Villanova University School of Law
School of Law Working Paper Series

Year 2006 *Paper* 42

Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise

Marisa S. Cianciarulo*

*Villanova Law School, cianciar@chapman.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/villanovalwps/art42

Copyright ©2006 by the author.

Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise

Marisa S. Cianciarulo

Abstract

The Real ID Act, passed on May 11, 2005, is the first post-September 11 antiterrorism legislation specifically to target a group of vulnerable individuals to whom the United States has historically granted protection: asylum seekers. The passage of the Real ID Act led asylum advocates to wring their hands in despair and immigration restrictionists to clap their hands in glee. This Article argues that both sides of the debate may have been justified in their reactions, but not because of the immediate chilling impact on asylum that they seem to expect. With regard to requirements for establishing asylum eligibility, the Real ID Act, rather than imposing new, onerous restrictions on asylum, codifies case law upon which adjudicators, advocates, and government attorneys have been relying for decades. However, several areas of poor drafting, combined with legislative history mischaracterizing the asylum system as a haven for terrorists and suicide bombers, may result in the denial of bona fide asylum applications. This Article provides concrete guidance for adjudicators, advocates, and government attorneys applying the Real ID Act to asylum cases. It examines the case law upon which some of the provisions are based and offers interpretations for unclear provisions. Overall, this Article emphasizes that it is the duty of adjudicators, advocates, and government attorneys to protect victims of persecution.

ARTICLE

TERRORISM AND ASYLUM SEEKERS: WHY THE REAL ID ACT IS A FALSE PROMISE

Marisa Silenzi Cianciarulo*

The Real ID Act, passed on May 11, 2005, is the first post–September 11 antiterrorism legislation specifically to target a group of vulnerable individuals to whom the United States has historically granted protection: asylum seekers. The passage of the Real ID Act led asylum advocates to wring their hands in despair and immigration restrictionists to clap their hands in glee. This Article argues that both sides of the debate may have been justified in their reactions, but not because of the immediate chilling impact on asylum that they seem to expect. With regard to requirements for establishing asylum eligibility, the Real ID Act, rather than imposing new, onerous restrictions on asylum, codifies case law upon which adjudicators, advocates, and government attorneys have been relying for decades. However, several areas of poor drafting, combined with legislative history mischaracterizing the asylum system as a haven for terrorists and suicide bombers, may result in the denial of bona fide asylum applications. This Article provides concrete guidance for adjudicators, advocates, and government attorneys applying the Real ID Act to asylum cases. It examines the case law upon which some of the provisions are based and offers interpretations for unclear provisions. Overall, this Article emphasizes that it is the duty of adjudicators, advocates, and government attorneys to protect victims of persecution.

I. Overview

The United States' asylum system has emerged as a new battleground in the "War on Terror." On May 11, 2005, Congress passed the Real ID Act,[1] purported antiterrorism legislation specifically targeting asylum seekers, a group of vulnerable non-citizens fleeing persecution to which the United States has historically offered protection. The purpose of the Real ID Act's asylum provisions,[2] according to its author, House Judiciary Committee Chairman James Sensenbrenner (R-Wis.), is to prevent
terrorists from using the U.S. asylum system to gain lawful immigration status in the United States:

---

* Reuschlein Clinical Teaching Fellow, Villanova Law School. Thanks to Michelle Anderson, Bridgette Carr, Michael Carroll, Chapin Cody, David Everson, Beth Lyon, Dveera Segal, and Amy Spare for their insightful comments. Thanks also to Brendan Wilson and Si Nae Lim for their research assistance. Special thanks to Michele Pistone for her inspiration and guidance, and to Marlena Cianciarulo and Carla Cianciarulo Embrey for their encouragement.

[1] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302–23 (2005) [Real ID Act].

[2] The Real ID Act addresses other immigration issues, including withholding of removal, judicial review, border security, and driver's license issuance. *See id.*, §§ 1(b), 102(c)(2), 102, 201. These provisions are beyond the scope of this Article.

> There is no one who is lying through their teeth that should be able to get relief from the courts, and I would just point out that this bill would give immigration judges the tool to get at the Blind Sheikh who wanted to blow up landmarks in New York, the man who plotted and executed the bombing of the World Trade Center in New York, the man who shot up the entrance to the CIA headquarters in northern Virginia, and the man who shot up the El Al counter at Los Angeles International Airport. Every one of these non–9/11 terrorists who tried to kill or did kill honest, law-abiding Americans was an asylum applicant. We ought to give our judges the opportunity to tell these people no and to pass the bill.[3]

Unfortunately, the law has far more potential to undermine the legitimate goals of the asylum system than it does to strengthen national security. The fact that Chairman Sensenbrenner targeted non-citizens for antiterrorism legislation is neither surprising nor uncommon. The magnitude of the September 11 terrorist attacks has clouded the fact that they were not the first incidents of terrorism on U.S. soil. According to the USA PATRIOT Act,[4] terrorism consists of criminal "acts dangerous to human life" intended "to influence the policy of a government by intimidation or coercion."[5] Based on this definition, several acts of terrorism occurred in the years leading up to the September 11 attacks. One such act occurred on a date already somewhat faded from the collective U.S. memory: April 19, 1995. On that day, Timothy McVeigh bombed the Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people, including 19 children, and injuring more than 500 others.[6] Before the Oklahoma City bombing, the Unabomber killed three people and maimed twenty-nine others over a period of seventeen years.[7] Terrorist Eric Rudolph evaded law enforcement for several years before being arrested, tried and convicted for deadly bombings at multiple abortion clinics and the 1996 Summer Olympics in Atlanta.[8] Political or religious ideology motivated the perpetrators of all of these acts of domestic terrorism. None of them was an asylum seeker; indeed, each was a U.S. citizen.

While targeting non-citizens as potential terrorists is commonplace, the Real ID Act is unusual in that it illogically focuses on shoring up an asylum system that already was a difficult and unattractive means of gaining legal status in the United States.[9] The Act squarely targets the

---

[3] 151 Cong. Rec. H460 (daily ed. Feb. 10, 2005) (statement of Chairman Sensenbrenner). *See also* H.R. Rep. No. 109-72, at H2868 (May 3, 2005) (referencing Sheikh Omar Abdel Rahman ("Blind Sheikh"), Ramzi Yousef (1993 World Trade Center bombing), Ahmad Ajaj (1993 World Trade Center bombing), Mir Aimal Kansi (CIA attack), and Hesham Mohamed Ali Hedayet (El Al Airlines murder)).

[4] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [PATRIOT Act].

[5] *Id.* § 802(a)(4) (amending 18 U.S.C. §§ 2331(A) and 2331(B)(ii) (2000)).

[6] Serge F. Kovaleski, *Oklahoma Tries to Get Past the Pain; Rebuilding Is the Easier Part of Recovering from April Bombing*, Wash. Post, Aug. 10, 1995, at A1.

[7] George F. Will, *Sanity and the Unabomber*, Wash. Post, Jan. 8, 1998, at A21.

[8] Jay Reeves, *Clinic Bomber Gets 2 Life Sentences: Rudolph is Unrepentant, Says Abortion Must Be Fought "With Deadly Force,"* Wash. Post, July 19, 2005, at A5.

[9] *See infra* Part III (discussing the current asylum system, including significant changes

well-fortified asylum process while ignoring the myriad other, more likely immigration routes available to non-citizens seeking to harm the United States, including over twenty types of non-immigrant visas,[10] several of which were utilized by the September 11 hijackers.[11] Moreover, application of the Real ID Act's asylum provisions is not limited to asylum seekers who may match the profile of a terrorist.[12] It instead affects all asylum seekers, including those fleeing female genital mutilation, domestic violence, religious persecution, politically based persecution, genocide, and ethnic cleansing. Thus, the Real ID Act has the potential to have a severely negative impact on the U.S. asylum system by making acquisition of asylum even more difficult for those who need it most.

As mentioned above, the modus operandi of this legislation is not novel. Examples abound of imprudent anti-terrorism efforts implemented since September 11, purporting to prevent terrorism but in reality only serving the interests of immigration restrictionists. The controversial National Security Exit Entry Registration System (hereinafter NSEERS) required non-citizens from certain countries, all of which were Arab or Muslim, to register with immigration authorities. This initiative led to thousands of detentions and deportations for immigration violations, but to no terrorism-related convictions.[13] A "voluntary interview" program launched within a month of the September 11 attacks had federal law enforcement agents interviewing thousands of male nationals of Arab and Muslim countries, but did not turn up any significant reported leads in the terrorism investigation.[14] In perhaps the most misguided post–September 11 action prior to the passage of the Real ID Act, the Bush Administration suspended refugee resettlement, stranding thousands of refugees in dangerous, disease-ridden refugee camps, even though none of the September 11 terrorists (or any terrorist in U.S. history) entered

---

made in 1996).

[10] *See* 8 U.S.C § 1101(a)(15) (2000) (setting forth the nonimmigrant visas available to eligible non-citizens); *see also* 8 U.S.C. § 1101(a)(26) (2000) (defining the term "nonimmigrant visa").

[11] *See* Thomas R. Eldridge et al., 9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States 7–31(2004) (detailing each of the September 11 hijackers' visa application processes and encounters with U.S. immigration personnel) [hereinafter 9/11 and Terrorist Travel]. Most of the hijackers applied for and received tourist visas. *See id.* One applied for and received a student visa after being denied a tourist visa. *See id.* at 13–14.

[12] *See* Pub. L. No. 109-13, 119 Stat. 231, 302–23 (2005).

[13] Leadership Conference on Civil Rights Educational Fund & American Bar Association Commission on Immigration, American Justice Through Immigrants' Eyes 107 (2004) [hereinafter American Justice Through Immigrants' Eyes]. The government claimed to have gained significant leads in the terrorism investigation but declined to provide any information to the public. *See id. See also* Dalia Hashad, *Stolen Freedoms: Arabs, Muslims, and South Asians in the Wake of Post 9/11 Backlash*, 81 Denv. U. L. Rev. 735, 743–44 (2004) (discussing the shortcomings of NSEERS).

[14] *See* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. Davis L. Rev. 609, 628–29 (2005) (describing the "voluntary interview" program launched by the Bush Administration); *see also* American Justice Through Immigrants' Eyes, *supra* note **Error! Bookmark not defined.**, at 104 (pointing out that the "voluntary interviews" coincided with a massive law enforcement sweep in which over 1,000 nationals of Arab and Muslim countries were arrested for immigration violations).

the country through the refugee resettlement program.[15] While these measures may have served to provide a sense of security to non-Arab, non-Muslim U.S. citizens, they achieved no apparent or disclosed progress in the War on Terror.

The Real ID Act operates by taking advantage of several prevalent, xenophobic misconceptions held in U.S. society—that all non-citizens are potential terrorists, that an application for asylum is a free and easy pass into the United States, and that U.S. law does not give immigration officials sufficient authority to remove unwanted non-citizens from the country—to pass a restrictionist immigration law that does nothing to strengthen the asylum system against terrorism. Even the name of the Act's section dealing with asylum, "Preventing Terrorists from Obtaining Relief from Removal,"[16] is testament to its alarmist agenda. Amidst that alarmism, several salient facts are obscured. For example, on average, less than thirty percent of asylum claims prevail.[17] Moreover, applicants found to have fabricated asylum claims are banished for life from the United States.[18] Also, all of the terrorists' applications that Chairman Sensenbrenner mentions as evidence of a faulty asylum system[19] were submitted prior to the implementation of stricter asylum provisions contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[20] and were denied even under the less strict provisions in place at the time.[21]

In addition, Chairman Sensenbrenner's ill-advised attempt to prevent terrorism at first glance appears merely to codify existing case law governing asylum claims.[22] A closer reading of the Board of Immigration

---

[15] *See generally*, Marisa S. Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post-9/11 World*, 17 Yale J.L. & Feminism (forthcoming Fall 2005) (discussing the suspension of the U.S. refugee resettlement program in the wake of September 11).

[16] Pub. L. No. 109-13, § 101, 119 Stat. 231, 302 (2005).

[17] *See* Dept. of Homeland Security, Office of Immigration Statistics, 2003 Yearbook of Immigration Statistics 56 (2004) (reporting that between 1973 and 2003, the U.S. government approved twenty-eight percent of asylum applications) [hereinafter 2003 Yearbook].

[18] *See* 8 U.S.C. § 1158(d)(6) (2000); 8 C.F.R. §§ 208.3(c)(5), 1208.3(c)(5) (2005). Terrorists and persons deemed to be a threat to national security are also barred from asylum eligibility. 8 U.S.C. § 1158(b)(2)(A)(iv)–(v) (2000).

[19] *See supra* note **Error! Bookmark not defined.** and accompanying text.

[20] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546–3009-724 (1996). *See also* 9/11 and Terrorist Travel, *supra* note **Error! Bookmark not defined.**, at 47–48 (reporting that World Trade Center bombing perpetrators Ramzi Yousef and Ahmad Ajaj applied for asylum in 1992); *id.* at 51 (stating that Sheikh Omar Abdel Rahman filed an application for asylum on Aug. 27, 1992); *id.* at 215 (stating that Mir Aimal Kansi applied for asylum on Feb. 7, 1992); *id.* at 230 (reporting that Hesham Mohamed Ali Hedayet applied for asylum on Dec. 1, 1992).

[21] *See id.* at 51 (stating that an immigration judge denied Rahman's asylum application on Mar. 16, 1993); *id.* at 48 (reporting that Ajaj's asylum request was denied on Apr. 24, 1993 and that Yousef's application was never adjudicated because he was convicted of carrying out the 1993 World Trade Center bombing and sentenced to 240 years in prison); *id.* at 215 (reporting that Kansi's asylum application was denied); *id.* at 230 (stating that on Mar. 7, 1995, the INS issued a Notice of Intent to Deny Hedayet's asylum application and that Hedayet failed to respond to the notice within thirty days, resulting in the initiation of deportation proceedings against him).

[22] *Compare, e.g.*, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 231, 303 (2005) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.") *with* Matter of S-M-J-, 21 I&N Dec. 722, 725 (B.I.A. 1997).

