for refugee and asylum protection are treated with fairness, respect and dignity"<sup>168</sup> In practice, this area still needs work.

Ms. A., a pregnant Nigerian who had been tortured and suffered a miscarriage as a consequence, was told she would be sent back to Nigeria, that she was a liar, and that she would be jailed for five years.<sup>169</sup> She was shaking and vomiting in the airport.<sup>170</sup> Officers said, "Die if you want to, we're not getting you a doctor."<sup>171</sup> She was not informed about U.S. law and protection for those facing torture and

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155. *Id.* at 80.

156. *Id.*

157. *Id.*

158. *Is This America?* *supra* note 35, at ¶ 21.

159. White, *supra* note 109, at 82.

160. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: APPENDIX D, INS AND THE INTERNATIONAL RELIGIOUS FREEDOM ACT, Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 6 (Sept. 5, 2000).

161. White, *supra* note 109, at 82.

162. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 160, at 3.

163. *Is This America?* *supra* note 35, at ¶ 27.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at ¶ 27

168. 2000 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, *supra* note 160, at 1.

169. *Is This America?* *supra* note 35, at ¶ 50.

170. *Id.* at ¶ 62.

171. *Id.*

did not find out about asylum until she was in detention.<sup>172</sup>

The INS Inspector's Field Manual says, "if the alien indicates in any fashion that he or she has a fear of persecution, or that he or she has suffered or might suffered [sic] torture, you are required to refer the alien to an asylum officer for a credible fear determination."<sup>173</sup>

Mr. O., a Nigerian theology student, was whipped and thrown in jail in Nigeria because of his political views.<sup>174</sup> Upon arriving in the United States, he was told he could not apply for asylum.<sup>175</sup> He was stripped naked and given a body cavity search in the hallway of the airport.<sup>176</sup> When he cried he was mocked by the INS officer, who said, "I have been in this business a long time. I have seen people like you crying and pretending. I send them back for lying, whether they cry or not."<sup>177</sup> Mr. O. was later granted asylum.<sup>178</sup>

INS policy requires that strip searches or body cavity searches are to be conducted in private.<sup>179</sup> Body cavity searches are to be supported by a search warrant and recorded.<sup>180</sup> This is not always the case.<sup>181</sup>

There are some innate difficulties with the expedited removal process. Refugees are unlikely to have documents.<sup>182</sup> If they have been tortured and persecuted, they may be frightened of officials.<sup>183</sup> There are language problems, they are worn out with traveling, and they may be ill or injured.<sup>184</sup>

Some officers are reported to be polite, courteous, professional, and follow INS regulations scrupulously.<sup>185</sup> Some refugees are treated kindly.<sup>186</sup> Others are treated badly.<sup>187</sup> One bipartisan group of congressional staffers investigating expedited removal conditions at JFK said that the INS officers had hostile body language and tone and "acted as if every asylum claim was a personal affront."<sup>188</sup>

Refugees may not understand the process. In some countries, refugees do not apply for asylum until after entering the country, so seekers may not be aware of the need to express their fear of persecution and desire for asylum at the secondary inspection unless the purpose of the inspection is explained.<sup>189</sup> If refugees think

172. *Id.* at ¶ 50, 62.

173. White, *supra* note 109, at 74 (citing INS, Inspector's Field Manual 17.15 (b) (2) (1999)).

174. *Is This America?*, *supra* note 35, at ¶ 39.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at ¶ 36.

180. *Id.*

181. *Id.*

182. *Id.* at ¶ 1.

183. *Id.* at ¶ 6.

184. *Id.* at ¶¶ 6, 7, 12.

185. *Is This America?* *supra* note 35, at ¶ 64.

186. *Id.*

187. *Id.* at ¶ 68.

188. *Id.* at ¶ 75.

189. *Id.* at ¶ 47.



they will be deported, they may be afraid to criticize their own government for fear of reprisals at home.<sup>190</sup>

Despite public outcry over some of the flaws in the expedited removal law, it seems unlikely that the law will be, or perhaps even should be, changed at this time because of U.S. security concerns. Because this law means that an enforcement officer of the INS, rather than a trained Immigration Judge, can turn refugees away, the INS enforcement officers should undergo the same training that the asylum officers do. Open access to secondary inspection, allowing monitoring of the process by outside groups, would hold INS officers accountable. Refugees should be allowed to contact family, friends, and counsel for support, even if they are not allowed to participate in the secondary inspection.

Although opinions differ as to whether the law is fair, it appears that the worst abuses happen when existing regulations are flouted. Aliens should be treated with courtesy and respect. Inspectors must remember that the consequences of their decision can mean life or death for the refugees. Enforcing existing regulations would ensure appropriate privacy during (justifiable) searches, that only people who seem dangerous are shackled and all refugees have access to adequate food, water, and the bathroom.<sup>191</sup> Regulations about interpreters should be followed as well.<sup>192</sup> Having a brutal attitude or callously breaking regulations should be sufficient cause for ending an INS officer's career. Random, but regular exit surveys of asylum applicants, would be a good way of checking "customer service."

Besides the fact that people should be treated with respect and dignity, there is an important U.S. policy concern. Each and every alien, whether granted asylum or not, is a talking advertisement of U.S. attitudes (as embodied in INS inspectors) and values. Each person has many links to friends and families. Many asylum seekers may be well known in their own countries. International travelers entering a foreign country are always a little frightened and impressionable; how much more so those fleeing persecution and seeking asylum. Those first hours form a permanent impression of our country. Their views, collectively, are taken around the world by word of mouth. The United States is engaged in an ideological war about freedom and should make sure that this "advertising" is positive and a recommendation for this country.

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190. *Id.* at ¶ 49.

191. *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 63 (D.C., 1998).

192. *Id.* at 54.

## III. DETENTION

Being a refugee in America has become a crime, we are handcuffed, shackled and treated like criminals.<sup>193</sup>

--July 20, 1999 letter from Olufema Abdulai, Nigerian asylum seeker

Once someone has been referred for a credible fear interview, detention is mandatory.<sup>194</sup> After the credible fear interview, the refugee is eligible for parole while the asylum case is pending.<sup>195</sup> Unfortunately, refugees are more commonly kept in detention<sup>196</sup> with the average detention being fifty-seven days.<sup>197</sup> Refugees from Sudan averaged 167 days, and those from other Muslim countries are also high above the average.<sup>198</sup>

The INS has been building and expanding detention facilities and contracting jail space as well, so that refugees are sometimes put among criminal inmates.<sup>199</sup> The cost ranges from \$58 to \$100 per person per day, and was estimated to exceed \$500 million annually by 2001.<sup>200</sup> Curiously, while "it is INS policy to favor release of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community,"<sup>201</sup> in actuality, very few are paroled.<sup>202</sup> Detention makes it difficult for detainees to prepare their asylum pleas with counsel.<sup>203</sup> If the facility is far away it can take counsel most of a day just to spend a few minutes with the detainee.<sup>204</sup>

Whether refugees have family or friends willing to support them does not appear to matter.<sup>205</sup> One Somali seeker who was detained nearly four years had U.S. citizen relatives willing to support him, but his parole requests were denied or ignored.<sup>206</sup>

Mr. Ladipo of Nigeria, who was repeatedly arrested and beaten in Nigeria because of pro-democracy activities and whose brother was killed, came into the U.S. without documents.<sup>207</sup> He asked to be paroled to his six cousins who were all

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193. *Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act*, Lawyers Committee for Human Rights, ¶ 1 (Aug. 1999) at <http://www.lchr.org/pubs/descriptions/behindbars.htm> [hereinafter *Refugees Behind Bars*].

194. *Is This America*, *supra* note 35, at ¶ 77.

195. *Refugees Behind Bars*, *supra* note 193, at ¶ 1.

196. *Id.*

197. White, *supra* note 109, at 68.

198. *Id.* at 69.

199. Alisa Solomon, *A Dream Detained*, THE VILLAGE VOICE, March 30, 1999, at 46.

200. *Refugees Behind Bars*, *supra* note 193, at ¶¶ 1-2.

201. *Id.* at ¶ 4.

202. *Id.* at ¶ 1.

203. *Id.* at ¶ 3.

204. *Id.* at ¶ 4.

205. *Refugees Behind Bars*, *supra* note 193, at ¶ 4.

206. *Id.*

207. *Id.* at ¶ 6.

legal residents, and one being a U.S. citizen.<sup>208</sup> He was refused parole.<sup>209</sup>

Dr. Z, an Afghani tortured by the Taliban because he touched a woman while helping to deliver her woman baby escaped to the United States.<sup>210</sup> His cousin was willing to support him, but his parole was denied for two and a half months.<sup>211</sup>

Yudaya Nanyonga, from Uganda, was a high school student who was forced to quit school to work and buy food and clothes for the rebels.<sup>212</sup> Military officials suspected her as a collaborator and she fled to the United States.<sup>213</sup> Her sister disappeared and her brother was killed the following year.<sup>214</sup>

She was put in chains at secondary inspection and chained to a chair for 20 hours.<sup>215</sup> She spent nearly two years dressed in prison uniform.<sup>216</sup> Part of the time was in a county jail.<sup>217</sup> One day she was crying hysterically and was put in maximum security for not paying attention to orders.<sup>218</sup> At that point, "five guards forced Nanyonga to disrobe, took her to a small cell, and fastened her to a cot."<sup>219</sup> She was "secured spread-eagle onto a coverless bed in four-point restraints while men in riot gear laughed at her nakedness."<sup>220</sup> They sedated her by roughly injecting a needle.<sup>221</sup> "No one ever saw me naked like that. They made it even worse because they were laughing and making fun of me."<sup>222</sup> She was injected again and woke up two days later "wondering who had put her bra and panties back onto her body and wondering what else they might have done."<sup>223</sup> Jail officials justified it by saying she was suicidal.<sup>224</sup> Next she spent a month and a half in maximum security with criminals who called her "African monkey."<sup>225</sup> Although she has since been granted asylum, she is clinically depressed.<sup>226</sup> "I have no desire to go anywhere, to do anything. I am afraid of being outside. I don't trust anyone."<sup>227</sup>

Conditions can be very poor in detention. The only access to fresh air may be

208. *Id.*

209. *Id.*

210. *Id.* at ¶ 10.

