Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms

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IRRECONCILABLE DIFFERENCES?
DIVORCING REFUGEE PROTECTIONS
FROM HUMAN RIGHTS NORMS

Karen Musalo*

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INTRODUCTION

On January 22, 1992, the U.S. Supreme Court decided INS v. Zacarias. The decision was one of only three cases in which the high court has directly interpreted and applied the substantive provisions of the 1980 Refugee Act.

INS v. Zacarias involved the political asylum and withholding of deportation claim of a young Guatemalan male who fled his country out of fear that antigovernment guerrillas who had tried to recruit him...
would either force him to join or would retaliate against him for his continued refusal. The immigration judge denied relief and was upheld by the Board of Immigration Appeals. The Ninth Circuit Court of Appeals granted political asylum to the applicant, and the case went to the U.S. Supreme Court on a petition for certiorari brought by the Immigration and Naturalization Service.

The U.S. Supreme Court, in a six to three decision, held that Jairo Elias Zacarias was not a refugee within the meaning of the 1980 Refugee Act because he had failed to prove that any harm he would suffer was "on account of political opinion" within the meaning of the 1980 Refugee Act. The Supreme Court's decision was based upon an interpretation of the phrase "on account of" which requires proof of the persecutor's motivation or intent.

The Zacarias decision, which is troubling for many reasons, is consistent with Supreme Court precedent in other areas, where protection has been narrowed by shifting analysis away from the effect or impact on the claimant or victim and placing it on the intent of the defendant or persecutor. Pursuant to this analytical model, if intent cannot be demonstrated, relief is unavailable regardless of the egregiousness of the harm. The Supreme Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith represents this trend in the jurisprudence of the free exercise of religion.

The Supreme Court's requirement of intent is problematic for an array of reasons, not the least of which is that it is supported neither by the plain language nor by the legislative history of the 1980 Refugee Act. Furthermore, it is contrary to guiding international authority on the issue. In addition, the focus on the intent of the persecutor makes little sense from the policy perspective. The overarching objective of the domestic and international refugee regime is protection of potential victims of persecution, not punishment of persecutors. In such a context,

5. Employment Div., Dep't of Hum. Resources of Or. v. Smith, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990). In Smith, the Supreme Court held that a statute which affects an individual's religious practice is not prohibited by the First Amendment's Free Exercise Clause, as long as the statute is neutral and does not embody an intent to interfere with religious practice. Id. The Smith decision overturned the Court's own prior decision that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (citing Sherbert v. Verner, 374 U.S. 398 (1963)).
the inquiry should be on the effect of persecution on the victim and not on the intent of the persecutor.

The *Zacarias* decision is troubling for another reason: it places an unrealistic evidentiary burden on the applicant, who must divine the motivation of her persecutor and then carry the burden of proof on this issue. This requirement fails to recognize the complexity of a persecutor's motivation, as well as the inherent difficulties of proof in these types of proceedings. The rule in *Zacarias* has had an immediate and visible impact. Its "narrow[,] grudging" construction has limited protection to asylum seekers and will continue to shape the contours of refugee jurisprudence in a fashion that makes a mockery of the frequently stated United States commitment to "human rights and humanitarian concerns" underlying the enactment of the 1980 Refugee Act.

The following sections will discuss in greater detail the profound defects of the Court's *Zacarias* decision. Section I will discuss the interpretation of key provisions of the 1980 Refugee Act, and describe the case of Jairo Elias Zacarias. Section II will review the plain language and legislative intent of the Act, including the congressional purpose of conforming to the 1967 Protocol. Section III will consider issues of burden of proof, and will examine the substantive impact which *Zacarias* has had on refugee cases. Section IV will focus on religious persecution as a paradigm of the inadequacy of an intent-based requirement and will examine the adverse impact the *Zacarias* rule has had on asylum cases involving claims of religious persecution. Section IV will also contrast the shrinking U.S. concept of religious freedom in refugee and constitutional law with the more liberal and protective-oriented trend in international law. Section V will provide a survey of the requirement of intent in other relevant areas of law as a comparison and contrast with the rule in *Zacarias*. Section VI suggests an elimination of the intent requirement, and proposes a revised framework for adjudicating claims under the 1980 Refugee Act. Finally, this article will suggest that just as Congress has intervened to reverse the Supreme Court's decision in *Oregon v. Smith* with its passage of the Religious

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7. *See infra* Section III.B, discussing the troubling decisions which are the progeny of *Zacarias*.

8. "The narrow grudging construction of the concept of 'political opinion' that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in *INS v. Cardoza-Fonseca* ...." *INS v. Zacarias*, 112 S. Ct. at 818 (Stevens, J., dissenting).

Freedom Restoration Act, it should act to undo the harm visited upon the 1980 Refugee Act by the Supreme Court in Zacarias.