Appeals and Circuit Courts of Appeals cases from which the Real ID Act draws, however, demonstrates subtle but nonetheless significant differences between the language of the Real ID Act and that of the cases that influenced it.[23] Where those cases are thoughtful and thoroughly reasoned, the Real ID Act is careless and rash.[24] Moreover, the previous case law approach allowed for individualized interpretation and evolution of asylum law, whereas the Real ID Act, as a statute, is far more rigid. Improper interpretation of the Real ID Act's language may have devastating consequences for bona fide asylum applicants while providing no additional protection against fraudulent claims.

This Article provides guidance for asylum adjudicators charged with the daunting task of interpreting the Real ID Act. Part II briefly explores the history of U.S. refugee law, from World War II, and the subsequent 1968 ratification of the 1967 Protocol Relating to the Status of Refugees,[25] to the Refugee Act of 1980.[26] Part III describes pre-Real ID Act statutory restrictions on asylum and discusses the passage of the Real ID Act itself. Part IV analyzes each asylum provision of the Real ID Act in terms of relevant jurisprudence and regulations and suggests how each provision should be interpreted. This Article concludes that asylum adjudicators have a duty to interpret the Real ID Act in the spirit of the humanitarian treaties and laws upon which the asylum system is based.

II. U.S. Asylum and Refugee Law: 1939–1980

A. Fleeing Religious Persecution: the Tragedy of the S.S. St. Louis

The United States has a long history of protecting individuals who are fleeing persecution. The country itself was founded as a shelter from religious persecution, and quickly became home to Quakers, Puritans, Catholics, Huguenots, and other religious denominations unwelcome in seventeenth and eighteenth-century Europe.[27] That tradition of sanctuary has survived several periods of intense xenophobia, racially based exclusionary policies, national security threats, and war.

This history of refugee protection, however, is not unblemished. One of the country's most egregious failures to protect persons fleeing religious and ethnic persecution occurred on June 6, 1939. On that date, the

---

[23] *See generally* Part IV *infra*.

[24] *Compare, e.g.*, § 101(a)(3)(B)(ii), 119 Stat. at 303 (failing to impose a "reasonableness" requirement) *with* Secaida-Rosales v. INS, 331 F.3d 297, 311 (2d Cir. 2003) (vacating a denial of asylum where, inter alia, the judge's demands for corroboration of testimony were unreasonable), Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003) (same), and Senathirajah v. INS, 157 F.3d 210, 216 (3d Cir. 1998) (vacating a denial of withholding where the judge's demands for corroboration were unreasonable in light of the validity of applicant's testimony).

[25] Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

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

[27] *See* International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a)(1) (2000) (noting that "[m]any of our Nation's founders ºed religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom"); William Carlson Smith, Americans in the Making: The Natural History of the Assimilation of Immigrants 4 (Edward Alsworth Ross ed., 1939) (noting that the United States was "vaunted as a land not only of economic opportunity but also of religious freedom"). *See generally* Roger Daniels, Coming to America: A History of Immigration and Ethnicity in American Life 94 (1990).

German transatlantic liner *St. Louis* was forced to return to Europe, its 937 passengers having been denied entry to the United States. Most of them were European Jews fleeing Nazi persecution.[28]

At the time, the United States did not have laws specifically permitting refugee admissions. Immigration occurred primarily through a nationality-based quota system; when the allotted number of visas ran out for a particular country or region, applicants had to wait until a visa became available in order to immigrate.[29] At the time of the *St. Louis*'s voyage, the German-Austrian quota had not only been filled but had a waiting list of several years.[30] Entry to the United States would have required an executive order from President Roosevelt, who declined to issue one.[31] While the *St. Louis* made its way back to Europe, Jewish organizations secured admission for most of the refugees to western European countries. The passengers eventually settled in Belgium, France, Great Britain, and the Netherlands to await their turn to enter the United States.[32] Approximately four months after the *St. Louis*'s return to Europe, World War II began. With the exception of Great Britain, all of the countries to which the *St. Louis* passengers were sent subsequently came under Nazi control. Many of the *St. Louis*'s passengers were forced into hiding, driven into Nazi labor camps, or killed in the Holocaust.[33]

B. The 1967 Protocol Relating to the Status of Refugees

In the aftermath of the Nazi atrocities of World War II, refugee protection gained prominence in the international community. The United Nations General Assembly promulgated the Convention Relating to the Status of Refugees in 1951[34] specifically to provide protection to refugees displaced as a result of World War II.

The United States, however, did not ratify the 1951 Convention, instead choosing to reformulate an independent asylum policy in the Immigration and Nationality Act of 1952.[35] Under the 1952 Act, the Attorney General was given authorization "to withhold the deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."[36]

Refugees gained a more formal immigration status when Congress

---

[28] United States Holocaust Memorial Museum, *Voyage of the "St. Louis,"* http://www.ushmm.org/wlc/en/index.php?ModuleId=10005267 (last visited Nov. 19, 2005) [hereinafter *Voyage of the "St. Louis"*]. The refugees were originally en route to Cuba, but the Cuban government revoked their landing passes and denied them entry. *Id.*

[29] Immigration Act of 1924, ch. 190, 43 Stat. 153, 159–65, *repealed by* Immigration and Nationality Act of 1952, ch. 477, tit. IV, § 403(a)(23), 66 Stat. 163, 279.

[30] *Voyage of the "St. Louis," supra* note **Error! Reference source not found.Error! Bookmark not defined.**.

[31] *Id.*

[32] *Id.*

[33] United States Holocaust Memorial Museum, *Warning: Fate of the Passengers of the "St. Louis,"* http://www.ushmm.org/wlc/en/index.php?ModuleId=10005267 (last visited Nov. 19, 2005).

[34] July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

[35] Pub. L. No. 82-414, 66 Stat. 163 (1952).

[36] *Id.* at 214 (current version at 8 U.S.C. § 1253 (2000)).

amended the 1952 Act in 1965,[37] but even that gesture was born largely of the United States' Cold War political concerns rather than humanitarian interests.[38] The 1965 Amendments allowed only refugees from either communist countries[39] or countries in the "general area of the Middle East" to qualify for asylum.[40] Asylum seekers falling within these narrow parameters still had to demonstrate a "clear probability" of persecution (a higher standard than the "reasonable possibility" standard that exists today) before being accepted as refugees.[41] The 1965 Amendments also retained strict numerical limitations.[42]

In 1967, the United Nations updated the 1951 Convention with the Protocol Relating to the Status of Refugees,[43] designed to address any refugee flows arising out of persecution-related events after World War II.[44] In 1968, the United States seemed to align with the international community's refugee policy by signing and ratifying the 1967 Protocol.[45] By acceding to the 1967 Protocol, the United States agreed that "equal status should be enjoyed by all refugees . . . irrespective of the dateline 1 January 1951 . . . ."[46] The Protocol defined "refugee" as any person who:

> [O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[47]

Yet, the United States' assent to the 1967 Protocol did not have a significant effect on asylum processing. From 1968 to 1980, the United States continued to enforce the narrow parameters, low ceiling on approvals, and strict burden of proof mandated by the amended 1952 Act

---

[37] An Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965).

[38] *See* Deborah E. Anker & Michael J. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 13–14 (1981) (remarking that Congress's exceptions to immigration policy were strictly responses to Soviet expansionism, and should not be viewed as humanitarian commitments).

[39] *See* An Act to Amend the Immigration and Nationality Act § 203(a)(7) (current version at 8 U.S.C. § 1153 (2000)).

[40] *Id.*

[41] *See, e.g.*, Pierre v. U.S., 547 F.2d 1281, 1289 (5th Cir. 1977) (holding that the burden was on the asylum seeker to show that she was a refugee by a "clear probability" standard of proof); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977) (same); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976) (sustaining denial of asylum where applicants failed to demonstrate a "clear probability" of persecution).

[42] *See* An Act to Amend the Immigration and Nationality Act § 203(a)(7) (current version at 8 U.S.C. § 1153 (2000)) (specifying that of the 170,000 visas available yearly, no more than six percent should be granted for asylum applicants).

[43] 1967 Protocol, *supra* note **Error! Bookmark not defined.**.

[44] *See id.* pmbl.

[45] *Id.* (specifying that the Senate ratified the Protocol on Oct. 4, 1968 and the President signed it on Oct. 15, 1968).

[46] *Id.* pmbl.

[47] *Id.* art. 1, ¶ 2.

and the courts' interpretation of it.[48]

C. Refugee Act of 1980

With the Refugee Act of 1980,[49] Congress for the first time passed a law specifically addressing refugees and asylum seekers. By enacting the Refugee Act, Congress sought to give "statutory meaning to our national commitment to human rights and humanitarian concerns."[50] The Refugee Act repealed the 1952 Act's geographical and political limitations on the asylum process,[51] explicitly adopted the 1967 Protocol's definition of "refugee,"[52] formulated a legal right to seek asylum in the United States,[53] and lifted the numerical caps on yearly grants of asylum.[54] In addition, the Refugee Act mandated that the Attorney General establish procedures for asylum processing.[55]

---

[48] *See* Karen Musalo et al., Refugee Law and Policy: Cases and Materials 65 (1997); INS v. Stevic, 467 U.S. 407, 429–30 (1984) (articulating the standard for eligibility for withholding of removal).

[49] Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[50] S. Rep. No. 96-256, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 144; *see also* Refugee Act, § 101(a) ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . .").

[51] Refugee Act, sec. 203(c)(3), § 203(a)(7), 94 Stat. 102. However, the Refugee Act failed to alleviate some of the political biases that had existed in asylum processing before 1980. Between 1984 and 1990, the United States' geopolitical concerns led to disparate treatment of Central American asylum applicants fleeing human rights abuses arising from civil wars in El Salvador, Guatemala, and Nicaragua. During that time period, the United States granted only 2.6% and 1.8% of claims from those fleeing American-backed regimes in El Salvador and Guatemala, respectively, compared to 26% of the asylum requests from those fleeing the communist regime in Nicaragua. *See* Sharon S. Russell, *Migration Patterns of U.S. Foreign Policy Interest*, *in* Threatened Peoples, Threatened Borders 50–67 (Michael S. Teitelbaum & Myron Weiner eds., 1995). That particular bias finally became known during a series of lawsuits spearheaded by the American Baptist Churches against the Immigration and Naturalization Service, the Department of State, the Department of Justice, and the Attorney General. *See* American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991); American Baptist Churches v. Meese, 712 F. Supp. 756 (N.D. Cal. 1989); American Baptist Churches v. Meese, 666 F. Supp. 1358 (N.D. Cal. 1987). These lawsuits, which challenged the government's treatment of Salvadoran and Guatemalan asylum seekers and the government's prosecution of those providing sanctuary to them, culminated in a 1991 settlement approved by the District Court for the Northern District of California, in which the Department of Justice conceded, inter alia, that foreign policy, governmental relations with the applicant's country of origin, and the applicant's political beliefs "are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution . . . ." *Thornburgh*, 760 F. Supp. at 799.

[52] *See* § 201(a) (defining a refugee as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.)

[53] § 208(a) (authorizing "*[a]ny* alien who is physically present in the United States or at a land border or port of entry . . . to apply for asylum . . . .") (emphasis added).

[54] *Id*. (authorizing the Attorney General to grant asylum to any alien who meets the definition of refugee, without any numerical restrictions).

[55] *Id*. The Attorney General issued regulations in 1990 that created a professional corps of asylum officers; vested initial jurisdiction of affirmative asylum claims with the Office of Refugees, Asylum and Parole; established filing procedures for applications for asylum; established interview procedures; set forth eligibility requirements; and established procedures for granting derivative status to immediate family members. *See* INS Asylum

The passage of the Refugee Act ushered in a new era of refugee protection. The Supreme Court recognized the implications of the Refugee Act in the groundbreaking case of *INS v. Cardoza-Fonseca*,[56] which articulated a new, lower standard of proof for asylum eligibility, differentiating it from that of withholding of removal.[57] Asylum was no longer an ad hoc, marginal immigration procedure entirely subject to the whims of policy. Over the next twenty-five years, asylum would emerge as a unique, complex body of law and a lightning rod for the national immigration debate, forcing the country to balance traditional humanitarian interests against weighty national security concerns.

III. U.S. Asylum and Refugee Law: 1980–2005

A. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

By the mid-1990s, lawmakers were aware of perceived flaws in the U.S. asylum system. Processing delays had led to a backlog of several years,[58] during which time asylum applicants could both legally remain in the United States and apply for immediate work authorization, renewable on a yearly basis until the asylum adjudication was complete.[59] This loophole allowed economic migrants, unscrupulous individuals, or even potential terrorists to avoid deportation and then to abscond as their applications went unexamined.[60]

Congress finally addressed these concerns in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[61] The 1996 Act put into effect a number of provisions designed to curtail abuse of the asylum system. The most significant limitations were a one-year deadline on applying for asylum,[62] delay in work authorization eligibility,[63] prompt adjudication of asylum applications,[64] expedited removal,[65] and detention of asylum seekers.[66] With these provisions in place, the asylum process has become an unlikely choice for an individual seeking an easy, low-profile way to gain lawful immigration status.

Procedures, 8 C.F.R. § 208 (1990).

[56] 480 U.S. 421 (1987).

[57] *Id.* at 430–33.

[58] *See* News Release, U.S. Dep't of Justice, Immigration and Naturalization Service, Asylum Reform: Five Years Later (Feb. 1, 2000), *available at* http://uscis.gov/graphics/publicaffairs/newsrels/Asylum.htm [hereinafter *Asylum Reform*].

[59] *See* 8 C.F.R. § 208.7 (1993).

[60] *See Asylum Reform*, *supra* note **Error! Bookmark not defined.** ("By 1993, the asylum system was in a crisis, having become a magnet for abuse by persons filing applications in order to obtain employment authorization.").

[61] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 to 3009-724 (1996).

[62] § 604(a), 110 Stat. at 3009-691 (amending 8 U.S.C. § 1158(a)(2)(B) (1994)).