211. *Id.*

212. Elizabeth Llorente, *A Young Woman's Search for Safety Puts Her in Chains*, THE RECORD, (BERGEN COUNTY, N.J.), Feb. 13, 2000, at A10.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Solomon, *supra* note 199, at 46.

221. Llorente, *supra* note 212, at A10.

222. *Id.*

223. Solomon, *supra* note 199, at 46.

224. *Id.*

225. *Id.*

226. Llorente, *supra* note 212, at A10.

227. *Id.*

"an hour in a walled-in cement courtyard with a chain-link roof."<sup>228</sup> Refugees must wear a prison uniform, which is difficult for women who culturally wear long dresses.<sup>229</sup> A typical setting is a large dorm-type room and open showers and toilets separated by three foot walls and no doors.<sup>230</sup> At times there have been unsanitary conditions, inadequate medical care, and physical and sexual abuse.<sup>231</sup> One active tuberculosis patient at Wackenhurt apparently exposed 90 other people, who then tested positive for tuberculosis.<sup>232</sup> Sometimes detainees are mixed with criminals and sometimes shocked with stun guns, cursed, or beaten.<sup>233</sup> Guards have been prosecuted for putting detainees' heads in the toilet, pulling their genitals with pliers, and forcing sexual acts.<sup>234</sup>

Adelaide Abankwah, a woman from Ghana who spent two years in detention<sup>235</sup> said, "Please tell [the INS] that I am not a criminal. I just want to be free. . . I feel like I am dead here. There is no fresh air. I cannot eat. I feel that this is where I will die."<sup>236</sup>

District Director McElroy said that paroled applicants are unlikely to appear at hearings, but Ms. McClenahan of Catholic Legal Immigration Network says that check-in requirements and other procedures can be very successful.<sup>237</sup> The Secretary of State's Advisory Committee on Religious Freedom said, "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release."<sup>238</sup> Torture victims, for instance, can experience panic attacks and flashbacks from being detained.<sup>239</sup>

Because the INS has recommendations but not regulations, it would be helpful for Congress to clarify that detentions after the credible fear interview are not the desired policy and for the INS to issue regulations providing for parole of asylum seekers who pose no danger to the community.<sup>240</sup> This would achieve a human rights policy goal, and save a great deal of taxpayer money.<sup>241</sup> The INS should be regularly accountable for detention conditions. Detainees should be kept away from criminal populations. Besides releasing detainees to friends and families of good character, the INS can use refugee accommodation centers, group homes, and supervised release programs. Refugees can also be released on bond

228. Solomon, *supra* note 199, at 46.

229. *Refugee Women at Risk*, *supra* note 1, at 10.

230. Solomon, *supra* note 199, at 46.

231. *Refugees Behind Bars*, *supra* note 193, at ¶¶ 17-21.

232. *Id.* at ¶ 28.

233. *Id.* at ¶¶ 18-19.

234. *Id.* at ¶ 20.

235. Solomon, *supra* note 199, at 46.

236. *Refugees Behind Bars*, *supra* note 193, at ¶ 23 (citing Ginger Thompson, *Asylum for Woman Threatened with Genital Cutting*, N.Y. TIMES, April 25, 1999).

237. Solomon, *supra* note 199, at 46.

238. *Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States*, May 17, 1999, at 48.

239. *Refugees Behind Bars*, *supra* note 193, at ¶ 29.

240. *Id.* at ¶¶ 7-8.

241. *Id.* at ¶ 6.

or to a guarantor. Non-profit groups spend money more efficiently than the government at no cost to taxpayers, and should be encouraged. This frees both money and energy to more fully investigate those who might actually be a danger to the community.

#### IV WHEN DOES RELIGIOUS DISCRIMINATION BECOME PERSECUTION?

*The very God! think, Abib; dost thou think? So, the All-Great, were the All-Loving too— So, through the thunder comes a human voice.* <sup>242</sup>

--Robert Browning

*Zaid b. Aslam reported that the Apostle of Allah (may peace be upon him) declared that the man who leaves the fold of Islam should be executed.*

-- Muwatta Imam Malik<sup>243</sup>

The INS has seen an increase in religious asylum claims from Muslim countries.<sup>244</sup> The majority of these claims are Christian, either ethnically Christian or converts from another religion, usually Islam.<sup>245</sup> Sudan and Iran retain the Shari'a rule of apostasy in which conversion from Islam is "punishable by death or imprisonment," while in other countries converts are executed as spies.<sup>246</sup> Some of these refugees flee their country out of fear of persecution, but others are *sur place* asylum claims, resulting when "an asylum applicant claims religious conversion while in the United States."<sup>247</sup>

The international law standards on religious freedom are expressed in the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>248</sup> This was an "update" of the 1948 Universal Declaration of Human Rights, which said in Article 18 "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."<sup>249</sup> The 1981 Declaration provides a

242. ROBERT BROWNING, *An Epistle*, THE POETICAL WORKS (New York: Hurst & Co., 1872).

243. John Gilchrist, *The Social Laws and Customs of Islam*, in MUHAMMAD AND THE RELIGION OF ISLAM, orig. JESUS TO THE MUSLIMS, at ¶ 4 (Benoni, Republic of South Africa 1986), at <http://answering-islam.org/Gilchrist/Vol1/8d.html>.

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

245. *Id.*, see also cases discussed in this article.

246. Samahon, *supra* note 244, at 2211.

247. *Id.* at 2214.

248. Derek H. Davis, *The Evolution of Religious 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. R EV. 217, 217 (2002).

249. *Id.* at 224.

“comprehensive list of rights to freedom of thought, conscience and religion.”<sup>250</sup> However, it does not specifically include the right to change religion because of protests from Muslim countries.<sup>251</sup> In compromise, Article 8 says, “Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights.”<sup>252</sup> Therefore, by implication, the right to change religion may be preserved.<sup>253</sup> The Declaration is limited because it is not a convention or binding international law but it still has the “most prestige among all the international human rights documents; it has become the highest standard by which religious human rights are upheld.”<sup>254</sup> As such, it should guide the United States in its refugee policy and in determining who has been persecuted on account of their religious beliefs.

Congress, in passing the 1998 International Religious Freedom Act,<sup>255</sup> wanted to “heighten the awareness of religious persecution as a ground for refugee status.”<sup>256</sup> It developed guidelines for INS office training, for interpreters, for training in understanding religious persecution, and for evaluation.<sup>257</sup> There were also to be annual reports on religious freedom in different countries, which were to be used as a resource.<sup>258</sup> The changes were “intended to ensure that victims of religious persecution receive the same consideration given to refugees fleeing persecution” for other reasons.<sup>259</sup> The Congressional intent, which has probably not been effectively carried out, is worth noting.

For a well-founded fear, the “asylum applicant bears the burden of establishing that he or she qualifies as a refugee ‘either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.’”<sup>260</sup> In an unpublished case, *Dib*, a native of Syria, was denied application for asylum by the Board of Immigration Appeals (BIA).<sup>261</sup> His father was an evangelical preacher and he and his father had both been warned to stop preaching the gospel and stop providing humanitarian aid to Christians.<sup>262</sup> They were both beaten until they were unconscious, and his father died of the injuries.<sup>263</sup> Although the Immigration Judge mysteriously did not find that this rose to the

250. *Id.* at 226.

251. *Id.* at 229.

252. *Id.*

253. *Id.*

254. *Id.* at 232

255. International Religious Freedom Act of 1998 (H.R. 2431); U.S. Committee for Refugees, *Compromise Religious Persecution Bill Passes*, at ¶ 1, [http://www.refugees.org/world/articles/religious\\_rr98\\_10.htm](http://www.refugees.org/world/articles/religious_rr98_10.htm).

256. U.S. Committee for Refugees, *Compromise Religious Persecution Bill Passes*, at ¶ 2, [http://www.refugees.org/world/articles/religious\\_rr98\\_10.htm](http://www.refugees.org/world/articles/religious_rr98_10.htm).

257. *Id.* at ¶¶ 7, 10, 14, 15.

258. *Id.* at ¶ 15.

259. *Id.* at ¶ 5.

260. *Ouda v. INS*, 324 F.3d 445, 451 (C.A. 2003).

261. *Dib v. INS*, No. 96-70524, 1997 U.S. App. LEXIS 10807 at \*2 (9th Cir. 1997).

262. *Id.* at 3, 4.