[63] § 604(a), 110 Stat. at 3009-693 (amending 8 U.S.C. § 1158(d)(2) (1994)).

[64] § 604(a), 110 Stat. at 3009-694 (amending 8 U.S.C. § 1158(d)(5)(A)(iii) (1994)) (setting the maximum time for final adjudication at 180 days after application filing).

[65] § 302(a), 110 Stat. at 3009-581 (amending 8 U.S.C. § 1225(b)(1)(B)(iii)(I)–(III) (1994)).

[66] *Id.* (amending 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (1994)).

1. The One-Year Deadline

As of April 1, 1997, asylum seekers must file their applications for asylum within one year of their entry into the United States.[67] An applicant's failure to prove by clear and convincing evidence that he or she filed within one year of entry bars the applicant from asylum eligibility.[68] Applicants may only overcome the bar if they demonstrate "changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application . . . ."[69] The purpose of this provision is to ensure that individuals applying for asylum do so as the result of an urgent need for protection, rather than as a delay tactic to prolong an unauthorized stay in the United States.

2. Delay in Work Authorization Eligibility and Prompt Adjudication of Asylum Claims

By revoking employment authorization and mandating prompt adjudication of asylum claims, the 1996 Act closed another alleged loophole in the asylum system. The revised provision plainly states that "[a]n applicant for asylum is not entitled to employment authorization."[70] Congress authorized the Attorney General to provide for employment authorization via regulation, but stipulated that such authorization "shall not be granted . . . prior to 180 days after the date of filing of the application for asylum."[71] Therefore, because the 1996 Act also mandates that asylum cases be adjudicated within 180 days of receipt of application,[72] very few asylum seekers will qualify for employment authorization absent a final grant of asylum.
Moreover, the regulations stipulate that "[a]ny delay requested or caused by the applicant shall not be counted as part of" the 180-day delay before eligibility for employment authorization.[73] Thus, even if a denied asylum applicant's appeal puts him or her beyond the typical 180-day mark, he or she remains ineligible for employment authorization during that appellate period.

3. Expedited Removal

The expedited removal provisions of the 1996 Act authorize immigration officers at U.S. ports of entry to expel aliens deemed inadmissible for failure to provide valid entry documents.[74] Such removals are referred to

---

[67] 8 U.S.C. § 1158(a)(2)(B) (2000).
[68] *Id.*
[69] *Id.* § 1158(a)(2)(D).
[70] *Id.* § 1158(d)(2).
[71] *Id.*
[72] *Id.* § 1158(d)(5)(A)(iii).
[73] 8 C.F.R. § 208.7(a)(2) (2005).
[74] *See* 8 U.S.C. § 1225(b)(1) (2000) (stating that "the officer shall order the alien removed from the United States *without further hearing or review*") (emphasis added); *id.* § 1182(a)(6)(C) (rendering inadmissible persons who attempt to commit fraud to enter the United States); *id.* § 1182(a)(7) (2000) (rendering inadmissible persons who attempt to enter the United States without a visa).

as "expedited" because they are not subject to rehearing or review by a judge.[75] An individual who receives an order of expedited removal is barred from reentering the United States for at least five years.[76]
Only those individuals who express a fear of returning to their home country receive an opportunity to avoid being summarily deported. The 1996 Act provides that an asylum officer should interview any such individuals to determine whether the expressed fears are credible.[77] If the asylum officer determines from the "credible fear" interview that the individual has a "significant possibility . . . [of] establish[ing] eligibility for asylum,"[78] the individual may remain in the United States to pursue asylum before an immigration judge.[79] If the asylum officer does not believe the individual has a credible fear of persecution, the individual may be summarily removed.[80]

4. Detention of Asylum Seekers

Claiming asylum at a port of entry and even establishing a credible fear of persecution by no means guarantees an easy entry into the United States. Individuals subject to expedited removal for attempting to enter the United States without valid documentation, including those claiming asylum, are subject to mandatory detention under the Act.[81] The Department of Homeland Security usually detains "credible fear" interviewees in immigration detention facilities, or, more commonly, in county jails from which the Department rents bed space.[82] Therefore, many applicants are forced to spend several months or even years in uncomfortable detention quarters, awaiting the adjudication of an asylum application that has less than a thirty percent chance of success.[83]

B. The Asylum Application Process

An asylum applicant may apply for asylum in one of two ways: affirmatively, by filing an application with U.S. Citizenship and Immigration Services ("CIS"), or defensively, by filing with the immigration court as a defense in removal proceedings.[84] Persons eligible to apply affirmatively for asylum are those who have entered the country lawfully or who have entered illegally but evaded detection.[85] Individuals who request asylum upon entry to the United States, or who are apprehended upon entry for lack of valid entry documents, or who otherwise become subject to the jurisdiction of U.S. Immigration and Customs Enforcement ("ICE") may apply for asylum in front of an immigration judge.[86]

---

[75] *Id.* §§ 1225(b)(1)(A)(i), 1252(a)(2)(A)(i).
[76] *Id.* § 1182(a)(9)(A)(i).
[77] *Id.* § 1225(b)(1)(A)(ii).
[78] *Id.* § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2) (2005).
[79] 8 C.F.R. § 208.30(f) (2005).
[80] 8 U.S.C. § 1225(b)(1)(B) (2000).
[81] *Id.* § 1225(b)(1)(B)(iii)(IV).
[82] American Bar Association Commission on Immigration, Immigration Detainee Pro Bono Opportunities Guide 1 (2004).
[83] *See* 2003 Yearbook, *supra* note **Error! Bookmark not defined.**, at 56.
[84] 8 C.F.R. § 208.1(a) (2005).
[85] *Id.* § 208.2(a).

Both affirmative and defensive applicants must undergo identity verification and background checks before being eligible for asylum.[87] The government issues each asylum applicant a file number, or "alien number," which is entered into the Refugees, Asylum and Parole System ("RAPS") database.[88] RAPS interfaces with both the Computer Linked Applicant Information System ("CLAIMS") to identify and update asylum applicants' address changes, and with the Receipt and Alien File Accountability Control System ("RAFACS") to keep track of asylum applicants' files.[89] The asylum office may not grant asylum without first checking the identity of the applicant against all appropriate government databases, including the State Department's Consular Lookout and Support System ("CLASS")[90] and the Department of Homeland Security biometric identification system known as "IDENT."[91]

All affirmative applicants and their dependents must attend a face-to-face interview with a CIS asylum officer,[92] in order to "elicit all useful and relevant information bearing on the applicant's eligibility for asylum." During this "nonadversarial"[93] interview, the applicant "may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence."[94] If the asylum office approves the case, the applicant will be granted asylum upon completion of the security checks. If the asylum office denies the case, and the applicant is not in lawful status, he or she receives notice of removal proceedings and must appear before an immigration judge.[95]

An asylum applicant in removal proceedings is under the jurisdiction of the Department of Justice Executive Office for Immigration Review (EOIR).[96] Unlike the asylum interview, a removal hearing is an adversarial process. A trial attorney for ICE prosecutes the case.[97] Immigration court respondents may be represented by counsel, but not at government expense.[98] Each side may present documentary and testimonial evidence, conduct direct and cross examination, and object to the evidence and questions of the other side.[99] If an immigration judge declines to grant asylum or other relief, that judge has the authority to issue an order of removal.[100]

---

[86] *Id.* §§ 208.2(b), 208.4(b)(3).

[87] *Id.* §§ 208.9(b), 208.10, 240.67, 1240.67.

[88] U.S. Dep't of Justice, Office of the Inspector General, Immigration and Naturalization Service Refugees, Asylum and Parole System Audit Report (1998), *available at* http://www.usdoj.gov/oig/reports/INS/a9811.htm.

[89] *Id.*

[90] Ira J. Kurzban, Immigration Law Sourcebook 383 (9th ed. 2004).

[91] *Id.* at 100.

[92] 8 C.F.R. § 208.9(b) (2005). The interview is conducted at one of eight U.S. asylum offices. *See* U.S. Citizenship and Immigration Services, Asylum Offices, *at* http://uscis.gov/graphics/fieldoffices/aboutus.htm#asylum (last visited Nov. 18, 2005).

[93] 8 C.F.R. § 208.9(b) (2005). In the experience of the author, the meaning of "non-adversarial" varies among asylum officers. Some asylum officers conduct interviews in a pleasant, non-threatening manner, while others tend to be aggressive and confrontational.

[94] *Id.*

[95] *Id.* § 208.14(c)(1).

[96] *Id.* § 1003.14(a).

[97] *Id.* § 1003.16(a).

[98] 8 U.S.C. § 1229a(b)(4)(A) (2000); 8 C.F.R. § 1003.16(b) (2005).

[99] 8 U.S.C. § 1229a(b)(4)(B) (2000).

[100] *Id.* § 1229a(c)(1)(A), 8 C.F.R. § 208.14(a) (2005).

Both ICE prosecutors and asylum applicants are entitled to appeal immigration judges' decisions to the Board of Immigration Appeals (BIA).[101] Regulations mandate that the BIA complete appeals within 180 days.[102] During that time, asylum applicants must continue to keep the government apprised of their whereabouts.[103]

C. The Real ID Act's Passage

With the implementation of the laws and procedures discussed above, asylum—despite never having been a particularly popular avenue for terrorists to pursue—had become even more difficult to abuse. Filing deadlines, restrictions on employment authorization, face-to-face interviews with immigration officers, numerous background and identity checks, and mandatory detention combined to create a less-than-ideal environment for an individual seeking to abuse the asylum process. The 1996 Act, and particularly its expedited removal process, has been praised as "a key tool in overall border and anti-fraud strategy."[104] Thus, despite no indication that the asylum system needed strengthening beyond the provisions of the 1996 Act, the Real ID Act, authored by House Judiciary Committee Chairman Sensenbrenner, was attached to an emergency Iraq appropriations bill[105] and passed on May 11, 2005.[106] Because legislators considered the appropriations bill to be "must-sign" legislation,[107] the Real ID Act passed without floor debate.[108] This stands

---

[101] 8 C.F.R. §§ 1003.1(b), 1003.38(a) (2005).

[102] *Id.* § 1003.1(e)(8)(i). The 180-day rule applies to those appeals reviewed by a three-member panel of BIA members. Most appeals are subject to single member review, however, and must be adjudicated within ninety days. *Id.*

[103] 8 U.S.C. § 1229(a)(1)(F) (2000).

[104] David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va. J. Int'l L. 673, 675 (2000); *see also* Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1501, 1524 (1997) (stating that "Congress has created procedures that appear susceptible of fair application meeting the international standards, and the executive branch has taken a number of important steps that go far toward ensuring adequate protection of asylum seekers who fall within those procedures"). Both David A. Martin and Bo Cooper are former INS General Counsels.

[105] *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); Suzanne Gamboa, *More Visas for Nurses, Seasonal Workers Added to Iraq Spending Bill*, AP, May 3, 2005 ("House and Senate negotiators reached agreement Tuesday in the final $82 billion bill devoted primarily to paying for military operations and reconstruction in Iraq and Afghanistan.").

[106] Real ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005).

[107] 151 Cong. Rec. S4816, 4837 (daily ed. May 10, 2005) (statement of Sen. Chafee (R-R.I.)) ("By attaching REAL ID to a must pass spending measure, the critical process of vetting the bill in committee was circumvented and an opportunity for discussion and debate, which is essential for effective legislation, was denied."); *id.* at 4831 (Statement of Sen. Obama (D-Ill.)) (stating that the immigration provisions of the Real ID Act will become law "not because it is the right thing to do but because the House majority has abused its privilege to attach this unexamined bill to must-pass legislation").

[108] *See id.* at 4820 (statement of Sen. Byrd (D-W. Va.)) (expressing disappointment that the Real ID Act "was simply grafted onto the emergency supplemental appropriations bill that provides funding for our military operations and our troops, without debate or participation by the conferees"); *id.* at 4826 (statement of Sen. Murray (D-Wash.)) (expressing concern that "far-reaching and unrelated immigration rules got attached to this bill without a vote and without an opportunity for debate"); *id.* at 4831 (statement of Sen. Obama) (expressing concern that, despite the controversial immigration provisions of the Real ID Act, "the Senate did not conduct a full hearing or debate on any one of them").

in stark contrast to the debate given to most other pre–September 11 antiterrorism legislation, such as PATRIOT Act,[109] even though both gave law enforcement and other government officials authority to detain and investigate noncitizens.

IV. Interpreting the Real ID Act

The Real ID Act addresses three main areas of asylum law. First, the Real ID Act attempts to codify case law on claims in which the persecutor may have been motivated by several factors, one or more of which may not conform to the definition of a refugee.[110] These "mixed motive" cases have generated conflicting jurisprudence,[111] but the Real ID Act's attempt to codify the majority view creates more confusion than it alleviates. Second, the Real ID Act addresses corroboration requirements. Again, its drafters attempted to codify long-established case law regarding when adjudicators may require additional evidence apart from the applicant's testimony alone.[112] Yet, in doing so, the drafters failed to explicitly include the "reasonableness" requirement found in leading case law.[113] This careless drafting leaves room for adjudicators to abuse their discretion in deciding when to require corroboration by making patently unreasonable corroboration demands on asylum applicants.

Finally, the Real ID Act addresses credibility. In most respects, the credibility provision of the statute codifies case law.[114] Yet, on the matter of immaterial inconsistencies, the Real ID Act's provisions[115] again make a significant departure from case law, United Nations High Commissioner for Refugees guidelines, and Immigration and Naturalization Service guidelines.[116]

The Sections that follow closely examine and analyze each of these provisions. The analysis shows that the law, though potentially

---

[109] *See generally* Akram & Karmely, *supra* note **Error! Bookmark not defined.** (examining the PATRIOT Act and other pre–September 11 policies and legislation targeting Arab and Muslim citizens and noncitizens).

[110] Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (2005).

[111] *Compare, e.g.*, Singh v. Gonzalez, 406 F.3d 191, 197 (3d Cir. 2005) (holding that "an applicant for asylum need not prove that the persecution he or she suffered (or fears suffering in the future) occurred *solely* on account of one of the five grounds enumerated in the INA. Rather, an applicant must show that the persecution was motivated, *at least in part*, by one of the protected characteristics.") *with* Gebremichael v. INS, 10 F.3d 28, 35 (1st Cir. 1993) (holding that the enumerated ground must be at the "root of persecution"). The first view is the one adopted by the majority of Courts of Appeals. *See, e.g.*, Lopez-Soto v. Ashcroft, 383 F.3d 228, 236 (4th Cir. 2004); Marku v. Ashcroft, 380 F.3d 982, 988 n.10 (6th Cir. 2004); Girma v. INS, 283 F.3d 664, 667 (5th Cir. 2002); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994).

[112] § 101(a)(3)(B)(ii), 119 Stat. at 303 ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

[113] Matter of S-M-J-, 21 I&N Dec. 722, 725 (B.I.A. 1997).

[114] § 101(a)(3)(B)(iii), 119 Stat. at 303.

[115] *Id.* (stating credibility determinations should be made "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim . . . .").

[116] *See, e.g.*, Singh v. INS, 365 F.3d 1164, 1171 (9th Cir. 2003) ("Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding.") (quoting Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988)).

detrimental to legitimate asylum seekers, is not necessarily so. If interpreted as suggested below, the damage it may cause to asylum seekers can be minimized.

A. Was It Really Persecution? The Problem of "Mixed Motive" Cases

1. Current Law on Proving that the Harm Suffered Was "on Account of" One of the Five Grounds for Asylum

An applicant for asylum must prove that the harm he or she suffered amounted to persecution. The test for whether harm rises to the level of persecution is threefold. First, the applicant must have suffered harm severe enough to rise to the level of persecution.[117] Second, the harm must have been committed by a government or an entity that the government is unable or unwilling to control.[118] Third, the harm must have occurred on account of at least one of the five grounds of asylum: race, religion, nationality, political opinion, or membership in a particular social group.[119] The Real ID Act addresses the third component, stating that asylum applicants must prove that one of the five grounds for asylum was or will be "at least one central reason" for the persecution they suffered.[120] Many cases involve "mixed motives," in which persecution may have occurred on account of one or more non-protected grounds, as well as one or more protected grounds. In 1992, the Supreme Court held in *INS v. Elias-Zacarias*, that an applicant must provide "*some* evidence . . . direct or circumstantial" of the persecutor's motive.[121] The Court further specified that establishing asylum eligibility does *not* require "direct proof of [the] persecutors' motives."[122] Moreover, "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible."[123] The importance of these holdings cannot be overstated, because, as discussed more fully in Part III.B, *infra*, persecutors generally do not provide their victims with evidence of, insights into, or discussion about the atrocities they commit. Requiring asylum applicants to prove the mental states of their persecutors to an adjudicator would be an almost impossible burden for applicants to meet.[124] Moreover, according to the

---

[117] *See* Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004) (holding that detention for ten days accompanied by daily beatings and hard labor constitutes persecution, even in the absence of serious physical injury); Ouda v. INS, 324 F.3d 445, 454 (6th Cir. 2003) (finding that threats and beatings combined with deprivation of livelihood and ability to leave home amount to persecution); Andriasian v. INS, 180 F.3d 1033, 1042 (9th Cir. 1999) (holding that persistent death threats and assaults on one's family constitute persecution).

[118] 8 U.S.C. § 1101(a)(42)(A) (2000). *See also, e.g.*, Galicia v. Ashcroft, 396 F.3d 446, 448 (1st Cir. 2005); Abdulrahman v. Ashcroft, 330 F.3d 587, 592 (3d Cir. 2003); Llana-Castellon v. INS, 16 F.3d 1093, 1097–98 (10th Cir. 1994).

[119] 8 C.F.R. § 208.13 (b)(2)(A) (2005).

[120] Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (2005).

[121] 502 U.S. 478, 483 (1992).

[122] *Id.*

[123] Shoafera v. INS, 228 F.3d 1070, 1076 (9th Cir. 2000) (quoting Matter of Fuentes, 19 I&N Dec. 658, 662 (B.I.A. 1988)); *see also* Romilus v. Ashcroft, 385 F.3d 1, 7 (1st Cir. 2004) ("[N]or is [the asylum applicant] required to establish [the persecutors'] exact motivations.").

[124] *See, e.g.*, Zubeda v. Ashcroft, 333 F.3d 463, 474 (3d Cir. 2003) ("[R]equiring an

Board of Immigration Appeals,[125] "[s]uch a rigorous standard would largely render nugatory the Supreme Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and be inconsistent with the 'well-founded fear' standard embodied in the 'refugee' definition."[126]

2. *The Real ID Act: "At Least One Central Reason"*

The Real ID Act states that asylum applicants must prove that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[127] Although, as discussed below, this language can and should be interpreted as a codification of *Matter of S-P-*, the use of the term "central" creates opportunity for adjudicators to require more proof of causation than *Elias-Zacarias* and *Matter of S-P-* permit.

The Real ID Act does not define "centrality," but it appears to have adopted the term "central" from proposed INS regulations issued in December 2000[128] in which centrality was a major theme. In those regulations, the INS proposed that "[i]n cases involving a persecutor with mixed motivations, the applicant must establish that the applicant's protected characteristic is central to the persecutor's motivation to act against the applicant."[129] In explaining the reasoning behind this proposed regulation, the INS cited two cases which purportedly represented "conflicting interpretations of the extent to which the persecutor's motivation must relate to a protected characteristic":[130] the Ninth Circuit case *Singh v. Ilchert*[131] and the First Circuit case *Gebremichael v. INS*.[132] In *Singh*, the Ninth Circuit held that "persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied."[133] In its decision in *Gebremichael*, the First Circuit stated that an asylum applicant must prove that one of the five statutory grounds is "at the root of persecution."[134]

Despite the INS's reasoning that these opinions were at odds with each other,[135] a more careful reading of the cases shows that the INS misread the First Circuit case and that no split ever existed. In using the phrase "root of persecution," the First Circuit simply borrowed language from its own prior decision in *Ananeh-Firempong v. INS.*[136] In that case, the

---

alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles. . . .").

[125] Matter of S-P-, 21 I&N Dec. 486, 489–90 (B.I.A. 1996).

[126] *Id. See also* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that asylum seekers must prove only a reasonable possibility of persecution in order to establish a well-founded fear).

[127] Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231, 303 (2005).

[128] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598 (Dec. 7, 2000).

[129] *Id.* at 76,598.

[130] *Id.* at 76,592.

[131] 63 F.3d 1501 (9th Cir. 1995).

[132] 10 F.3d 28 (1st Cir. 1993).

[133] *Singh*, 63 F.3d at 1509.

[134] *Gebremichael*, 10 F.3d at 35.

[135] *See supra* notes **Error! Bookmark not defined.–Error! Bookmark not defined.** and accompanying text.

[136] 766 F.2d 621 (1st Cir. 1985).

court quoted the following language from a United Nations Asylum Handbook:[137]

> Membership [in] such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members or the very existence of the social group as such, is held to be an obstacle to the Government's policies.[138]

The UNHCR Handbook was used merely to define the term "social group," rather than to address "centrality" of motive. The First Circuit even noted as such in *Ananeh-Firempong*, stating that the *UNHCR Handbook* is a "'useful tool' for interpreting the phrase 'social group' as it appears in the U.N. Protocol . . . ."[139] Thus, the court, in using the language "root of persecution," did not intend to propound a bright-line rule for determining the motivation of a persecutor.[140]

INS's reliance on the *Gebremichael* "root of persecution" formula is even more problematic when one considers that the First Circuit was the only circuit even arguably to use such an analysis when determining the persecutor's motive. The Second, Eighth, and Ninth Circuits were united in the prevailing view that persecution on account of a protected ground is established when the applicant proves that the persecutor's motives were based *in part* on a protected ground.[141]

Moreover, the legislative history of the Real ID Act clearly indicates the legislature's support for the prevailing view among the Courts of Appeals regarding motive. First, the conference committee replaced the phrase "a central reason" in the House of Representatives version of the bill[142] with the phrase "at least one central reason."[143] This substitution emphasizes that more than one motive may prompt a persecutor to cause harm and that the asylum seeker need not prove that the protected ground was foremost in the persecutor's mind.

---

[137] Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/ Eng/Rev.1 (1992) [hereinafter UNHCR Handbook].

[138] 766 F.2d at 626 (quoting UNHCR Handbook at ¶ 78).

[139] *Id.*

[140] Even if the First Circuit's use of the term "root of persecution" were to be construed as a means of analyzing the motivation of a persecutor, it properly applies only in the context of withholding of removal under 8 U.S.C. § 1253(h) (2000), which carries a substantially higher burden of proof than asylum. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 430–33 (1987).

[141] *See, e.g.*, Chang v. INS, 119 F.3d 1055, 1065 (3d Cir. 1997) (granting petition for review where persecutor's motivation was based in part on a protected ground); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995) (holding that "an applicant is not required to provide direct proof of her persecutor's motives but rather some evidence of it, direct or circumstantial"); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (holding that persecution on account of a protected ground "does not mean persecution *solely* on account of the victim's political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution."). This view was later adopted by most other circuits. *See* Lopez-Soto v. Ashcroft, 383 F.3d 228, 236 (4th Cir. 2004); Marku v. Ashcroft, 380 F.3d 982, 988 n.10 (6th Cir. 2004); Girma v. INS, 283 F.3d 664, 667 (5th Cir. 2002).

[142] H.R. 418, 109th Cong. (1st Sess. 2005).

[143] H.R. Rep. No. 109-72 (2005) (Conf. Rep.).

Second, the Act's drafters intended that "[t]he central reason standard will . . . require aliens who allege persecution because they have been erroneously identified as terrorists *to bear the same burden as all other asylum applicants . . . in accordance with Supreme Court precedent*."[144] While this distinction did not appear in the legislation itself, it indicates that the rephrased centrality requirement was not intended to impose a *higher* bar for all asylum applicants beyond what the Supreme Court had already enunciated; rather, it was simply imposed to prevent applicants accused of being terrorists from getting a *lower* bar.

The only sensible interpretation of the centrality provision of the Real ID Act, therefore, is that adjudicators should continue to rely on the standard set forth in the Supreme Court's *Elias-Zacarias* decision and the BIA case *Matter of S-P-* for the "nexus" determination. That is, an adjudicator must conclude whether, based on a reasonable interpretation of the facts and the evidence, the persecution occurred at least in part because of one of the five grounds.[145] This analysis also comports with what the INS suggested in the preamble to the 2000 proposed regulations: that nexus is not established "if the protected characteristic was incidental or tangential to the persecutor's motivation."[146] There is no evidence, then, suggesting that drafters intended a heightened nexus requirement for asylum applicants.

3. Analyzing Nexus Under the Real ID Act: "Miguel's Case"

The case of Miguel,[147] an asylum seeker from Colombia, illustrates the analysis set forth above. Miguel owned a small factory in Bogotá, Colombia. He belonged to a small local branch of the national conservative party called the National Salvation Movement (Movimiento de Salvación Nacional, "MSN"). As a factory owner, Miguel sought to employ poor rural youth who, because of their socioeconomic status, are at high risk for recruitment by a guerrilla group called the Armed Revolutionary Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, "FARC"). As a member of the MSN, Miguel donated building materials for civic projects in the poverty-stricken rural areas surrounding Bogotá. He also supported political candidates who reflected his conservative, anti-guerrilla values and political viewpoint.

In May 1999, a group of armed men robbed Miguel's factory at gunpoint. Miguel was not present, but his wife, sister-in-law, and several employees were. The armed men identified themselves as guerrillas and demanded that the captives turn over their jewelry and cash. They also forced Miguel's wife to turn over the keys to one of the company SUVs. Before leaving, they locked everyone in a room and warned them not to report the incident to the police. After escaping, Miguel's wife promptly

---

[144] H.R. Rep. No. 109-72, at 165 (emphasis added).

[145] *See* INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); *Matter of S-P-*, 21 I&N Dec. 486, 494 (B.I.A. 1996).

[146] Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (Dec. 7, 2000).

[147] "Miguel" is the pseudonym of an actual client of the Villanova Clinic for Asylum, Refugees, and Emigrant Services (CARES) who, along with his family, was granted asylum. The names of CARES's clients are kept anonymous due to the highly personal nature of asylum claims. Documentation is on file with the author.

filed a police report. Shortly thereafter, Miguel received a menacing letter from a person claiming to be a FARC commander and threatening harm against the family in retaliation for Miguel's wife's reporting the robbery to the police.

From those facts alone, the only indication that the robbery and the threat were politically motivated is that the robbers and letter writer identified themselves as guerrillas. The main purpose for their attack on Miguel's factory seems to have been to obtain cash and a vehicle; the main purpose of the letter seems to have been to retaliate against or intimidate the family for reporting the robbery to the police. Thus, on these facts alone, it would be difficult for Miguel to prove that his membership in an anti-guerrilla political party had much, if anything, to do with the robbery and threatening letter. His political opinion may have in part motivated the guerrillas to steal from him rather than from someone who supports their cause, but there is no evidence of that in this account. These facts would indicate that the motivation on account of a protected ground was tangential or incidental at best, but would not necessarily satisfy the centrality requirement.

Miguel's case, however, contains additional facts that would demonstrate a sufficient nexus between the persecution suffered and one of the five grounds for asylum. Shortly following the robbery, the family began receiving threatening phone calls from a person claiming to be a FARC commander, demanding that Miguel discontinue his "activities." In addition, two men who identified themselves as guerrillas briefly abducted Miguel's eldest daughter at gunpoint and ordered her to tell her father to stop his activities. The robbery, when viewed in conjunction with these additional incidents, takes on new meaning: this family was a specific target of a guerrilla group attempting to curtail Miguel's political activities.