263. *Id.* at \*4.

level of persecution,<sup>264</sup> the Ninth Circuit overruled and granted asylum, saying that he was both personally threatened and had a reasonable fear because of his father's death for his faith.<sup>265</sup>

Asylum based on a well-founded fear of persecution satisfies a subjective test of genuine fear and an objective test of "credible, direct, and specific evidence in the record" supporting a reasonable fear.<sup>266</sup> Muslim Abkhaz Separatists gained control in Abkhazia, part of Georgia, and starting killing and torturing non-Abkhaz.<sup>267</sup> Melkonian and his wife Angela were Armenian Christians with a large farm and a herd of cattle.<sup>268</sup> Angela's father spoke out against Muslim tactics, and then had to flee with Melkonian to Russia.<sup>269</sup> Separatists stole all the cows and murdered an elderly woman and man associated with the family.<sup>270</sup> Melkonian and Angela eventually made their way to the United States and asked for asylum.<sup>271</sup> The lower court denied asylum, but the Circuit Court said that the proper standard was whether he had a credible subjective fear and whether it was objectively reasonable.<sup>272</sup> The Court decided that with the campaign of ethnic cleansing and the possibility that Melkonian would be killed "because of his prior support of the Georgians (political opinion), and because he is an Armenian (ethnicity) and a Christian (religion), the Immigration Judge (IJ) was in error."<sup>273</sup>

In granting or denying asylum, the court must consider past persecution.<sup>274</sup> El Moraghy, a young Coptic Christian, applied for asylum after his tourist visa expired "to escape the persecution of the Muslim Fundamentalists in Egypt, because I am a Coptic Christian."<sup>275</sup> Four fellow students, members of a fundamentalist Muslim group, beat him up, dislocating his shoulder and giving him a concussion.<sup>276</sup> He suffered violence other times as well. A Muslim woman friend of his asked to visit the monastery with him.<sup>277</sup> They were stopped and forced out of her car by Islamic fundamentalists, who told him that because of their relationship, El Moraghy must convert and marry her.<sup>278</sup> He was forced to sign a paper promising to convert, but since the official in charge of conducting marriages was not available, they were told to return to complete the marriage later.<sup>279</sup> Fearing for his life because he did not intend to convert, El Moraghy left

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264. *Id.* at 5.

265. *Id.* at \*7-8.

266. *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (C.A. 9 2003).

267. *Id.* at 1065.

268. *Id.* at 1066.

269. *Id.*

270. *Id.*

271. *Id.* at 1066-67.

272. *Id.* at 1068.

273. *Id.* at 1069.

274. *Nagi El Moraghy v. Ashcroft*, 331 F.3d 195, 198 (2003).

275. *Id.*

276. *Id.* at 199.

277. *Id.* at 200.

278. *Id.*

279. *Id.* at 200.

the country, and applied for asylum.<sup>280</sup> He argued that the "government could not control fundamentalists and did little to protect Coptic Christians."<sup>281</sup> The IJ dismissed the State Department country condition reports for Egypt, which described anti-Coptic terrorism, because a "review of those documents does not refer to the respondent or any members of his family in Egypt."<sup>282</sup> The IJ did not address whether El Moraghy had suffered past persecution and concluded that he was not likely to be persecuted.<sup>283</sup> The Circuit Court remanded, ruling that this was improper use of the country reports, and the court must make findings on past persecution.<sup>284</sup>

If the government is doing the persecuting, it should be possible to demonstrate a lack of safety in the country. Abdel's claim as a Sudanese Christian under the Islamic military government was that he had been arrested and beaten twice during protest demonstrations and the government was looking for him.<sup>285</sup> The BIA did not find that this rose to the level of persecution, but the Circuit Court found that while the previous beatings were not persecution, there was "little reason to generally suppose that a government's past actions in this respect create an 'outer limit' on its future actions."<sup>286</sup> Conditions in Sudan showed that the government was promoting a plan to impose Shari'a on all citizens and that there was civil war raging against Christians in the southern part of Sudan.<sup>287</sup> The Circuit Court reversed.<sup>288</sup>

Courts usually deny a claim when the attacks are made by individuals; "persecution must be at the hands of the government or a group the government is unable or unwilling to control."<sup>289</sup> In an unpublished case, Morgan, a 42 year old Egyptian Coptic Orthodox Christian who applied for asylum in 1982, had been arrested and beaten by the police in 1972, to the point where he had broken bones.<sup>290</sup> In 1981 he was threatened with death because he was a Christian.<sup>291</sup> The court denied his claim, saying that "Copts have full constitutional protection in Egypt"<sup>292</sup> and that "Morgan had failed to establish that the Egyptian authorities were unwilling to help him in such circumstances."<sup>293</sup>

In another unpublished case, Lina Mozian, a Lebanon-born Palestinian Christian, was threatened and interrogated by Christian militia because she was

280. *Id.* at 201.

281. *Id.*

282. *Id.* at 202.

283. *Id.*

284. *Id.* at 198.

285. *Abdel-Masieh v. U.S. I.N.S.*, 73 F.3d 579 (5th Cir. 1996).

286. *Id.* at 584.

287. *Id.* at 586.

288. *Id.* at 586-87.

289. *Mozian v. INS*, No. 95-70551, 1997 U.S. App. LEXIS 1380 at \*3 (9th Cir. Jan. 27, 1997).

290. *Morgan v. INS*, No. 92-70818, 1994 U.S. App. LEXIS 23893 at \*2 (9th Cir. Aug. 29, 1994).

291. *Id.* at \*3.

292. *Id.* at \*4.

293. *Id.* at \*5.



Palestinian and tortured by Muslim groups because she was a Christian.<sup>294</sup> The court was unsympathetic because she did not establish that the Lebanese government could not or would not control the problem.<sup>295</sup>

Courts seem to think that having “full constitutional protection” is meaningful in Muslim countries. They also are reluctant to call “isolated incidents” persecution. This is analogous to lynchings which occurred in the South in the last century. African-Americans had “full constitutional protection, at least of their lives, and lynchings were, relative to the number of black people, merely isolated incidents. However, an entire race of people lived in terror because the laws protecting them were not implemented. This is exactly the situation today in many Muslim countries.

The writer of this article saw a young Pentecostal preacher dying in a hospital in a predominantly Muslim area of Indonesia from a beating that occurred when he was in police custody, which left marks of burns and electric shocks. What was the reason? At a revival service he led, converts to Christianity from animism burned their magic charms. A Muslim observer accused him of burning a copy of the Koran. He died on his 22<sup>nd</sup> birthday. The whole proceeding was illegal and unconstitutional in that secular country, and was statistically unlikely to happen to the other 20 million Indonesian Christians, so a U.S. court would have been unlikely to give protection to an Indonesian Christian threatened in this way.

Sadeghi was an Iranian teacher who did not agree with the Islamic principles of the 1979 revolution.<sup>296</sup> He was teaching in 1982 when he advised a fourteen-year-old student not to go fight in the Iraqi war to be a “martyr for God.”<sup>297</sup> Because of this episode, four armed men came to arrest him, and while other teachers and students distracted them, Sadeghi fled.<sup>298</sup> He managed to leave the country and asked for asylum from America.<sup>299</sup> Despite the fact that he presented evidence that he was still on a wanted list, the decision to deny asylum was affirmed.<sup>300</sup> The dissent indignantly pointed out that assuming Sadeghi’s behavior was subject to legitimate prosecution was wrong, as “Iran has ratified the Convention on the Rights of the Child which prohibits nations from permitting or requiring children to participate in fighting wars.”<sup>301</sup> This judge believed that denying Sadeghi asylum was “ignoring the very purpose of our immigration laws as intended by Congress.”<sup>302</sup> Moreover, our court essentially aided the Iranian regime, which was violently anti-American, to persecute its own dissidents who were promulgating a viewpoint consistent with a democratic one.

Courts can have a very narrow definition of persecution. In an unpublished

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294. *Mozian v. INS*, No. 95-70551, 1977 U.S. App. LEXIS 1380 at \*4.

295. *Id.*

296. *Sadeghi v. INS*, 40 F.3d 1139, 1141 (10th Cir. 1994).

297. *Id.*

298. *Id.* at 1144.

299. *Id.* at 1140.

300. *Id.* at 1140.

301. *Id.* at 1145.

302. *Id.* at 1148.

case, they denied a claim for Ghali, a Christian Syrian woman, on the grounds that what she experienced was merely harassment.<sup>303</sup> The dissent brought out some interesting facts. She was insulted by a male Muslim supervisor in the government Ministry where she worked who said, "Christian women are all whores, and "I know your [sic] a virgin and you want to give it up, and put his hand on her body whenever he saw her."<sup>304</sup> Once the supervisor and two of his bodyguards detained her for an hour, groping her and saying, "Let us see if you really are a virgin."<sup>305</sup> The bodyguards held her down while the supervisor simulated rape.<sup>306</sup> She appealed to higher Ministry officials, who told her that "because she was a Christian, she would have to solve the problem herself."<sup>307</sup> She then complained to the police, "who also refused to help because she was a Christian."<sup>308</sup> After that, she received a letter threatening her life because she had complained to the police, whereupon she fled the country.<sup>309</sup> It is hard to see why this is not considered persecution, and one cannot help but wonder if a judge would see this differently if it happened to a member of his/her family

Sometimes it is hard for an applicant to articulate what is happening, especially if the court is unsympathetic. Grachik and Anik Rostomian were Armenian Christians, age 80 and 77 respectively, who had fled to the United States to live with their only daughter because of their Christian beliefs.<sup>310</sup> Their application was denied.<sup>311</sup> The dissent pointed out that Muslim Azeris had beaten Mr. Rostomian and cut his back with knives, that the Azeris had come back "constantly, and the Rostomians had fled because there was no police protection."<sup>312</sup> Their claim was denied because it was not detailed enough, but the court had insisted on questioning Mr. Rostomian who was "an elderly gentleman [who] has difficulty remembering a lot of things that happened" and refused to allow his wife to speak.<sup>313</sup> The dissent protested, "Leaving aside the fundamentally unfair treatment they received at their deportation hearing, what purpose does it serve to send this elderly couple back to Armenia?"<sup>314</sup>

Courts will deny the claim if there is a subjective fear, but not enough objective evidence about the country.. In an unpublished case, Fatmir Visha was a native of Albania and a Muslim convert to Christianity who filed for asylum after studying in the United States.<sup>315</sup> He said he feared being killed as an outspoken convert from Islam and that he had been harassed and threatened.<sup>316</sup> The INS

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303. Ghali v. INS, No. 98-70947, 2000 U.S. App. LEXIS 19156 at 4 (9th Cir. Aug. 4, 2000).

304. *Id.* at \*7

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at \*8.

310. Rostomian v. INS, 210 F.3d 1088, 1089 (9th Cir. 2000).

311. *Id.*

312. *Id.*

313. *Id.* at 1090.

314. *Id.* at 1093.

315. Visha v. INS, No. 00-3446, 51 Fed. Appx. 547, 548 (6th Cir. Nov. 13, 2002).

316. *Id.* at 549.

agreed that his fear was subjectively genuine but denied his claim saying he had not shown objective evidence and his country reports were too general.<sup>317</sup>

Sometimes the court can get confused between ethnic and religious groups. Mansour, a 42 year old native of Iraq and an Assyrian Christian, made an asylum claim because of religious persecution.<sup>318</sup> The Iraqi army, in which he served, beat him up, broke his leg, and damaged the vision in one eye because of his faith and because “they thought I had joined the Kurdish rebels.”<sup>319</sup> The BIA denied Mansour’s claim, but the appellate courts questioned “whether the BIA adequately comprehended and addressed Mansour’s torture claim,”<sup>320</sup> because the BIA called his group Syrian Christian rather than Assyrian Christian.<sup>321</sup> “Mansour is not a citizen of Syria, as the phrase ‘Syrian Christian’ may suggest.”<sup>322</sup> He is an Iraqi national, an ethnic Assyrian, and a member of the Chaldean Catholic Church.<sup>323</sup> Pointing out that the U.S. Department of State Report (1998) said that Assyrian Christians were abused, the Seventh Circuit vacated the BIA’s decision against Mansour.<sup>324</sup>

In other cases the court has sometimes applied its own limited experience. Bandari, a 25 year old Armenian Christian from Iran, fell in love with Afsaneh, a Muslim girl, and kissed her one night in the street.<sup>325</sup> The police arrested him for breaking a law against public display of affection, but when they found he was a Christian, they knocked him down, beat, and kicked him.<sup>326</sup> He was beaten with a rubber hose, and they wanted him to confess to rape.<sup>327</sup> Bandari was given the choice between conversion and being convicted of an interfaith relationship.<sup>328</sup> When he would not convert, he was sentenced to 75 lashes and a year in prison.<sup>329</sup> His grandfather got him out of prison with a bribe.<sup>330</sup> When it became clear that the situation was not over, he fled Iran, where there is still a rape charge pending.<sup>331</sup> The BIA judge did not find his testimony credible however, because of minor discrepancies and because she did not believe that beating with a rubber hose would not cause him to bleed.<sup>332</sup> (Bandari said his back swelled but did not bleed.)<sup>333</sup> The Ninth Circuit reversed.<sup>334</sup>

317. *Id.* at 549, 550.

318. *Mansour v. INS*, 230 F.3d 902, 904 (7th Cir. 2000).

319. *Id.*

320. *Id.* at 908.

321. *Id.* at 907.

322. *Id.* at 908.

323. *Id.* at 909.

324. *Id.* at 908.

325. *Bandari v. INS*, 227 F.3d 1160, 1163 (9th Cir. 2000).

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 1164.

330. *Id.*

331. *Id.*

332. *Id.* at 1167.

333. *Id.* at 1167.

334. *Id.* at 1169.

Rape is a common charge against Christians in the Muslim world. Again, this is analogous to the common accusation prior to a lynching that a black man had raped or slept with a white woman. The author of this article has personal friends in Indonesia whose family sheltered Defi, a teenage Muslim girl who ran away and converted to Christianity. When Defi's family found her, she denied that she ran away and converted voluntarily to protect herself. Despite a statement that the girl had signed when she moved in with the family rape and kidnapping charges were filed against the father of the host family and two pastors. When a lynch mob threatened to burn down the court and kill the judge and the defense counsel as well as the defendants, the court quickly convicted the three men to a several year jail sentence.. When released, their lives will be in danger. It is sobering that they might not be eligible for asylum in the U.S.

Sometimes the court has limited cultural experience. In an unpublished case, *Wissa*, a 38 year old Coptic Christian, experienced multiple threats, detentions, and beatings by both police and Muslim fundamentalists because of his religion.<sup>335</sup> There was a fraud issue as well and the BIA found it incredible that he had not contacted a lawyer about being defrauded by fundamentalists.<sup>336</sup> The conversation went as follows:

Immigration Judge: "The question is why didn't you contact a lawyer.

Wissa: "I didn't know how to get in touch with a-

IJ: "How about—you happen to be sitting here with a beeper on your pants on your belt. Do you know how to use a telephone?"

"In Egypt, we don't have telephones or beepers.

"Oh, you don't have telephones in Egypt? I see.

"In my pocket just like now, no."<sup>337</sup>

The Ninth Circuit remanded, commenting that he was "less concerned about being defrauded and more concerned about being beaten or killed."<sup>338</sup>

One difficulty for refugees from Muslim countries is that Westerners do not understand that Islam is not monolithic and has more than one tradition.<sup>339</sup> For instance, Shari'a law can impose a death penalty for conversion (apostasy) and many families throughout the Muslim world will kill a relative who converts.

335. *Wissa v. INS*, No. 98-70974, 2000 U.S. App. LEXIS 8212 at \*2 (9th Cir. 2000).

336. *Id.*

131. *Id.* at \*4.

338. *Id.* at \*3.

339. Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, *IJRL* 2000.12(7), at 4 (Oxford Univ. Press 2000).

Poison was a favorite method in areas where this author has lived. The death penalty for apostasy is of long tradition, but there “does not seem to be any Qur’anic authority for this extreme form of punishment. The Hadith, however, openly states that Muhammad demanded the death sentence for those who turn their backs on Islam”<sup>340</sup>

However, many modern Muslim jurists disagree that the death penalty for conversion is part of Islamic law.<sup>341</sup> They also differ on whether violence should be used on unbelieving outsiders. One writer said,

The commandment to ‘slay the pagans wherever you find them’ in verse 9:5 speaks of the hostile Arab tribes surrounding Medina. When sincere scholarship and exegesis is [sic] applied, it becomes quite clear that verse 9:5 is one of self-defense and not a carte blanche to kill all non-believers.<sup>342</sup>

Moreover, what a government professes and what extremist groups do is often different. Muslim government officials often do not intervene on behalf of Christians or minorities to whom they are not very sympathetic anyway because they fear violence to themselves or widespread riots by sympathizers with the extremists.

The court must consider how different governments react to apostasy. Najafi, a native to Iran, lived in the United States for a number of years and converted to Christianity.<sup>343</sup> He asked for asylum as a refugee because apostasy is a capital crime in Iran.<sup>344</sup> The lower court denied his claim, apparently unsure as to whether Najafi was really a Christian.<sup>345</sup> The higher court said that how “apostates are treated in Iran is at the heart of the asylum inquiry” and remanded the claim, giving Najafi some good advice as to what sort of evidence he should present.<sup>346</sup>

Without understanding how complex Islamic thought is, courts will not understand a Muslim refugee who has a genuine Islamic belief but is also being persecuted by an Islamic government.<sup>347</sup> It is important for the INS and the immigration court system to understand these complexities, both for human rights reasons, and because it is current U.S. policy to encourage moderate positions within Islam.

Asylum seekers on religious persecution grounds are rightly questioned about their faith but not always in sensible ways. The questioning tends to take the form of a doctrinal quiz.<sup>348</sup> Sometimes a new convert, or an uneducated applicant, or an applicant from a country where his/her religion has been repressed cannot answer

340. Gilchrist, *supra* note 243, at ¶ 3.

341. Akram, *supra* note 339, at 48.

342. *Distortion of Islam*, THE INDEPENDENT (BANGLADESH), Nov. 21, 2001.

343. *Najafi v. INS*, 104 F.3d 943, 945 (7th Cir. 1997).

344. *Id.* at 948.

345. *Id.*

346. *Id.* at 949-50.