Moreover, Miguel's student representatives provided a number of supporting documents demonstrating that political opinion and membership in a particular social group, rather than financial gain or general violence, motivated the guerrillas. An expert in Miguel's case testified that the guerrillas, who purport to follow strict Marxist tenets, target small business owners because they represent the capitalism and free market economy that Marxists oppose. A State Department Report on Human Rights in Colombia, as well as reports from several respected human rights groups, indicated that FARC guerrillas were responsible for numerous attacks against individuals whom they perceived as ideologically and politically opposed to FARC's goals.

This evidence, together with the family's testimony, was sufficient to prove centrality under the Real ID Act and allow Miguel to be granted asylum. Although no direct evidence of the persecutor's exact motivation exists, it is clear that the protected grounds—political opinion and membership in a particular social group—were not merely incidental or tangential motivations for the persecution. FARC may have targeted Miguel and his family in part for pecuniary gain, but Miguel's opposition to FARC, manifested in his business and political activities, formed at least part of the motivation for the attacks on Miguel's family.

B. Corroborating Evidence: How Much Is Enough?

1. Corroboration of Persecution Generally

Corroborating asylum claims presents significant challenges, especially in terms of logistics and authentication. Obviously, most asylum seekers will not come to court equipped with notarized affidavits from their persecutors stating, "I, Joe Persecutor, beat and tortured your client on three occasions between December 1999 and August 2003 on account of her political opinion against our oppressive but beloved dictator. Her political opinion was foremost in my mind when this occurred."[148] Moreover, many asylum seekers arrive from countries that lack infrastructure, adequate communication systems, and sometimes even a functioning government.[149] Obtaining documents, even ones as relatively common as a birth certificate or medical report, can therefore involve logistical impediments that often prove insurmountable. Additionally, persons escaping persecution may leave behind important documents (such as identity cards, birth certificates, medical records, etc.) when fleeing their countries, either in haste or in an attempt to conceal their identities from persecutors.[150] By attempting to obtain the documents later, an asylum seeker risks interception of his or her mail, potentially exposing family and friends to harassment by the persecuting entity.[151] Even documentation of physical trauma itself can be difficult to obtain, such as in rape cases, with often little if any physical evidence.[152] In many cases, therefore, the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof. As such, establishment of an accurate but not unduly burdensome corroboration

---

[148] *See* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."); *see also generally* Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corrobo-ration and Authentication Requirements in Asylum, Withholding and Torture Convention Cases*, 01-10 Immigr. Briefings 1 (Oct. 2001) (discussing in detail the corroboration require-ments for asylum seekers).

[149] *See* United Nations High Commissioner for Refugees, *Refugees: 2004 Year in Review*, Refugees Mag., Jan. 1, 2005, at 8–12 (describing conditions in refugee-producing countries around the world), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41e3a9fc4.

[150] *See* Michele R. Pistone, *The New Asylum Rule: Improved but Still Unfair*, 16 Geo. Immigr. L.J. 1, 8 (2001) (explaining that "records may take months or years to compile because refugees usually leave them behind, and the documents may be available only in the country from which the refugee has °ed.").

[151] *See id.* (stating that "[e]ven if friends or family members can obtain copies of the documents, hostile governments may intercept international mail. Therefore, asylum applicants may hesitate for a long time before asking others to put themselves at risk by requesting corroborating records.").

[152] *See* Physicians for Human Rights, Examining Asylum Seekers: A Health Professional's Guide to Medical and Psychological Evaluations of Torture 54–61 (2001). The Guide states:

> In the majority of political asylum applicants who allege sexual assault during torture, the traumatic event(s) will have occurred months or years before the medical examination. Therefore, most individuals will not have physical signs at the time of the examination. . . . Even on examination of the female genitalia immediately after rape there is identifiable damage in less than 50% of cases. Anal examination of males and females after anal rape shows lesions in less than 30% of cases.

process can be very difficult.

2. *The Courts on Corroboration*

Courts have recognized the unique challenges discussed above. In 1987, the Board of Immigration Appeals decided in *Matter of Mogharrabi* that, due to the difficulty asylum seekers often face in obtaining corroborating evidence, "the applicant's testimony [alone] will suffice if it is credible, detailed and specific."[153] Several Courts of Appeals adopted this reasoning,[154] and it eventually made its way into the Code of Federal Regulations.[155]

Two years later, in *Matter of Dass*, the Board clarified its holding in *Matter of Mogharrabi* and articulated a general rule for corroboration: where corroborating evidence is available, the applicant should present it; when unavailable, the applicant should explain why.[156] The Board also distinguished between a claim "focused on specific events involving the [applicant] personally" and a "sweeping and general" claim involving an elaborate background context.[157] The Board noted that in order to better establish the credibility of the applicant's story, more corroborating background evidence would be necessary in the latter.[158]

The Board further refined this holding in *Matter of S-M-J-*,[159] clarifying that in cases where corroborating evidence is *reasonably* expected, it *should* be provided.[160] The Board went on to say that if the applicant fails to present such evidence, it "*can* lead to a finding that [the] applicant has failed to meet her burden of proof."[161] However, the Board noted that specific "documentary corroboration of an applicant's particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers."[162]

---

[153] 19 I&N Dec. 439, 444 (B.I.A. 1987) (relying on Cardoza-Fonseca v. INS, 767 F.2d 1448, 1458 (9th Cir. 1985)).

[154] *See* Cordon Garcia v. INS, 204 F.3d 985, 992–93 (9th Cir. 2000) (holding that due to "the serious difficulty with which asylum applicants are faced in their attempts to prove persecution . . . this court does not require corroborative evidence" from asylum applicants who have testified credibly); Gumbol v. INS, 815 F.2d 406, 412 (6th Cir. 1987) (citing Youkhanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984)) (holding that an asylum seeker must present some specific facts, *either* through objective evidence or through persuasive credible testimony, to show that his fear of persecution is well-founded); Ganjour v. INS, 796 F.2d 832, 837 (5th Cir. 1986) (holding that an asylum applicant "must present *specific* facts, through objective evidence if possible, or through his or her own persuasive, credible testimony, showing actual persecution or detailing some other good reason to fear persecution . . . ." (quoting Carvajal-Munoz v. INS, 743 F.2d 562, 576 (7th Cir. 1984)).

[155] 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.13(a), 1208.16(b) (1990).

[156] 20 I&N Dec. 120, 124–25 (B.I.A. 1989).

[157] *Id.* at 125.

[158] *Id.*

[159] 21 I&N Dec. 722 (B.I.A. 1997).

[160] *See id.* at 725 (holding that "[u]nreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided.").

[161] *Id.* at 726 (emphasis added).

[162] *Id. See also* Matter of M-D-, 21 I&N Dec. 1180 (B.I.A. 1998), *rev'd sub nom.* Diallo v. INS, 232 F.3d 279 (2d. Cir. 2000) (upholding the BIA's determination that asylum

Matter of S-M-J- also provides examples of the types of facts "easily subject to verification"[163] for which adjudicators may reasonably expect corroborating evidence. Those examples include "evidence of [the applicant's] place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment."[164] Importantly, the BIA placed the burden of providing evidence of general country conditions on the adjudicator[165] and the government attorneys,[166] as well as on the asylum applicant. Thus, most asylum cases presumably have at least a State Department Report in the record, often supplied by the government. This aspect of *Matter of S-M-J-* is especially relevant in cases involving unrepresented, detained clients with limited or no access to resources or legal aid.[167]

The opinion's admonitions to adjudicators and government attorneys aside, *Matter of S-M-J-* is not particularly sympathetic to the plight of asylum seekers. A document that is easily subject to verification may still not be easily obtainable by an individual fleeing persecution. A refugee from war-torn Somalia who lived for years in a Kenyan refugee camp, for example, is unlikely to have or be able to obtain a document as common and presumably simple as a birth certificate. Moreover, what an adjudicator considers reasonable to provide may differ from a persecution victim's perception of what is reasonable to provide, due to the fears discussed above: interception by government officials, danger to family members, and repercussions for colleagues.

In *Ladha v. INS*,[168] the Ninth Circuit explicitly rejected the corroboration rule of *Matter of S-M-J-*, basing its holding on three lines of Ninth Circuit cases. The first line of cases "emphasizes the difficulty of proving

---

applicants should provide corroborating evidence when it is available).

[163] 21 I&N Dec. at 725.

[164] *Id.*

[165] *See* Matter of S-M-J-, 21 I&N Dec. at 727 (stating that:

> Although the burden of proof is not on the Immigration Judge, if background information is central to an alien's claim, and the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record . . . . Thus, the statute specifically recognizes that the presentation of evidence is a proper function of an Immigration Judge.).

[166] *See id.* (holding that "[a]s a general matter, therefore, we expect the Service to introduce into evidence current country reports, advisory opinions, or other information readily available from the Resource Information Center").

[167] *See* Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 Harv. Hum. Rts. J. 197, 219–20 (1999) [hereinafter *Justice Delayed is Justice Denied*]. The author noted:

> Detained asylum seekers usually do not have access to relevant legal or background resource materials. Indeed, until recently, the INS did not have any standards concerning the content of legal libraries at detention facilities. Even though these standards are in place, they do not apply to non-INS facilities such as local, county, and city jails where many asylum seekers are detained; therefore, the contents fall far short of alleviating concerns about the availability of sufficient corroborative materials. The standards do not require libraries to maintain up-to-date information about country conditions . . . . Even with all the relevant legal and country condition resource materials necessary to present a claim for asylum, only the minority of asylum seekers fluent in English are able to use them.

[168] 215 F.3d 889, 899 (9th Cir. 2000).

specific threats by persecutors, and emphasizes that credible testimony as to a threat is sufficient to prove that the threat was made."[169] The second line of cases "emphasizes that not only specific threats but also other facts that serve as the basis for an asylum or withholding claim can be shown by credible testimony alone if corroborative evidence is 'unavailable.'"[170] Finally, the third line of cases "make[s] clear that when an alien credibly testifies to certain facts, those facts are deemed true and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief."[171] Based on the reasoning in these three lines of cases, in which the court recognized the difficulties that asylum seekers face in attempting to corroborate their claims, the *Ladha* court held that "[t]o the extent that decisions such as *Matter of S-M-J-* . . . establish a corroboration requirement for credible testimony, they are disapproved."[172]
Ladha's reasoning, though arguably most in line with the spirit of refugee protection, was not favored among other Courts of Appeals.[173] As such, there remains a split between the Circuit Courts of Appeals as to whether *Matter of S-M-J-* is good law.

3. *Corroboration Under the Real ID Act*

The Real ID Act permits an asylum seeker to corroborate his or her claim solely with his or her own testimony, but stipulates that such testimony must be "credible, . . . persuasive, and refer[ ] to specific facts sufficient to demonstrate that the applicant is a refugee."[174] However, even if that testimony is sufficient to establish asylum eligibility, the Real ID Act

---

[169] *Id.* (citing Lopez-Reyes v. INS, 79 F.3d 908, 912 (9th Cir. 1996); Artiga Turcios v. INS, 829 F.2d 729, 723 (9th Cir. 1987); and Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285, 1288 (9th Cir. 1984)).

[170] Ladha, 215 F.3d at 900 (citing Castillo v. INS, 951 F.2d 1117, 1121 (9th Cir. 1991); Limsico v. INS, 951 F.2d 210, 212 (9th Cir. 1991); Estrada-Posadas v. INS, 924 F.2d 916, 918–19 (9th Cir. 1991); Aguilera-Cota v. INS, 914 F.3d 1375, 1378 (9th Cir. 1990); Blanco-Comarribas v. INS, 830 F.2d 1039, 1042–43 (9th Cir. 1987); Del Valle v. INS, 776 F.2d 1407, 1411 (9th Cir. 1985); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985)).

[171] *Ladha*, 215 F.3d at 900–01 (citing Khourassany v. INS, 208 F.3d 1096, 1100 (9th Cir. 2000); Yazitchian v. INS, 207 F.3d 1164, 1168 (9th Cir. 2000); Duarte de Guinac v. INS, 179 F.3d 1156, 1159 (9th Cir. 1999); Del Carmen Molina v. INS, 170 F.3d 1247, 1249 & n.2 (9th Cir. 1999); Campos-Sanchez v. INS, 164 F.3d 448, 451 n.1 (9th Cir. 1999)).

[172] *Ladha*, 215 F.3d at 901.

[173] *See* Gontcharova v. Ashcroft, 384 F.3d 873, 877 (7th Cir. 2004) (declining to follow the Ninth Circuit's rejection of *Matter of S-M-J-* but requiring that immigration judges explain their application of *Matter of S-M-J-*); El-Sheikh v. Ashcroft, 388 F.3d 643, 647 (8th Cir. 2004) (quoting Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000) and Abdulai v. Ashcroft, 239 F.3d 542, 554 (3d Cir. 2001)) (declining to adopt the Ninth Circuit's rejection of *Matter of S-M-J-* but adopting the Second and Third Circuits' requirement that immigration judges and the BIA "(1) rule explicitly on the credibility of an applicant's testimony; (2) explain why it was reasonable to expect additional corroboration; and (3) assess the sufficiency of the applicant's explanations for the absence of corroborating evidence"); Dorosh v. Ashcroft, 398 F.3d 379, 382 (6th Cir. 2004) (expressly rejecting the Ninth Circuit's reasoning and adopting that of the Second and Third Circuits with regard to *Matter of S-M-J-*)). *See generally* Brian P. Downey & Angelo A. Stio, III, *Of Course We Believe You, But . . . : The Third Circuit's Position on Corroboration of Credible Testimony*, 48 Vill. L. Rev. 1281 (2003).