347. Akram, *supra* note 339, at 6-7.

348. *Testing the Faithful: Religion and Asylum, Summary Results of Survey*, Lawyers Committee for Human Rights, 1-2 (Nov. 2002) at <http://www.lchr.org>.

detailed questions.<sup>349</sup> In one case a Shi'ite Muslim knew the names of the main imams, but could not name all twelve, which caused the judge to deny his claim (which was later granted on appeal.)<sup>350</sup> In another case a refugee from Russian Tatarstan, who had converted from Islam to evangelical Christianity, could not answer a series of questions about the difference between Orthodox and evangelical beliefs (and neither could most American Christians).<sup>351</sup> He knew the "Lord's Prayer" but not the English name for it.<sup>352</sup> The judge found this so outrageous that he started jumping up and down and yelling at him.<sup>353</sup> An Iraqi Chaldean Christian had to recite the Ten Commandments and demonstrate prayer for about half an hour until his translator refused to keep translating.<sup>354</sup> Particularly in conversion cases, it is a problem if either the translator or the decision-maker is a member of the group the asylum seeker fears.<sup>355</sup> Some adjudicators seemed to believe that the right to practice faith freely is important, while others appeared to want refugees to go home and be quiet about their religion.<sup>356</sup> On the whole, "U.S. immigration judges were generally receptive to learning about religions that they [we]re not familiar with."<sup>357</sup>

A better approach than quizzing applicants about details of their religion is to elicit information about how they practice their religion, what the religion means to them personally, and their experience of persecution.<sup>358</sup> Judges should have a respectful attitude and also be aware that not all refugees can afford expensive expert testimony.<sup>359</sup>

One concern about convert applicants is whether or not they are imposters, and no doubt some are. There is a perception that asylum applicants abuse religious asylum to avoid deportation and to get welfare benefits or work authorization.<sup>360</sup> Asylees who apply *sur place* (from within the United States) because they have converted "likely will only have recourse to the religion ground for protection."<sup>361</sup> They do not need to have suffered past persecution but must be identified with a religious group that would be subject to persecution.<sup>362</sup> Tuan Samahon argues that the INS cannot define religion too explicitly without interfering in the Establishment Clause or the Free Exercise clause and points out that mainstream Christianity has a lack of verifiable outward observances.<sup>363</sup>

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349. *Id.* at 3.

350. *Id.* at 11.

351. *Id.* at 10.

352. *Id.*

353. *Id.* at 10.

354. *Id.* at 12.

355. *Id.* at 17.

356. *Id.* at 4.

357. *Id.* at 5.

358. *Id.* at 6.

359. *Id.* at 7.

360. Samahon, *supra* note 244, at 2215.

361. *Id.*

362. *Id.* at 2218.

363. *Id.* at 2215-16.

While lack of outward observances is a problem, those working with Muslim converts widely accept that the watershed of true commitment is baptism. Baptism is seen by Muslims as the point of betrayal and by Christians as full commitment. It is generally the one single act that puts the convert's life at risk. Furthermore, the community, the brotherhood of the faith, (*ummah Islam*) is absolutely crucial in Islam. Leaving the *ummah Islam* will bring personal rejection at a minimum. Generally, people are unlikely to sever these important ties without some real conviction. Those whose conversion is not entirely genuine are usually fleeing a dysfunctional and unhappy background. Supporting even doubtful conversions is good public policy because conversions within an ethnic group spark more conversions and any encroachment on the monolithic practice of Islam tends towards pluralism and moderation.

## V SPECIAL ISSUES FOR WOMEN

*Around the world women often suffer persecution because they are female, and experience persecution differently because they are women.*<sup>364</sup>

Female refugees outnumber males,<sup>365</sup> but unless gender-related claims are acknowledged, female refugees are less likely than men to be found eligible.<sup>366</sup> The 1951 Convention does not include gender as a ground of persecution<sup>367</sup> and some even argue that women are not a social group because it would be too broad.<sup>368</sup> Sometimes women face the same persecution as men and sometimes persecution is gender-specific.<sup>369</sup> At times women are persecuted for having transgressed the mores of their culture, and sometimes just for being a close relative of another persecuted person.<sup>370</sup> For a long time, gender-specific persecution was not recognized, but that is changing.<sup>371</sup> The 1979 Convention on the Elimination of All Forms of Discrimination Against Women, Article 1, defines "discrimination against women" as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>372</sup>

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364. *Refugee Women at Risk*, *supra* note 1, at 1.

365. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625 (1993).

366. *Id.* at 627.

367. Ninette Kelley, *Opinion—The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress*, IJRL 2002.13(559), August 2002, at 5.

368. *Id.*

369. Kelly, *supra* note 365, at 642.

370. *Id.*

371. Kelley, *supra* note 367 at 4.

372. Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 MDJILT 199, 200 (1991).

Muslim countries make a number of reservations to this treaty based on Shari'a law.<sup>373</sup> The argument is that the reservations are based on religion and expressions of religion are protected by international human rights law.<sup>374</sup> Religion however, "may not be used as a justification for the derogation of rights that are universally recognized and upheld."<sup>375</sup> The U.S. government is trying to develop appropriate responses and its "leadership in recognizing gender-based asylum claims is crucial in settling an example for many other nations and should be applauded."<sup>376</sup>

Rape is now legitimately considered persecution, though it was not in the past.<sup>377</sup> As recently as 1989 the Fifth Circuit denied the claim of a Salvadoran woman whose male family members were hacked and shot to death.<sup>378</sup> She was forced to watch and then she was raped.<sup>379</sup> The rape was found not to be political but personal.<sup>380</sup> However, it has become increasingly known that while men are tortured in other ways, women are often raped or sexually tortured by the same actors for the same reasons.<sup>381</sup> Rape and sexual assault on female family members of political opponents is seen more and more as persecution.<sup>382</sup>

Women who have been raped and assaulted have difficulty talking about their experiences, especially to a male interviewer or judge.<sup>383</sup> In some cultures, a woman will be ostracized if a sexual assault becomes known.<sup>384</sup> One Albanian woman fled to the United States in May 1997 after being gang-raped by armed and masked men who were hunting her husband for political reasons.<sup>385</sup> She was put into expedited removal and was too ashamed to talk about the rape to an Albanian male interpreter, because of the shame in her culture.<sup>386</sup> She was then deported to Albania.<sup>387</sup> Later on, her case became known in the press and the INS allowed her to return and be granted asylum.<sup>388</sup> If women are suffering from Post-Traumatic Stress Disorder, they may be unable to talk about their experiences at all.<sup>389</sup> The INS should provide female staff and interpreters, and where this is not possible, make an assumption that they may be needed, and be generous in granting a credible fear interview.

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373. Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* 44 AMULR 1949, 1951 (1995).

374. *Id.* at 1962.

375. *Id.* at 1963.

376. *Refugee Women at Risk*, *supra* note 1, at 4.

377. Kelly, *supra* note 365, at 647.

378. *Id.* at 638.

379. *Id.*

380. *Id.* at 638-639.

381. *Id.* at 647.

382. Kelley, *supra* note 367, at 5.

383. Kelly, *supra* note 365, at 630.

384. *Id.*

385. *Is This America?* *supra* note 35, at ¶ 7.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Refugee Women at Risk*, *supra* note 1, at 6.



Women seem to be more frequently subjected to expedited removal, perhaps because they present themselves more often without proper travel documents, or perhaps the law is applied in a way that disfavors women.<sup>390</sup> The interviews are not necessarily conducted in private, and shackling and strip searches add to their fear.<sup>391</sup>

In detention, parents are separated from their children who are detained in separate facilities.<sup>392</sup> Lengthy separation from small children causes some women to abandon legitimate claims,<sup>393</sup> as the "INS has refused to provide some mothers with contact visits, even with young children."<sup>394</sup> People caring for young children should be paroled routinely. The U.N. Convention on the Rights of the Child, signed by the United States and most other countries, gives guidelines on how children should be treated.<sup>395</sup> As the United States has signed the treaty, it is binding international law upon the United States. Article 2(2) says that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."<sup>396</sup> This would imply that a child should not be separated from his mother or father just because they are refugees. Article 9(1) is even more explicit, saying "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except that such separation is necessary for the best interests of the child."<sup>397</sup> It would be hard to argue that it would be in the best interests of a refugee child to be torn away from his mother. Article 22(1) talks specifically about refugee children, saying that "States Parties shall take appropriate measure to ensure that a child who is seeking refugee status .shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights."<sup>398</sup> By separating refugee parents from their young children, the United States is in breach of international law and must move to find more humanitarian solutions to detention.

Under the 1996 law, refugees have one year to file an asylum claim when they are in the country.<sup>399</sup> The only two exceptions are if circumstances affecting their eligibility have changed or if there are extraordinary circumstances relating to the delay.<sup>400</sup> More than 13,000 women have had claims rejected because they

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390. White, *supra* note 109, at 50-51.

391. *Refugee Women at Risk*, *supra* note 1, at 7.

392. *Id.* at 13.

393. *Id.*

394. *Id.* at 12.

395. Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989).

396. *Id.* at art. 2(2).

397. *Id.* at art. 9(1).

398. *Id.* at art. 22(1).

399. *Refugee Women at Risk*, *supra* note 1, at 14.