[174] Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(ii), 119 Stat. 231, 303 (2005).

permits adjudicators to require corroborating evidence: "Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[175] Therefore, that clause directly refutes *Ladha's* ruling that no corroboration should be required for credible testimony, and for the most part, codifies *Matter of S-M-J-*.[176]
That the drafters of the Real ID Act chose to eviscerate *Ladha* was unfortunate, but not completely unexpected, particularly when most other Circuit Courts of Appeals backed the *Matter of S-M-J-* ruling. Yet, the Real ID Act's corroboration provisions are particularly troubling in that they differ from even the less desirable approach sanctioned by *Matter of S-M-J-* and the Courts of Appeals that approved of it. Those decisions required that adjudicators act reasonably in requesting additional corroboration and explain their rationale for the request.[177] The Real ID Act's provision, on the other hand, does not hold specifically adjudicators to a standard of reasonableness when determining whether corroboration is necessary or whether the corroboration provided is sufficient.
The only sensible conclusion to draw from the Real ID Act's drafters' failure to include a reasonableness provision is that Congress intended adjudicators to rely on the guidance found in *Matter of Mogharrabi*, *Matter of Dass*, and *Matter of S-M-J-* to determine when and what kind of corroboration should be expected. This is supported by the fact that the Act's sponsors stated in the Conference Report that credibility determinations "must be reasonable and take into consideration the individual circumstances of the specific witness and/or applicant."[178] That language evinces a Congressional intent for the statute to be read in light of the Board's "reasonableness" standard. Moreover, as a practical matter, failure on the part of appellate courts and immigration judges to read a reasonableness requirement into the Act could lead to abuse of discretion, inconsistent application of the law, and the denial of valid asylum claims.[179]

4. Analyzing the Real ID Act's Corroboration Requirement: The Case of Marie and Paul

The case of Marie and Paul,[180] a married couple from Haiti, illustrates

---

[175] *Id.*

[176] *See* H.R. Rep. No. 109-72, at H2870 (2005) (Conf. Rep.).

[177] *See* Secaida-Rosales v. INS, 331 F.3d 297, 311 (2d Cir. 2003) (vacating a denial of asylum where, inter alia, the judge's demands for corroboration of testimony were unreasonable); Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003) (same); Senathirajah v. INS, 157 F.3d 210, 216 (3d Cir. 1998) (vacating a denial of withholding where the judge's demands for corroboration were unreasonable in light of the validity of applicant's testimony).

[178] H.R. Rep. No. 109-72, at H2870 (2005) (Conf. Rep.).

[179] *See* Qiu v. Ashcroft, 329 F.3d 140, 153–54 (2d Cir. 2003) (holding that "[u]nless the BIA anchors its demands for corroboration to evidence which indicates what the petitioner can reasonably be expected to provide, there is a serious risk that unreasonable demands will inadvertently be made. . . . What is (subjectively) natural to demand may not . . . be (objectively) reasonable.").

[180] "Marie" and "Paul" are pseudonyms of actual clients of the Villanova Clinic for Asylum, Refugee and Emigrant Services (CARES) who were granted asylum. The names of CARES's clients are kept anonymous due to the highly personal nature of asylum claims.

how adjudicators should apply the Real ID Act's corroboration requirement. Marie and Paul ºed Haiti with their two young daughters in the summer of 2003, during the rule of Jean-Bertand Aristide and his political party, the Fanmi Lavalas ("Lavalas"). Paul's family opposed the Lavalas and he, as well as his brother, uncle, father, and the rest of the family, refused to take part in what they considered a corrupt political process. An armed, pro-Lavalas gang called the Chimeres attacked the family several times for their refusal to support the Lavalas. Still, the family refused to submit. One day, Paul's uncle and brother went missing. Their house had been vandalized and they were never found. Paul's father, fearing for his family members' lives, raised money for Paul to flee Haiti with Marie and the children.

Upon arriving in the United States, Marie, Paul, and the children were placed in a family detention center. They applied for asylum but were detained for the duration of their proceedings. Fortunately, they secured representation through the Villanova Clinic for Asylum, Refugee and Emigrant Services.

Paul's representatives submitted several pieces of evidence in support of his claim. First was Paul's own affidavit. They also submitted a number of newspaper articles, the 2003 State Department Country Report on Human Rights for Haiti, several reports from reputable non-governmental organizations, and the affidavit of an expert on Haiti. All of these materials corroborated Paul's written and oral testimony and supported his claim that he would suffer beatings, torture, or even death if he were to return to Haiti.

Yet other materials that an adjudicator could reasonably expect were noticeably absent, such as affidavits from Paul's family members, including his father, who had arranged for the trip. This is where the case-by-case analysis prescribed in *Matter of S-M-J-* becomes crucial. Marie and Paul were detained and destitute. They came from a poor village, and they, as well as their family members, had limited education. There were no telephones in their village. Paul and his representatives could have tried to send a letter, but even if the mail service had been adequate, the family members were not literate. Yet the general reports of Haitian country conditions—together with Paul's consistent, detailed, and persuasive testimony—provided sufficient corroboration to establish a claim, and the immigration judge granted the family asylum.

Authorizing adjudicators to require corroboration in any form, for any fact, in any case, would serve only to imperil bona fide asylum seekers like Marie and Paul. It is therefore improper under the humanitarian spirit of the 1967 Protocol[181] to impose such a severe and unrealistic burden of corroboration on asylum seekers. Rather, adjudicators should continue to follow the *Matter of S-M-J-* reasonableness test[182] in determining when it is appropriate to require corroboration and what kind of corroboration it is appropriate to require.

Documentation is on file with the author.

[181] *See* 1967 Protocol, *supra* note **Error! Bookmark not defined.**, at pmbl.

[182] 21 I&N Dec. 722, 725 (B.I.A. 1997).

C. Credibility: Is the Devil Now in the Details?

Credibility is arguably the most crucial aspect of any asylum case. As discussed above, specific corroboration is difficult, if not impossible, in many cases. An asylum applicant's testimony is often the most probative evidence available. The credibility of that testimony therefore becomes critical.

Courts have endeavored to strike a balance between protecting the asylum system from fraud and accepting that certain minor factors may adversely impact credibility. Current case law stipulates that asylum adjudicators take into account the totality of the circumstances when making a credibility determination, including such factors as demeanor,[183] plausibility,[184] and factual inconsistencies and omissions.[185] In addition, current regulations direct the BIA to apply a "clearly erroneous" standard of review with regard to credibility, thus affording great deference to immigration judges' credibility determinations.[186] Thus, because of the discretion involved in the adjudicator's role and the deference accorded to it, incorrect interpretations of the Real ID Act's credibility provisions may harm legitimate victims of persecution. It is therefore crucial to examine the particular factors that influence credibility determinations so as to assist judges in acting justly within their broad discretion.

1. Factors Impacting Credibility

a. Psychological Effects of Trauma

An asylum applicant may have one or more psychological disorders that affect credibility. Post-Traumatic Stress Disorder (PTSD) affects

---

[183] *See* Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 1994) (holding that credibility findings based on demeanor deserve more deference that those based on testimonial analysis); Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) (holding that an immigration judge is in the unique position to observe the alien's tone and demeanor, to explore inconsistencies in the testimony, and to determine whether the testimony has "the ring of truth"); Kokkinis v. Dist. Dir., 429 F.2d 938, 941–42 (2d Cir. 1970) (holding that "great weight" should be afforded to the findings of the special inquiry officer who conducted the deportation hearing, because, inter alia, he had the opportunity to observe the respondent's demeanor); Matter of V-T-S-, 21 I&N Dec. 792, 796 (B.I.A. 1997) (recognizing the immigration judge's "advantage of observing the alien as he testifies").

[184] *See* Salaam v. INS, 229 F.3d 1234 (9th Cir. 2000) (holding that findings of implausibility cannot be based upon unsupported assumptions); Matter of B-, 21 I&N Dec. 66, 71 (B.I.A. 1995) (holding that consistent, sufficiently detailed, and unembellished testimony may provide a plausible and coherent account of the basis for the fear of persecution, without corroborating evidence); Matter of Dass, 20 I&N Dec. 120, 124 (B.I.A. 1989) (holding that the court is to determine whether the alien's testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his alleged fear); *see also* UNHCR Handbook, *supra* note **Error! Bookmark not defined.**, at ¶ 204 (stating that "[t]he applicant's statements must be coherent and plausible, and must not run counter to generally known facts").

[185] *See In re* A-S-, 21 I&N Dec. 1106, 1109 (B.I.A. 1998) (refusing to overturn an immigration judge's adverse credibility determination based on inconsistencies and omissions, because the record revealed that "(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions had not been supplied by the alien").

[186] 8 C.F.R. § 1003.1(d)(3)(i) (2005).

survivors of or witnesses to severely traumatic events, such as rape, murder of loved ones, and physical or psychological torture.[187] Sufferers of PTSD and other trauma-related disorders may have one or more of the following symptoms: ºat affect when relaying traumatic events, inability to remember dates or sequences of events correctly, dissociation, and avoidance.[188] All of these symptoms affect the way an adjudicator perceives the veracity of an applicant's statements. An applicant with a ºat affect rather than an emotional display while recounting her rape may appear incredible. An applicant who cannot recall the precise date on which he witnessed the massacre of his family may cause an adjudicator to doubt his credibility. Similarly, applicants who respond vaguely to direct questions about crucial elements of their claims may be dissociating or avoiding, but may appear to an adjudicator to be lying.[189] Therefore, those individuals appearing most incredible will, in fact, often have suffered the most serious trauma.

b. Cultural Differences

Cultural differences may also have a strong impact on an adjudicator's perception of an applicant's credibility.[190] Meeting the eyes of an authority figure and addressing him or her in a confident tone of voice may be an inconceivable notion to an applicant from a culture in which downcast eyes and soft speech are required to show respect.[191] In the United States and other Western cultures, however, failing to meet an adjudicator's eyes and speak firmly may to some observers indicate

---

[187] American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 424–25 (4th ed. 1994).

[188] *Id.*; *see also* Memorandum from Jeff Weiss, Acting Dir., Office of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators (Dec. 10, 1998), at 14, *available at* http://uscis.gov/graphics/lawsregs/handbook/10a_ChldrnGdlns.pdf (stating that "[q]uestionable demeanor can be the product of culture or trauma rather than a lack of credibility. . . . Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, long pauses before answering, as well as avoidance or disassociation") [hereinafter Children's Guidelines].

[189] *See* James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of "Well-Founded Fear?,"* 26 Mich. J. Int'l L. 505, 519–20 (2005) ("Individuals suffering from PTSD may be among the most fearful asylum applicants, yet they are acutely disadvantaged in their ability to communicate that trepidation to decisionmakers."); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 Geo. Immigr. L.J. 367, 396 (2003) ("The psychological effects of traumatic events can hamper a refugee's ability to communicate why he or she is afraid to return home, and make it difficult for some of the most vulnerable refugees to establish claims that would give them legal protection."); *Justice Delayed Is Justice Denied*, *supra* note **Error! Bookmark not defined.**, at 221 (explaining that the effects of PTSD "can lead to an adverse assessment of the asylum seeker's credibility on the witness stand").

[190] *See* Beate Anna Ort, *International and U.S. Obligations Toward Stowaway Asylum Seekers*, 140 U. Pa. L. Rev. 285, 309–10 (1991) (explaining how cultural differences with regard to conceptions of family, geography, time, country, common sense, and "verbal behavioral cues" affect credibility determinations in asylum cases); *see also* Kagan, *supra* note **Error! Bookmark not defined.**, at 379 ("The nonverbal cues that people tend to rely on to decide if another person is telling the truth vary widely from culture to culture."); Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 14 (providing various examples of cultural differences that asylum officers will likely encounter).

[191] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 14 (noting that downcast eyes are a signal of respect to authority in certain Asian cultures).

evasiveness and deceit.[192] Similarly, a rape victim from a culture in which the victim is often blamed, ostracized or even severely punished for being raped may fail to reveal that she has been raped until significant legal and psychological counseling have taken place. Her failure to do so from the time she first encounters a U.S. immigration official, however, may indicate to an adjudicator that she fabricated the rape, and thus harm her asylum claim.

c. Circumstances of Flight

The circumstances of an asylum applicant's flight from his or her own country may also impact credibility. Upon entering the United States, most asylum applicants encounter uniformed, armed, sometimes curt government officials. Many applicants' experiences with government officials have not been pleasant. Government officials may have been responsible for years of oppression, persecution and killings in applicants' home countries. Some asylum seekers may have had to lie to government officials in the past to save their lives or avoid torture, or to prevent the persecution of friends, family, or colleagues. The impact of such experiences remains upon arrival at American gates. Certain asylum applicants may therefore lie or avoid revealing important details to government officials, especially those whom they meet upon first entering the country.[193] They may also have the same initial mistrust of their lawyers, which may harm their ability to have effective representation. Both issues may harm their asylum claims.

2. Current Law on Credibility

a. Deference to Adjudicator: "Clearly Erroneous" Standard of Review

Immigration judges' credibility determinations receive a great deal of deference from reviewing courts.[194] The Immigration and Nationality Act authorizes Courts of Appeals to reject an immigration judge's credibility determination only if a "reasonable adjudicator would be compelled" to do so.[195] Similarly, the Board of Immigration Appeals may only overturn an immigration judge's credibility determination if the decision is

---

[192] *See, e.g.*, Balasubramanrim v. INS, 143 F.3d 157, 161 (3d Cir. 1998).

[193] *See* Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 7 ("Officers must be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences which give him or her good reason to distrust persons in authority. . . . A fear of encounters with government officials in countries of origin may carry over to countries of reception.").

[194] Credibility determinations based on demeanor receive particular deference because of the immigration judge's opportunity to observe the applicant's testimony. *See* Singh-Kaur v. INS, 183 F.3d 1147, 1149–51 (9th Cir. 1999) (affording great deference to credibility determination based on observation of demeanor); Kokkinis v. District Director, 429 F.2d 938, 941–42 (2d Cir. 1970) (holding that "great weight" should be afforded to the adjudicator who conducted the hearing because he had the opportunity to observe the applicant's demeanor); Matter of V-T-S-, 21 I&N Dec. 792, 796 (B.I.A. 1997) (recognizing that an immigration judge has the advantage of observing an applicant as he or she testifies).

[195] 8 U.S.C. § 1252(b)(4)(B) (2000).