400. *Id.*

missed the filing deadlines.<sup>401</sup> Refugee women, who may be illiterate, abused, or caring for young children, may not even know about asylum. Not knowing the English language is a problem, as is finding legal representation.<sup>402</sup> Women are often less familiar with dealing with the government and legal authorities.<sup>403</sup> The deadline can be long past before they realize they are even eligible.<sup>404</sup>

Women have attempted to make persecution claims because of gender-specific oppressive treatment, though not very successfully. Ms. Sargis, a 71 year old Armenian Christian from Iran, did not want to go back partly because she did not want to conform to the dress code.<sup>405</sup> Women would be spray painted or even sprayed with acid if their face wasn't covered.<sup>406</sup> Their lips would be rubbed with glass if they wore lipstick often.<sup>407</sup> She argued that her social group was Christians "who fear the threat of persecution for failing to conform to the dress code imposed by Islamic laws."<sup>408</sup> The court said it was not persecution because she had complied with the dress code before.<sup>409</sup> It can be even more difficult for Muslim women, who are not prepared "to articulate their objections to the particular 'Islamic' regime in question as a fundamental rejection of the faith itself."<sup>410</sup> Saideh Hassib-Tehrani, who did not want to follow the Iranian rules for women, and who previously had confrontations with the religious police and been fired from her job, was denied asylum.<sup>411</sup> Susan Musarrat Akram suggests that perhaps she could have made the argument that she disagreed with the government's interpretation of Islam in a way that repressed women, and that she held a different and valid Muslim interpretation.<sup>412</sup>

Bangladesh Muslim author Taslima Nasrin wrote about a Hindu family being tormented by Muslims and has also criticized the treatment of women in Islamic states.<sup>413</sup> The Council of Islamic Soldiers formed a 100 person death squad to kill her.<sup>414</sup> When a newspaper quoted her as saying that the Koran (although she insists she said the Shari'a) should be "thoroughly revised to eliminate passages which discriminate against women," a crowd as large as 200,000 supported demands for her death, and a local court issued a warrant for her arrest for "deliberately hurting religious sentiments."<sup>415</sup> After two months in hiding, the

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401. *Id.* at 14.

402. *Id.* at 15.

403. *Id.*

404. *Id.* at 16.

405. *Yadegar-Sargis v. INS*, 297 F.3d 596, 600 (7th Cir. 2002).

406. *Id.* at 599.

407. *Id.* at 599-600.

408. *Id.* at 600.

412. *Id.* at 606.

410. Akram, *supra* note 339, at 12.

411. *Id.* at 14-15.

412. *Id.* at 14.

413. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV. 139, 147 (1996).

414. *Id.*

415. *Id.*

European Union offered her asylum.<sup>416</sup> For Muslim dissidents to be able to speak out about the treatment of women, there needs to be some place to seek asylum.

Female genital mutilation is gradually becoming recognized as a ground for asylum. Before 1996, two judges ruled in opposite directions about two women from Sierra Leone who were abducted and mutilated.<sup>417</sup> One judge granted asylum, but the other denied it, saying "she could choose to support the practice to maintain tribal unity."<sup>418</sup> In 1996, the "Board of Immigration Appeals issued a ground-breaking decision recognizing that asylum could be granted based on fear of female genital mutilation."<sup>419</sup>

Female genital mutilation (FGM) dates back to the time of the Pharaohs and is a traditional belief strongly associated with Islam, though it is not officially required by Islam, and a few Christian and animist groups practice it as well.<sup>420</sup> Some Asian Muslim groups who do not ethnically have the tradition, such as the Minangkabau, practice it in order to be good Muslims, although according to this author's informants, in a very mild form not involving the removal of the clitoris. FGM involves 85 to 114 million women<sup>421</sup> and is practiced as early as infancy and as late as pregnancy with the first child.<sup>422</sup>

There are three main forms of FGM. Clitoridectomy removes the clitoral prepuce and is the least severe, though there is still horrible pain and a danger of death from shock and blood loss when the clitoral artery is cut.<sup>423</sup> Excision removes the labia minora and the clitoris.<sup>424</sup> Infibulation, known as Pharaonic circumcision because it is traditionally practiced in upper Egypt, involves removing the clitoris and labia minora, then sewing together the labia majora and binding the legs together twenty days or more to let scar tissue form.<sup>425</sup> A tiny opening is left for blood and urine.<sup>426</sup>

Because FGM is usually done without anesthetics and with non-sterile knives, razors, or pieces of glass, infection is common and the woman may contract tetanus or AIDS.<sup>427</sup> Side effects include constant pain, painful intercourse, infertility, dangerous childbirth, urine retention, urinary infections, back pain, accumulation of menstrual blood with offensive odors, blood clots, cysts, and psychological fear of sex.<sup>428</sup> In the more severe form, nothing is left of the genitals

416. *Id.*

417. Kris Ann Balsler Moussette, *Female Genital Mutilation and Refugee Status in the United States—A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 355 (1996).

418. *Id.*

419. *Refugee Women at Risk*, *supra* note 1, at 4.

420. Moussette, *supra* note 417, at 360.

421. *Id.* at 359.

422. *Id.*

423. *Id.* at 358, 364.

424. *Id.* at 358.

425. *Id.*

426. *Id.* at 359.

427. *Id.* at 364.

428. *Id.* at 363, 365-7.

but a long, ugly scar.<sup>429</sup>

Proponents say that it maintains tradition, enhances fertility, prevents promiscuity, and protects virginity (by removing sexual desire), maintains hygiene, and is aesthetically pleasing.<sup>430</sup> It is perpetuated by women themselves.<sup>431</sup> One woman of the Meru tribe felt that it proved one was part of the community and recalled her circumcision "as if it was something sweet."<sup>432</sup> Mothers will do it to ensure a good marriage for their daughters, as men will not marry an uncircumcised girl, considering her unclean and oversexed.<sup>433</sup>

Lydia Olulero, a Nigerian citizen with two American-born daughters, was to be deported and asked for asylum because her little girls would have been subject to FGM had she returned.<sup>434</sup> She had been circumcised herself and her family strongly believed in it.<sup>435</sup> The court said it would be an extreme hardship for the little girls and granted the application for suspension of deportation.<sup>436</sup>

As FGM becomes more a matter of common knowledge, it is agreed to be gender-based persecution.<sup>437</sup> The INS has adopted guidelines that will make it easier to get asylum for FGM claims.<sup>438</sup>

Women who transgress the mores of their culture may be subject to persecution. Abankwah,<sup>439</sup> from the Nkumssa tribe of Ghana, which worshiped the goddess Kwasi Nkumssa, had converted to Christianity, and because of or despite her new beliefs, had a premarital sexual relationship with a man.<sup>440</sup> Her tribe condemns women who practice premarital sex by punishing them with FGM.<sup>441</sup> Abankwah's mother was Queen Mother of the tribe, and when she died, Abankwah was to become the next Queen Mother.<sup>442</sup> However, it was required that the Queen Mother remain a virgin until she was installed.<sup>443</sup> For part of the ceremony, they would pour water into her cupped hands, and if it spilled, she was not a virgin.<sup>444</sup> In any case, when a husband was selected for her, he would discover she was not a virgin.<sup>445</sup> Abankwah requested asylum.<sup>446</sup> The Immigration Judge believed that Abankwah was genuinely fearful, but did not

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429. *Id.* at 363.

430. *Id.* at 360.

431. *Id.* at 356, 357.

432. *Id.*

433. *Id.* at 360-361.

434. *Id.* at 388-389.

435. *Id.* at 389.

436. *Id.* at 390.

437. *Id.* at 394.

438. *Id.*

439. She was mentioned briefly in the detention section.

440. *Abankwah v. INS*, 185 F.3d 18, 20 (2d Cir. 1999).

441. *Id.* at 20.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

have objectively reasonable fears.<sup>447</sup> The Second Circuit pointed out that the “practice of FGM has been internationally recognized as a violation of women’s and female children’s rights,”<sup>448</sup> and pointed out that it is criminal under federal law if done to a minor, regardless of cultural practice.<sup>449</sup> Between 15 and 30% of all women and girls in Ghana had been subject to FGM, so Abankwah’s fear was objectively reasonable.<sup>450</sup> In reversing the decision, the judge pointed out dryly that “a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.”<sup>451</sup>

Recent asylum rights for women have been expanding into the arena of domestic violence. Janet Reno vacated a 1999 BIA Appeals decision that “would have prohibited a victim of severe domestic violence from receiving asylum.”<sup>452</sup> There are also some limited protections against domestic violence for victims who are already in the country under the Violence Against Women Act<sup>453</sup> and the Victims of Trafficking and Violence Protection Act,<sup>454</sup> which provide some additional means to obtain visas.<sup>455</sup>

Many women’s asylum claims are made by women from Muslim countries. Women in these countries are beginning to challenge the traditional order and it is no longer extraordinary for a woman to be a Muslim feminist. If women, either Christian or Muslim, are to make challenges to repressive regimes, they need a place of asylum if those challenges fail and they are endangered. Freedom for women is one of the most appealing characteristics of American society for women worldwide. One of America’s best chances to moderate repressive ideology is for it to support those attempting to reform their societies.

## V POST 9/11 DEVELOPMENTS

*The common stereotypes are that we re all Arabs, we re all violent, and we're all conducting a holy war*<sup>456</sup>

--Ibrahim Hooper

Right after the terrorist attack which destroyed the World Trade Center on

447. *Id.* at 21.

448. *Id.* at 23.

449. *Id.*

450. *Id.* at 25.

451. *Id.* at 26.

452. *Refugee Women*, *supra* note 1, at 4.

453. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-55, 8 U.S.C. §§ 1151, 1154, 1186a, 1254, and 2245 (1994).

454. Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464, Pub. L. No. 106-386 (Oct. 28, 2000).

455. Gail Pendleton & Ann Block, *Applications for Immigration Status Under the Violence Against Women Act*, THE COLORADO LAWYER (March 2003).

456. Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 295, 301 (2002).

9/11, the program to admit refugees shut down almost completely for three months, stranding more than 22,000 people who had already been given permission to enter.<sup>457</sup> U.S. INS offices in Europe, Turkey, and Pakistan canceled immigration interviews.<sup>458</sup> Some refugees had heard no decision.<sup>459</sup> Others who had been granted asylum were waiting to fly.<sup>460</sup> Because they had no legal status in Europe, they were often stranded or deported to face more persecution.<sup>461</sup> On December 11, 2001, the program resumed, but much more slowly.<sup>462</sup> By December of 2002, Canada, with one-tenth the population of the United States, had accepted more refugees than the United States since 9/11.<sup>463</sup>

Moreover, in February of 2001, before the terrorist attack, the INS in Europe had begun to require transit visas for refugees coming into European countries, but because "of restrictions and persecutions faced by many Muslim convert Christians [sic], it [was] nearly impossible for them to obtain such a visa."<sup>464</sup> One solution to the problems of expedited removal would be to make it easier for refugees to obtain the visas they need to legally enter the United States and then apply for asylum.