"clearly erroneous."[196] In practice, so long as an adverse credibility determination is based on more than bare speculation,[197] the Courts of Appeals and the Board will generally uphold it.[198]

b. Inconsistencies and Omissions

An adverse credibility determination based on inconsistencies and omissions will pass the "clearly erroneous" test if based on evidence in the record. In *Matter of A-S-*,[199] the Board of Immigration Appeals set out the criteria for determining whether an adverse credibility determination based on inconsistencies and omissions is supported by the record. First, the discrepancies and omissions must actually be present in the record.[200] Second, the discrepancies and omissions must provide specific and cogent reasons to conclude that the applicant provided incredible testimony.[201] Finally, the applicant must have had an opportunity to explain the discrepancies and omissions and must have failed to do so.[202] Most Courts of Appeals have held that discrepancies and omissions that do not go to the heart of the claim are not an appropriate basis for an adverse credibility determination.[203] In *Uwase v. Ashcroft*,[204] for example, the immigration judge had denied asylum because the applicant, a survivor of the 1994 Rwandan genocide, provided inconsistent testimony regarding her means of supporting herself in the United States. The applicant's student visa paperwork indicated that financial support for her stay in the United States would come from Rwanda; her testimony in

---

[196] 8 C.F.R. § 1003.1(d)(3)(i) (2005).

[197] *See, e.g.*, Dia v. Ashcroft, 353 F.3d 228, 249 (3d Cir. 2003) (en banc) (overturning an immigration judge's credibility determination based on "speculation and conjecture"); Unase v. Ashcroft, 349 F.3d 1039, 1042 (7th Cir. 2003) (finding that an immigration judge's adverse credibility determination was unsupported by the record when the immigration judge relied on speculation and tenuous logic).

[198] *See* Kalitani v. Ashcroft, 340 F.3d 1, 4–5 (1st Cir. 2003) (upholding an immigration judge's credibility determination based upon discrepancies in the applicant's testimony regarding who procured the documents allowing her to enter the United States, inconsistencies regarding the applicant's identity, and perceived implausibility in the applicant's account); Wu Biao Chen v. INS, 344 F.3d 272, 274–75 (2d Cir. 2003) (upholding an adverse credibility determination based on the applicant's hesitant and unconvincing testimony as well as several inconsistencies in his testimony); Krouchevski v. Ashcroft, 344 F.3d 670, 673 (7th Cir. 2003) (finding that an applicant's assertions that the inconsistencies present in his testimony were the result of translation errors and misunderstandings were insufficient to overcome the "clearly erroneous" standard of review); Matter of R-S-H-, 23 I&N Dec. 629, 637 (B.I.A. 2003) (upholding an immigration judge's adverse credibility finding based on the "clearly erroneous" standard).

[199] 21 I&N Dec. 1106, 1110 (B.I.A. 1998) (noting that an individual fleeing persecution may have difficulty "remembering exact dates when testifying before an immigration judge").

[200] *Id.* at 1109.

[201] *Id.*

[202] *Id.*

[203] *See* Kondakova v. Ashcroft, 383 F.3d 792, 796 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 894 (2005) ("While minor inconsistencies and omissions will not support an adverse credibility determination, inconsistencies or omissions that relate to the basis of persecution are not minor but are at the heart of the asylum claim."); Singh v. INS, 365 F.3d 1164, 1171 (9th Cir. 2003) ("Minor inconsistencies in the record such as discrepancies in dates which reveal nothing about an asylum applicant's fear for his safety are not an adequate basis for an adverse credibility finding.") (quoting Vilorio-Lopez v. INS, 852 F.2d 1137, 1142 (9th Cir. 1988)); *see also* Leia v. Ashcroft, 393 F.3d 427, 436 (3d Cir. 2005); Sylla v. INS, 388 F.3d 924, 926 (6th Cir. 2004); Capric v. Ashcroft, 355 F.3d 1075 (7th Cir. 2004); Unase v. Ashcroft, 349 F.3d 1039 (7th Cir. 2003).

court, however, was that her father's friend in the United States was supporting her.[205] The Seventh Circuit held that, because the testimony regarding the facts of her asylum claim was credible, and that the testimony regarding her means of support did not go to the heart of her claim, the Board of Immigration Appeals was incorrect to sustain the immigration judge's negative credibility determination.[206] Requiring that inconsistencies go to the claim's core is an important safeguard against unjust denials of asylum.

c. Airport Statements

Current regulations permit asylum adjudicators to take into account "any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."[207] These include statements that U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers elicit from asylum applicants whom they apprehend attempting to enter the United States without proper documentation. As discussed in Section b, *supra*, such statements may contain discrepancies and omissions that become evident after an asylum applicant has submitted an asylum application and provided oral testimony. Courts have recognized that, due to trauma and cultural differences, statements taken upon an asylum applicant's entry into the United States may not be the most reliable indicators of credibility. In *Balasubramanrim v. INS*,[208] the Third Circuit held that the immigration judge and the Board of Immigration Appeals placed undue weight on a statement provided by a Sri Lankan asylum applicant to immigration officers upon his arrival at JFK Airport in New York.[209] The interview took place without a translator and the only record of the interview consisted of twenty-five hand-written questions and answers.[210] During the interview, Mr. Balasubramanrim stated that he had been arrested by a Sri Lankan rebel group and detained for ten days.[211] He did not mention any other arrest or mistreatment. In his asylum application, he listed eight incidents of arrest, several of which entailed physical violence and torture.[212] The immigration judge and Board denied Balasubramanrim's case, finding that the discrepancies between his airport statement and his subsequent written and oral testimony rendered him incredible. The Third Circuit reversed, holding that discrepancies in airport statements alone are an inappropriate basis for an adverse credibility determination.[213] As such, current case law on credibility suggests that a judge's application denial, if based on inconsistencies and discrepancies "going to the heart of the claim," will likely not be reversed as "clearly

[205] *Id.* at 1042–43.
[206] *Id.*
[207] 8 C.F.R. § 1240.7(a) (2005).
[208] 143 F.3d 157 (3d Cir. 1998).
[209] *Id.* at 159–60.
[210] *Id.* at 162.
[211] *Id.*
[212] *Id.* at 159.
[213] *Id.* at 164.

erroneous" unless those inconsistencies arose from an airport statement.

3. *The Real ID Act's Impact on Credibility Determinations*

The Real ID Act codifies the long-established prescription that adjudicators weigh the totality of the circumstances when making credibility determinations.[214] Yet, the Real ID Act departs from established case law regarding whether adjudicators should take into account minor inconsistencies and omissions by stating that immigration judges may base a credibility determination on, *inter alia*, inconsistencies, inaccuracies, or falsehoods "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim . . . ."[215] As discussed in Section 2.b, *supra*, most circuits have held differently, as do as the INS Guidelines, which state that "[m]inor inconsistencies, misrepresentations, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim."[216] This provision of the Real ID Act, however, is not a license to base a negative credibility finding in whole or in any significant part upon inconsistencies regarding immaterial facts. It merely permits immaterial inconsistencies to be considered as part of the totality of the circumstances.[217] This is clear because the conference committee expressly rejected language in the House of Representatives version of the bill that would have allowed adjudicators to dispense with a reasoned totality of the circumstances analysis and make negative credibility determinations based on "*any such factor*, including . . . any inaccuracies or falsehoods . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."[218] Therefore, the Real ID Act specifies that immaterial discrepancies should be factored in, but conclusively denies them controlling weight. Because the Real ID Act is otherwise silent on the weight of such factors, adjudicators should look to established case law, such as *Balasubramanrim* and *In re A-S-*, as well as the UNHCR Handbook, in deciding how much weight to give to discrepancies that do not go to the heart of the claim.[219] That being said, legislators should seriously consider repealing this portion of the Real ID Act. Permitting adjudicators to take into account minor inconsistencies that do not go to the heart of the claim will not prevent terrorism any better than the pre-Real ID system did. This is in part because the asylum system simply did not need strengthening.[220]

---

[214] Real ID Act, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(iii), 119 Stat. 231, 302–23 (2005).

[215] *Id.*

[216] *INS Supplementary Refugee/Asylum Adjudication Guidelines*, *reprinted in* 67 Interpreter Releases, 101–03 (Jan. 22, 1990).

[217] *See* § 101(a)(3)(B)(iii), 119 Stat. at 303–04 (listing the numerous factors that adjudicators may consider while employing a "totality of the circumstances" analysis).

[218] H.R. 418, 109th Cong. § 101(a)(3)(B)(iii) (2005) (emphasis added).

[219] *See* 151 Cong. Rec. S4816, 4838 (daily ed. May 10, 2005) (statement of Sen. Brownback (R-Kan.)) (clarifying that in applying the Real ID Act, "[i]t would not be reasonable to find a lack of credibility based on inconsistencies, inaccuracies or falsehoods that do not go to the heart of the asylum claim without other evidence that the asylum applicant is attempting to deceive the trier of fact").

[220] *See supra* notes **Error! Bookmark not defined.–Error! Bookmark not defined.**

One might argue that the absence of signs of successful abuse does not mean the system is perfect. Yet, even if the asylum system could be strengthened, the focus on minor inconsistencies would be an ineffective means of doing so; a terrorist bent on gaining access to lawful immigration status will likely not make mistakes in his or her asylum proceedings, but rather will be well-rehearsed and thoroughly coached.[221] The focus on minor inconsistencies very well may, however, prevent bona fide asylum seekers from accessing the protection to which they are entitled by law and treaty. A bona fide asylum seeker, particularly one who has survived torture or other trauma, often will encounter or trigger the credibility issues discussed above. As a result, the provision will hurt bona fide asylum seekers without helping national security.

V. Implications for Special Cases Under the Real ID Act: Gender Asylum and Children's Asylum Claims

The carelessness of the drafters of the Real ID Act is most evident with respect to gender-based asylum claims and the asylum claims of children. Women and especially children tend to be more at risk for persecution than adult males.[222] Moreover, given that U.S. law enforcement officials focused their immediate post–September 11 investigative measures largely on males between the ages of eighteen and thirty-five, it is clear that the government recognizes that women and children are also the least likely to present a security risk to the United States.[223] Yet, the drafters of the Real ID Act failed to distinguish gender-based and children's asylum claims from general asylum claims. Although a full analysis of gender-based and children's claims under the Real ID Act is beyond the scope of this Article, it is important to discuss briefly the potential impact that the Real ID Act may have on those claims.

A. Gender Claims

Gender claims generally involve women fleeing persecution stemming

---

and accompanying text (discussing the failure of numerous terrorists to gain entry through the asylum process even under the more lax system in place before the pre-1996 reforms). *See also* 151 Cong. Rec. H453, 468 (daily ed. Feb. 9, 2005) (statement of Rep. Zoe Lofgren (D-Cal.)) ("[W]e have heard references to those who came prior to the first World Trade Center bombing. We made changes in the law subsequent to that. That fix has already been done. We do not need to do what is before us today."); 151 Cong. Rec. S4816, 4838 (daily ed. May 10, 2005) (statement of Sen. Brownback (R-Kan.)) ("[The Real ID Act's] language was added based on a claim that our asylum system can be used by terrorists to enter the country. This is not the case.").

[221] *See generally* 9/11 and Terrorist Travel, *supra* note **Error! Bookmark not defined.** (detailing the modus operandi of foreign terrorists who have used subterfuge to enter and remain in the United States).

[222] *See* Jonathan Todres, *Women's Rights and Children's Rights: A Partnership with Benefits for Both*, 10 Cardozo Women's L.J. 603, 605 (2004) (noting that "political obstacles, such as not having the right to vote, and developmental issues, such as the more limited verbal skills of younger children, make children more susceptible to exploitation"). Professor Todres also identifies a number of practices to which women are vulnerable due to their gender, such as "domestic violence, incest, rape, trafficking and forced prostitution, child marriages, dowry-related violence, and female genital mutilation." *Id.* at 606.[223] *See* Akram & Karmely, *supra* note **Error! Bookmark not defined.**, at 629–32 (discussing several anti-terrorism measures that targeted almost exclusively Muslim and Arab males ages eighteen and older).

from cultural, religious, and social subjugation and subordination. Examples include women who refuse to conform to their countries' strict interpretation of Islamic law;[224] women who have been subjected to or are in danger of being subjected to female genital mutilation;[225] and women fleeing life-threatening domestic violence.[226] Gender claims have had mixed results in the courts; the law, particularly with regard to claims based on domestic violence, is in a state of transition.[227]
The most challenging issue for gender-based asylum claims is proving that the motivation of the persecutor was one of the five grounds for asylum.[228] This is particularly true for claims based on domestic violence, in which adjudicators often find that the persecution occurred at the hands of a single private actor on account of motivations not supported by the asylum statute.[229] Thus, one might assume that the Real ID Act's centrality provision would affect gender claims most. As discussed above, however, the centrality provision, although its language derives from the proposed gender regulations, does not much alter the extent to which an asylum applicant must prove the motivation of his or her persecutor. Therefore, the Real ID Act's centrality provision appears neither to help nor to harm gender-based asylum applicants.

---

[224] *See, e.g.*, Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993). Parastoo Fatin ºed Iran and sought asylum because of her beliefs in equal rights for women and her refusal to wear a veil as prescribed by Iranian law. Because of her views, Ms. Fatin faced a jail sentence or public whipping or stoning. *Id.* at 1236.

[225] *See, e.g.*, Matter of Kasinga, 21 I&N Dec. 357 (B.I.A. 1996). Fauziya Kasinga ºed from Togo to the United States to avoid being forced to submit to her tribe's ritual of female genital mutilation. *Id*. at 358. The BIA overturned an immigration judge's denial of asylum, finding that Ms. Kasinga belonged to a particular social group and qualified for asylum, even if the persecutors lacked malignant intent. *Id*. at 365.

[226] *See, e.g.*, Matter of R-A-, 22 I&N Dec. 906 (B.I.A. 1999). The applicant in *Matter of R-A-* was a Guatemalan woman named Rodi Alvarado, whose husband subjected her to severe abuse between 1984 and 1994. Her husband raped and sodomized her, "broke windows and mirrors with her head, dislocated her jaw," pistol-whipped her, terrorized her with a machete, and kicked her violently in the spine while she was pregnant. Ms. Alvarado repeatedly attempted to flee her husband and to obtain protection, to no avail. The authorities "refused to intervene because it was a 'domestic matter.'" Ms. Alvarado's husband threatened to "cut off her arms and legs, and . . . leave her in a wheelchair, if she ever tried to leave him." *Id.* at 908–10. *See also* Center for Gender and Refugee Studies, *Rodi Alvarado's Story*, http://sierra.uchastings.edu/cgrs/campaigns/update.php (last visited Nov. 19, 2005).

[227] *See generally* Leslye E. Orloff & Janice v. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 Am. U.J. Gender Soc. Pol'y & L. 95 (2001); Elizabeth M. Schneider, Battered Women and Feminist Lawmaking (2000). *See also, e.g.*, Matter of R-A-, 22 I&N Dec. at 918 (reversing the immigration judge's grant of asylum and holding that the social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination" was not "recognized and understood to be a societal faction or otherwise a recognizable segment of the population"). As discussed in Part IV.A, *supra*, Attorney General Janet Reno issued proposed regulations recognizing gender-related persecution claims in 2000, but they have never become final. 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000).

[228] *See* Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stan. L. & Pol'y Rev. 417, 422–25 (2005) (discussing the problems women face in convincing courts that their persecution was based on a protected ground and, in particular, membership in a particular social group).

[229] *See* Laura S. Adams, *Fleeing the Family: A Domestic Violence Victim's Particular Social Group*, 49 Loy. L. Rev. 287, 287 (2003) ("[O]ne of the primary arguments against granting refugee status to domestic violence victims is that domestic violence is private in nature and therefore is not the type of politically motivated harm entitled to international protection under refugee law.").

The provision regarding credibility, however, may prejudice gender claims more than it harms non-gender claims. As discussed in Part IV.C, *supra*, cultural issues, past experiences with government officials, and trauma-related psychological ailments have a tremendous impact on credibility determinations. This impact is especially significant in many gender claims, in which cultural stigmas associated with disclosing incidents of rape, female genital mutilation, and domestic violence prevent many bona fide asylum applicants from being forthright about the persecution they suffered.[230] Usually, victims of gender-based persecution must first receive psychological counseling and establish trusting relationships with their legal counsel before revealing their experiences fully.[231] For many victims, however, particularly those in immigration detention, neither psychological nor legal counsel is available. Thus, the Real ID's credibility provisions may result in the inappropriate denial of gender-based asylum claims.

The case of a woman from Albania provides an example of a victim of gender-based persecution for whom cultural differences had devastating consequences.[232] The twenty-nine-year-old woman, whose name has been kept confidential per her request, was married at the age of sixteen by arrangement of her family. She lived with her husband's family in the mountains of northern Albania, kept house, and tended livestock. When the Albanian communist regime ended, her husband took a job with the new authoritarian government. Eventually, southern Albanians rebelled against that regime. The woman's husband, a government worker, fled into the mountains after several groups of armed supporters of the regime tried forcibly to recruit him to fight against the southern rebels. Shortly after he disappeared, a group of armed, masked men came to the house, separated the woman from the rest of the family, and gang-raped her. Four days later, the woman fled to the United States with a false passport. U.S. officials took her into custody and placed her in a detention center. She received a credible fear interview with a female asylum officer, but the interpreter was an Albanian male and she was too embarrassed to describe the rape in front of him. The asylum officer found that the woman's fear was not credible, and the woman appealed the decision to an immigration judge. During the hearing, the woman revealed that she had been raped. The immigration judge did not believe her, because she had not mentioned the rape in her credible fear interview. The woman was deported to Albania but could not return to her village and family because of the perceived shame and loss of honor resulting from the rape. Fortunately, a reporter from the *New York Times* gave her case media attention, and her lawyers located a witness who could corroborate a portion of her claim. In a highly unusual turn of

---

[230] *See* Lawyers Committee for Human Rights, Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers 6 (2002).

[231] *Id.* at 3–4.

[232] Celia W. Dugger, *In New Deportation Process, No Time, or Room, for Error*, N.Y. Times, Sept. 20, 1997, at A1; Celia W. Dugger, *Albanian Seeking Asylum Is Allowed to Return to U.S.*, N.Y. Times, Jan. 14, 1998 at B5; *see also* Human Rights First, formerly Lawyers Committee for Human Rights, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (Oct. 2000), *available at* http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm (profiling the case of the Albanian woman).

events, the U.S. government had her returned to the United States for a full asylum hearing.[233]

As this example shows, adjudicators of gender-based cases must be vigilant in deciding how much weight, if any, to give minor discrepancies and omissions, especially when those discrepancies and omissions are based on airport interviews. The risk, then, is that abuse of the Real ID Act's more stringent credibility provision will greatly increase the number of victims of gender-based persecution who, like the woman from Albania, do not receive the refugee protection they deserve. The odds are that diligent reporters will not search for and fight for the return of those who are wrongfully deported due to officers' unreasonable expectations of immediate and total candor.

B. Children's Claims

Child asylum applicants stand to lose the most from the passage of the Real ID Act if adjudicators do not interpret it appropriately. The Real ID's Act's corroboration requirements and credibility criteria, if not applied more liberally to child asylum applicants, could result in many bona fide and eligible child asylum applicants having their claims denied. Such a result would be contrary to the United States' obligations under the 1967 Protocol[234] and the International Covenant on Civil and Political Rights.[235] It would also be far astray of the ideals espoused in the Convention on the Rights of the Child.[236] Fortunately, the INS issued "Guidelines for Children's Asylum Claims"[237] that provide comprehensive guidance on adjudicating children's claims. These guidelines can assist adjudicators in reading the Real ID Act consistently with the aforementioned international obligations. If adjudicators adhere to those guidelines faithfully, impact on children's claims should be minimal.

1. The INS Guidelines for Children's Asylum Claims

The Children's Guidelines provide guidance to asylum officers on procedural matters, including interviewing techniques, factors affecting

---

[233] Dugger, *Albanian Seeking Asylum Is Allowed to Return to U.S.*, *supra* note **Error! Bookmark not defined.**.

[234] *See supra* note **Error! Bookmark not defined.** and accompanying text.

[235] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976). Parties to the Covenant agree that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." *Id.* art. 24(1).

[236] G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Dec. 5, 1989) (entered into force Sept. 2, 1990). The Convention on the Rights of the Child obligates parties to "take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance." *Id.* art. 22(1). However, "because the U.S. has signed but not ratified the CRC, its provisions . . . provide guidance only and are not binding on adjudicators. Having signed the CRC, however, the United States is obligated under international treaty law to refrain from acts which would defeat the object and purpose of the Convention." Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 2.

[237] Children's Guidelines, *supra* note **Error! Bookmark not defined.**.

credibility,[238] and cross-cultural skills. The Children's Guidelines also address in great detail the legal analysis of children's asylum claims, including determining whether harm rises to the level of persecution, establishing nexus, and requiring corroborating evidence. The Children's Guidelines emphasize that asylum officers must have special consideration for child asylum applicants in how they conduct the asylum interview,[239] what expectations to have regarding testimony and corroboration, and how they evaluate the asylum claim.[240] In developing this guidance, the INS relied on several international documents, including the Universal Declaration of Human Rights,[241] United Nations Executive Committee of the Office of the United Nations High Commissioner for Refugees conclusions,[242] UNHCR policies on refugee children,[243] and Canadian children's guidelines issued in 1996.[244] The INS also consulted with UNHCR, U.S. nongovernmental organizations, and asylum and refugee experts while formulating the Children's Guidelines.[245] Therefore, they should be entitled to substantial weight in asylum proceedings.[246]

---

[238] *See id.* at 9 (cautioning asylum officers to be vigilant for nonverbal indications of confusion and discomfort, such as "a puzzled look, knitted eyebrows, downcast eyes, long pauses and irrelevant responses").

[239] *See id.* at 7–9 (providing detailed suggestions for establishing a child-friendly atmosphere and building rapport with a child asylum applicant).

[240] *See id.* at 14–27 (outlining the most appropriate factors and circumstances to consider and ask about).

[241] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 2 (citing Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948)).

[242] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 3 (citing UNHCR, Executive Committee of the UNHCR Programme, *Conclusions on the International Protection of Refugees*, No. 47 (XXXVIII) on Refugee Children (1987) (condemning the exposure of refugee children to physical violence and human rights violations and calling for international action to assist the child victims); UNHCR, Executive Committee of the UNHCR Programme, *Conclusions on the International Protection of Refugees*, No. 59 (XL) on Refugee Children (1989) (providing examples of how the needs of refugee children could be assessed, monitored, and met); and UNHCR, Executive Committee of the UNHCR Programme, *Conclusions on the International Protection of Refugees*, No. 84 (XLVIII) on Refugee Children and Adolescents (1997) ("reaffirming the 'best interests of the child' principle")).

[243] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 3–4 (citing UNHCR, Sub-Comm. of the Whole on Int'l Prot., *Policy on Refugee Children*, U.N. Doc. EC/SCP/82 (Aug. 6, 1993) (noting that refugee children have different needs and potentials than adults due to age-related developmental differences); UNHCR, Refugee Children: Guidelines on Protection and Care (1994) (incorporating international norms relevant to the protection and care of refugee children); and UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (Feb. 1997) (emphasizing the unique needs of unaccompanied refugee children)).

[244] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 4 (citing Canadian Immigration and Refugee Board, Child Refugee Claimants: Procedural and Evidentiary Issues (1996)).

[245] Children's Guidelines, *supra* note **Error! Bookmark not defined.**.

[246] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (stating that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

2. *Centrality, Corroboration, and Credibility Under the Children's Guidelines*

The Children's Guidelines provide concrete guidance to judges on how to determine whether the persecutor of a child applicant was motivated by a protected ground. The Guidelines point out that "a child may express fear or have experienced harm without understanding the persecutor's intent."[247] With regard to mixed motive cases, the Guidelines caution that "the child may be unable to identify all relevant motives, but a nexus can still be found if the objective circumstances support the child's claim that the persecutor targeted the child based on one of the protected grounds."[248] This comports with the Real ID Act's mandate that an applicant prove that a protected ground was at least one central reason for the persecution.[249]

The Children's Guidelines are also essential to the proper evaluation of a child's corroboration requirements under the Real ID Act. As discussed above, the drafters of the Real ID Act failed to impose an explicit reasonableness requirement on adjudicators with regard to when and how much corroborative evidence to require from asylum applicants.[250] Nonetheless, adjudicators should follow the Children's Guidelines suggestions on how to determine reasonably whether a child asylum applicant must corroborate his or her testimony. First, the Guidelines note that children "may lack the necessary documents to establish their race, nationality, or religion, and may have more limited access to these documents than a similarly situated adult. . . ."[251] Second, the Guidelines remind adjudicators that credible, consistent, and sufficiently detailed testimony may obviate the need for corroboration, and that in determining whether the child's testimony is sufficient to meet this standard, adjudicators should take into account the child's age, maturity level, and emotional state.[252] Third, the Guidelines instruct adjudicators to take into account whether the child has legal counsel and whether the child has been in contact with his or her family in determining whether to request corroborative evidence.[253]

Finally, the Guidelines provide essential guidance on determining whether a child asylum applicant is credible. The Guidelines advise that numerous indicators of unreliability may actually be the result of cultural differences, distrust of authority figures, and trauma.[254] If asylum officers encounter vagueness, inconsistencies, inappropriate laughter, or hesitation, they must not assume unreliability but rather "remember the possible developmental or cultural reasons" that may have caused it.[255] The Guidelines also warn that children are more susceptible to coercion by adults to tell a fabricated story, and advise adjudicators to explore the claim in depth, should a child begin to tell a seemingly fabricated

---

[247] *Id.* at 21.
[248] *Id.*
[249] *See supra* Part IV.A (analyzing the centrality provision of the Real ID Act).
[250] *See supra* Part IV.B (analyzing the corroboration requirements of the Real ID Act).
[251] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 22.
[252] *Id.* at 26.
[253] *Id.* at 27.
[254] *See supra* Part IV.C.1 (discussing factors that may affect an adjudicator's perception of an asylum applicant's credibility).
[255] Children's Guidelines, *supra* note **Error! Bookmark not defined.**, at 14.

story.[256] These considerations continue to apply under the Real ID Act, which, as discussed in Part IV.C.3, *supra*, expressly adopted a totality of the circumstances test for determining credibility. Therefore, in several areas, the Children's Guidelines offer pertinent and considered advice on the adjudication of children's asylum claims.

VI. Conclusion

This Article has examined the recently enacted Real ID Act and has proposed interpretations of its three major asylum provisions. The analysis reveals that the Real ID Act is a codification—albeit a vague and poorly drafted one—of existing case law, regulations, and agency guidance. Despite the assertions of the Real ID Act's supporters that the legislation is designed to repair a broken asylum system, the Real ID Act makes very few substantive changes to asylum law. Moreover, the changes that it does make will serve only to weaken the asylum system. Applicants for asylum have always had the burden of proof that the Real ID Act reiterates: to prove that the persecution they suffered was on account of one of the five grounds for asylum; to provide corroborating evidence when it would be reasonable to expect it; and to establish credibility. The Real ID Act creates potentially dangerous ambiguity in these crucial areas of asylum law. That it does so in the name of protecting the United States from terrorists demonstrates a profound ignorance of the current asylum system and the protections against fraud and abuse already built into it.

Overall, the Real ID Act creates more problems and confusion than it purports to alleviate. Even more unfortunate is that it does so against a background of misconceptions about the asylum system and of misplaced wariness about asylum seekers. Fortunately, existing case law, international and agency guidelines, and simple common sense still have a vital role in asylum adjudications. Asylum adjudicators, as executors of the asylum laws and the treaties that generated them, have a duty to rely on these guiding principles in applying the Real ID Act to the claims that come before them. If they fulfill that duty, the damage that the Real ID Act does to the asylum system need not be extensive.

---

[256] *Id.*