After the 9/11 attack, the 2001 Foreign Terrorists Tracking Force was formed.<sup>465</sup> Attorney General John Ashcroft commented,

We will arrest and detain any suspected terrorist who has violated the law. If suspects are found not to have links to terrorism or not to have violated the law, they'll be released. But terrorists who are in violation of the law will be convicted, in some cases deported, and in all cases be prevented from doing further harm to Americans.<sup>466</sup>

Around 1200 people were detained, mostly Arab, South Asian, and Muslim men.<sup>467</sup> Some were charged with criminal activity related to the investigation.<sup>468</sup> Some were held as material witnesses.<sup>469</sup> Some were deported for fraudulent documents, illegal entry overstaying visas, etc.<sup>470</sup> The courts are busy sorting out

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457. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 3 (2002) at [http://www.lchr.org/us\\_loss\\_ch3a.htm](http://www.lchr.org/us_loss_ch3a.htm).

458. Letter from Abe Ghaffari, Executive Director of Iranian Christians International, to U.S. government official (2002).

459. *Id.*

460. *Id.*

461. *Id.*

462. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 4 (2002) at [http://www.lchr.org/us\\_loss\\_ch3a.htm](http://www.lchr.org/us_loss_ch3a.htm).

463. Abe Ghaffari, *The ICI Partner Prayer Letter* (Iranian Christians International, Inc.), Dec. 2002.

464. Ghaffari, *supra* note 463.

465. *A Year of Loss, Chapter 3: Treatment of Immigrants, Refugees and Minorities*, Lawyers Committee on Human Rights, ¶ 11 (2002) at [http://www.lchr.org/us\\_loss\\_ch3a.htm](http://www.lchr.org/us_loss_ch3a.htm).

466. *Id.* at ¶ 12.

467. *Id.* at ¶ 6.

468. *Id.* at ¶¶ 7-8.

469. *Id.* at ¶ 19.

470. *Id.* at ¶ 17.

whether rights were violated.<sup>471</sup>

The USA Patriot Act of October 26, 2001 gave the Attorney General (AG) power to detain non-citizens suspected of terrorism.<sup>472</sup> The AG is required to charge them with a crime, initiate deportation, or release them within seven days.<sup>473</sup> Certification of a suspected terrorist must be reviewed every six months to be renewed or revoked.<sup>474</sup> The administration has used this detention power sparingly, if at all.<sup>475</sup> Also, INS regulations have been expanded to let a detainee be held 48 hours without charge, or for an additional “reasonable period of time” in an extraordinary circumstance.<sup>476</sup> Apparently some people have been detained for a longer period.<sup>477</sup>

In January 2002, “Operation Absconder” removed 6000 Middle Eastern young men who had ignored deportation orders.<sup>478</sup>

Also in 2002, the National Security Entry-Exit Registration System was implemented, also known as special registration.<sup>479</sup> The point of the law is to track visitors to prevent future terrorist attacks. Immigrants who are not permanent residents and who pose “national security risks” as determined by the federal government, are subject to fingerprinting, photographing, and special registration.<sup>480</sup> The current group for special registration is males over the age of sixteen from certain countries, all of which are heavily Muslim except for North Korea.<sup>481</sup> The law has resulted in the arrests of seven hundred Muslim men in Southern California.<sup>482</sup>

Shah Afshar, an Iranian Christian and legal resident, commented on the special registration, and went on to say, “Well, many people including some of my church members were arrested. FBI broke into one of the member’s house arrested [sic] and within a month sent him back to Iran.”<sup>483</sup> This is despite the fact that a Christian immigrant from the Middle East is one of the least likely people in the world to sympathize with Islamic terrorism. In fact, this man was here illegally because his asylum claim had been denied.<sup>484</sup> Mr. Afshar went on to say, “My own parents who live in Iran and have permanent residency in the U.S. are having

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471. *Id.* at ¶ 21.

472. *Id.* at ¶ 25.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.* at ¶ 28.

477. *Id.* at ¶ 29.

478. Akram & Johnson, *supra* note 456, at 342.

479. *Id.*

480. *Id.*

481. Kari Moreno, *New Immigration Law on the Books*, THE WRIT, Denver University, Feb. 2002, at 7.

482. *Id.*

483. E-mail from Shah Afshar to Bruce Sidebotham (Mar. 10, 2003)(on file with the author).

484. E-mail from Shah Afshar, to Theresa Sidebotham (Mar.13, 2003, 16:53) (on file with the author).

a hard time getting here.”<sup>485</sup>

It is important to note that “INS Special Registration does not discriminate between Christian Indonesians and Muslim Indonesians or between Jewish Iranians and Muslim Iranians or Christian Iranians.”<sup>486</sup> Although discrimination within special registration would not be legal and would be inflammatory, it should be possible to expedite legitimate asylum claims. Extremist Muslims are unlikely to be eligible for asylum. Special registration ends once a person is a permanent resident.<sup>487</sup>

The tension is between protecting the human rights of individuals and protecting the security of the country. Considering that all of our terrorist attacks have been perpetrated by Arab Muslim non-citizens, it is not unreasonable to track that group carefully. U.S. immigration laws have always discriminated between groups<sup>488</sup>. For instance, people from certain countries are not even required to have visas to enter the United States. Measures such as fingerprinting and tracking the location of immigrants are commonly accepted worldwide. This author remembers being fingerprinted on every finger every year, along with each of her small children, and having to register with the police every time she moved.

Concerns have been raised as to whether this will antagonize Muslim countries. Most Muslim countries practice equal or greater control over their alien residents, so U.S. measures should come as no great shock. Although there will undoubtedly be formal protests, Muslim cultures historically despise weakness and respect strength, including firmness, force, and control. U.S. concern for human rights and hesitancy to use force is generally perceived as a weakness. If people have ignored deportation orders, it is appropriate that they be removed. If special registration picks up immigrants who are here illegally with invalid visas, it may create hardship in the short run to remove them, but it will create a more orderly system as immigrants realize they must comply with U.S. laws. Perhaps there could be an option to seek asylum as well as discretionary immunity granted to those who would be separated from citizen spouses or American-born children, or to those who can demonstrate they have contributed positively to their U.S. community. Greater control of the immigrant population will not harm the United States in the eyes of the Muslim world.

It is important however, not to slide into the other extreme of hostility towards a group of people just because some enemies of America can be found within the group. The United States stands to repeat the injustices perpetrated against Japanese-Americans if it allows such attitudes to develop. American Arabs and Muslims are frightened by the hostility some hold towards them. Muslims are actually a minority among Arabs in this country (because more American Arabs are Christian), and Arabs are a minority among Muslims (because more Muslims

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485. *Id.*

486. E-mail from Ahmed Jabri, U.S. Committee for Refugees, to Theresa Sidebotham (Feb. 20, 2003, 13:34 EST) (on file with the author).

487. Moreno, *supra* note 481, at 7.

488. *Is This America?* *supra* note 35, at ¶¶ 3, 4.



are from Asia).<sup>489</sup> America must not turn against innocent people as she roots out the guilty. During World War II, the country did not successfully come up with a way to deal with possible Japanese spies without indiscriminately punishing all Japanese-Americans.<sup>490</sup> With thought and care, perhaps America can do better this time.

The Attorney General should ensure that INS officers and others who are questioning detainees treat them respectfully. He will have to work out with the courts what are violations of civil rights and how to balance individual rights against tipping off the terrorist networks. The United States should solicit the aid of the Arab and Muslim communities in this country in reporting possible terrorist activity. It should reassure all its people that appropriate measures are being taken, as fear will often trigger an irrational lashing out against a group of people.

And indeed, appropriate measures must be taken if we are not to be the victims of repeated terrorism. Terrorism is now an ever present threat. The evil of a few causes citizens and immigrants to suffer.

Some who suffer the worst are the refugees fleeing from fundamentalist Islam. "It is important to note that Muslim convert Christians [sic] from the Middle East are often fleeing the very same extremist Islamic regimes or groups who sponsor terrorism."<sup>491</sup> In fact, the campaign against terrorism has made their plight worse, as the hostility of fundamentalist groups has been stirred up against them.<sup>492</sup> As Mr. Ghaffari, an Iranian convert to Christianity says, "In this light, non-Muslims, and particularly Muslims who have turned from Islam and embraced Christianity, are seen as Western spies and traitors by these fundamentalist Muslims."<sup>493</sup> Christians are associated with the West, and both ethnic Christians and converts are facing increased persecution.<sup>494</sup>

## VI. SUGGESTIONS FOR U.S. POLICY

The two policy goals for the United States with respect to immigrants are to provide security within the country and to preserve human rights for immigrants. These goals are not morally incompatible, as they involve the pursuit of safety and freedom for both society and individuals, including immigrant and citizen.

The War on Terrorism involves the ideological clash between secularism, as represented by the West, and fundamentalist Islam. President Bush "spoke bluntly of a 'freedom gap' between the West and totalitarian Arab regimes."<sup>495</sup> However, there is also an ideological clash within Islam itself. The President commented that some leaders in the Middle East "speak of a new Arab Charter that champions

489. Akram & Johnson, *supra* note 456, at 312.

490. *Korematsu v. United States*, 323 U.S. 214 (1944).

491. Letter from Abe Ghaffari, Executive Director of Iranian Christians International, to U.S. government official (2002).

492. *Id.*

493. *Id.*

494. *Id.*

495. Joel C. Rosenberg, *FlashTraffic*, WORLD, Mar. 8, 2003, at 10.

internal reform, greater political participation, economic openness, and free trade."<sup>496</sup>

The extremist, fundamentalist groups are only a fragment of Islam.<sup>497</sup> As a minority position they may be compared to the splinter of Christians who bomb abortion clinics. The analogy does not extend fully however. By far the vast majority of Christians, even those who are actively pro-life, outspokenly and routinely condemn violence as unacceptable and un-Christian. The vast majority of Muslims would not perpetrate violence themselves. However, a large proportion agree theologically with the principles animating terrorist groups and admire them to some extent. Terrorist groups make an appeal to the masses.

The Taleban are Muslims working for the establishment of the Shari'ah, and Muslims in the East and West therefore have an obligation to support them. .O Muslims, stand together and unite to fight. .The Book of Allah calls you, and Paradise awaits you. Verily, Allah (SWT) orders you in the Qu'ran: "Go and fight, young or old and sacrifice your wealth and life in order to get Paradise." [Q 9:41]<sup>498</sup>

Muslims who speak out against terrorism are in the minority although more would speak out if not for the risk of being targets of violence themselves. This silence contributes to the Western perception that Islam is monolithic and to the hostility and suspicion towards Muslims and Middle Easterners in the United States.

There are signs that this is changing in the Muslim world. Recent attacks against obviously innocent people, including children, are sobering to many Muslims. A newspaper in Bangladesh said, "I don't think any Islamic country can support such sort of terrorism because Islam itself is a religion of peace."<sup>499</sup> In Indonesia, the Bali bombing killed Muslims or relatives of Muslims as well as foreigners.<sup>500</sup> The financial impact of the loss of the Bali tourist trade had repercussions throughout Indonesia.<sup>501</sup> It is human nature to ignore atrocities that are committed far away to someone "other. This is demonstrated constantly in the American news media, when catastrophes are ignored unless there are American deaths. The impact of terrorism perpetrated in Indonesia by Indonesian Muslims (rather than by Middle Easterners against Westerners) is horribly surprising, and "moderate Muslim organizations are finally speaking out to support and encourage the police in this work."<sup>502</sup> One devout elderly Muslim man said, .it's the first time I've ever heard them preaching what I've always believed

496. *Id.*

497. Irshad Manji, *A Muslim Plea for Introspection*, GLOBE AND MAIL, Nov. 8, 2001.

498. Press release, Al-Muhajiroun (Sept. 16, 2001) at [www.al-muhajiroun.f2s.com](http://www.al-muhajiroun.f2s.com).

499. Zahidul Haque, *Terrorist Attacks*, THE INDEPENDENT (BANGLADESH), Sept. 18, 2001.

500. Bruce Sidebotham, *Indonesians Feel Shame of Extremism*, OPERATION REVELLE SHOFAR, FIRST QUARTER 2003, at 7

501. *Id.*

502. *Id.* at 7.

that we should be friends with people of other religions. <sup>503</sup>

It should be a goal of U.S. policy to support influences that moderate Islam, with the goal of secularizing it enough so that pluralism is acceptable. Once pluralism is accepted, the violence against Western secularism will fade away and human rights conditions will improve. During the Cold War, the United States supported pro-democracy activity within Communist countries. For instance, Alexander Solzhenitsyn was able to publish his body of work, which had a profound influence within Soviet Russia, only because he had asylum in the United States. A comparable figure is Salman Rushdie, the Muslim writer of *The Satanic Verses*.<sup>504</sup> Because of his criticism of Khomeini, a *fatwa* was issued, offering a huge reward for assassinating him or his publishers.<sup>505</sup> This was no idle threat, as 59 exiled Iranian dissidents were assassinated between 1979 and 1993.<sup>506</sup> Technically Shari'a law only applies within the Muslim world, but an exception was made for Rushdie and other dissidents.<sup>507</sup> America should support those in the Muslim world with views that will tend to moderate extremist Islam, including Christians seeking freedom to worship, Muslim women working against oppression of women, pro-democracy advocates, and anyone who is fighting oppression. In order for courageous people to be able to speak out, there should be a safety net or somewhere to flee. Asylum for people like this should be quickly and easily secured.

For example, Abbas Zahedi, an Iranian, was nearly denied asylum by both an Immigration Judge and the Board of Immigration Appeals, but was declared eligible for asylum by the Ninth Circuit.<sup>508</sup> He heard Khomeini's *fatwa* against Salman Rushdie's *The Satanic Verses* and concluded that the government was "trying to hide something from people, from us."<sup>509</sup> With great difficulty, he obtained a copy of the book.<sup>510</sup> His friend Moshen started translating it, while Zahedi copied and distributed the chapters.<sup>511</sup> However, after about four chapters, Moshen was arrested, tortured, and killed.<sup>512</sup> Zahedi fled the country and asked for asylum.<sup>513</sup> The IJ found that although he might face criminal charges if he went back, "[t]hat is a matter for the government of Iran to decide. This is not a basis for the grant of asylum."<sup>514</sup> Fortunately for Zahedi, the Ninth Circuit granted his appeal.<sup>515</sup>

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503. *Id.*

504. Donna E. Arzt, *Religious Human Rights in Muslim States of the Middle East and North Africa*, EMORY INT'L L. REV. 139, 147-48 (1996).

505. *Id.*

506. *Id.* at 148.

507. *Id.*

508. *Zahedi v. INS*, 222 F.3d 1157, 1160 (9th Cir. 2000).

509. *Id.* at 1161.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.* at 1161.

514. *Id.* at 1162.

515. *Id.* at 1168.

Another reason for this is that the United States is putting these people at more risk in pursuing the War on Terrorism. Just as America gave special preference to refugees from Communism during the Cold War, so now the United States owes it to the asylum seekers whose suffering has intensified due to the war on terrorism.

Another area that should be considered is witness or agent protection. Those who are willing to help track down terrorist activity or speak out against oppressive regimes such as Saddam Hussein's, should be given immunity and residency. Illegal aliens within the country who help U.S. security interests should be rewarded with legal residency. Pragmatically, the United States should both protect and reward those who are helping it pursue policy interests.

For U.S. policy to be fair towards refugees or useful in the War on Terrorism, it needs to be more finely crafted. During the Cold War, the United States managed to distinguish between Communists, defectors, and pro-democracy refugees. It should do the same in this conflict.

Asylum rights should be granted quickly to those with a genuine credible fear. Groups that are not a threat to national security such as Christians, Jews, women fleeing oppression, children, and Muslims fleeing repressive regimes, should be identified. Detention after the credible fear interview should be nearly eliminated in favor of releasing people to the care of relatives and nonprofit organizations. The money saved can be used to investigate real security risks.

America should begin with the assumption that its own Arab and Muslim citizens and permanent residents are loyal to the United States. That is usually the reason they or their forebears came here.

All immigrants should be treated with the fairness and respect they deserve as humans, and in keeping with this country's traditions. People are not nearly as likely to resent procedures, such as special registration, as they are attitudes of racism, condescension, or hatred. Each encounter with an immigrant should be treated as a public relations opportunity to spread U.S. values. Arab and Muslim immigrants realize that we are dealing with a massive security threat. Those who want to be here regret, by and large, the activities of extremists. As Shah Afshar, an Iranian immigrant, said, "Their anger should be directed at the Arabs who created this mess rather than the U.S. government!"<sup>516</sup> As long as security measures are carried out with respect and decency immigrants will understand. Mr. Afshar also commented, in response to a question about racial profiling,

You may find my answer a bit different than what you might expect from a Middle Eastern, but if he acts like a duck and quacks like a duck, he could very well be a duck. I have no problem with racial profiling. As one who travels much, for me, no amount of security is just enough. We have to do what we need to do in order to protect our people, those who live in this country. By the way, for a while after 9/11 while traveling, I would wear an American flag as a

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516. E-mail from Shah Afshar to Bruce Sidebotham (Mar. 10, 2003) (on file with the author).

bandana.<sup>517</sup>

Mr. Afshar acknowledges the real enemy and is prepared to make sacrifices of convenience and the embarrassment of being profiled on behalf of his adopted country.<sup>518</sup>

Those who are not permanent U.S. residents and who have been proven to be anti-American and who support violence should be deported. Living in America is a privilege, not a right for aliens and there can be certain obligations attached to the granting of a visa.

INS officials should be informed of U.S. policy and human rights objectives and held accountable. Officials who are brutal should be dismissed and the INS should actively recruit workers who are compassionate towards refugees and concerned about human rights.

While there has been great concern expressed about the INS being placed under Homeland Security, the new arrangement is an opportunity to consistently pursue the goals of improving the INS' human rights record, improving internal security, and supporting U.S. international policy objectives. The recommendations in this paper do not involve a great deal of extra expense, or a radical overhaul of U.S. laws. They do involve changes of attitude and approach, better training of immigration officers, and more consistent implementation of existing recommendations. However, they would better the situation for refugees, catalyze change that would benefit millions in the Muslim world, and contribute to America's own security

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517. *Id.*

518. *Id.*