A. Background


The key provisions of the 1980 Refugee Act mirror those of the 1951 Convention and 1967 Protocol. The Convention and the Protocol define a refugee as a person with "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"13 and urge States to "facilitate the assimilation and naturalization of refugees."14 Article 33(1) of the Convention and Protocol prohibit the expulsion or return of an individual whose life or freedom would be threatened on account of the aforementioned enumerated grounds. The 1980 Refugee Act incorporates these provisions almost verbatim. 8 U.S.C. § 1101(a)(42)(A) defines a refugee as an individual with a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group, and provides for the discretionary grant of asylum to an individual who meets this definition.15 8 U.S.C. § 1253(h)(1) requires the withholding of deportation of an individual who can establish that her life or freedom would be threatened on account of these grounds.16

13. 1951 Convention, supra note 11, art. 1; 1967 Protocol, supra note 10, art. 1.
14. 1951 Convention, supra note 11, art. 34; 1967 Protocol, supra note 10, art. 34.
16. The distinctions between asylum and withholding are outlined in note 3, supra.
By adopting the international definition of refugee, the 1980 Refugee Act constituted a significant departure from prior United States law, which admitted refugees on the basis of geographical and ideological factors. The definition of refugee in the Convention and Protocol, which was incorporated into the 1980 Refugee Act, is neutral and does not contain a preference for individuals of a particular nationality or ideology. When Congress enacted the 1980 Refugee Act it removed the geographical and ideological restrictions that had existed in United States law for nearly three decades.

B. Stevic and Cardoza-Fonseca: The Supreme Court Establishes Burden of Proof

The statute that defines refugee, 8 U.S.C. § 1101(a)(42)(A), and the statute that provides for withholding of deportation, 8 U.S.C. § 1253(h)(1), are parallel in structure. Claims under both statutes may be broken down analytically into three constituent components: (1) type of harm (persecution for recognition as a refugee, threat to life or freedom for withholding); (2) likelihood of harm; and (3) causal connection between the harm and the five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group.

In the early 1980s, the greatest controversy regarding the 1980 Refugee Act centered on the question of the likelihood of harm necessary to establish eligibility for relief. In asylum cases the applicant is required to show past persecution or a "well-founded fear," while in withholding of deportation cases she must show that her life or freedom "would be threatened." The Circuit Courts of Appeal were in conflict as to whether the "well-founded fear" and "would be threatened" standards denoted the same likelihood of harm. This issue brought the 1980 Refugee Act before the Supreme Court twice for interpretation, and the Supreme Court decisions of INS v. Stevic and INS v. Cardoza-Fonseca resolved these questions. In Stevic, the Court interpreted the
statutory language "would be threatened" to require proof by a preponderance of the threat to life or freedom. In Cardoza-Fonseca, the Court ruled that the well-founded fear standard for asylum is lower than that required of withholding applicants and that it could be met by a showing of a one in ten likelihood of suffering persecution.\footnote{22}

In Stevic and Cardoza-Fonseca, the Court engaged in an examination of the statutory language as well as the legislative history and congressional intent underlying the 1980 Refugee Act's passage in interpreting the asylum and withholding statutes. In both decisions, the Court acknowledged Congress' intent to conform United States law to the 1967 Protocol,\footnote{23} and looked to the Protocol's structure and language in interpreting the 1980 Refugee Act.\footnote{24} The Court accepted guidance from scholars who had analyzed the meaning of key terms in the 1967 Protocol\footnote{25} and directed the INS to look also to such appropriate sources.\footnote{26} The Court also recognized the Handbook on Procedures and Criteria for Determining Refugee Status\footnote{27} as a source of "significant guidance in construing the Protocol . . . ."\footnote{28} Overall, the Court's interpretive ap-
proach appeared balanced and took into consideration the relevant international and domestic underpinnings of the 1980 Refugee Act.

C. Controversy Shifts to Meaning of "On Account Of"

The Supreme Court's decisions in Stevic and Cardoza-Fonseca did not put to rest controversy regarding the interpretation and application of the 1980 Refugee Act. Resolution of the question of likelihood of harm simply shifted the debate to the meaning of the statutory language "on account of." At issue was the nature of the causal connection required to establish that the harm was "on account of" the applicant's race, religion, nationality, political opinion, or membership in a particular social group. Also at issue was the question of the amount and type of evidence required to make the showing of a causal connection between the harm and the enumerated ground.

1. Intent versus Effects Analysis

In the context of United States jurisprudence, the question of "on account of" can be seen as essentially a question of intent versus effects analysis. An intent-based analysis of the phrase "on account of" would require a showing that the persecutor was motivated to harm the victim because of the victim's status or beliefs. An effects-based analysis would allow the victim to prevail upon a showing that he or she suffered because of his or her status or beliefs, whether or not he or she could prove the persecutor's motivation. The Board of Immigration Appeals (BIA),\(^2\) whose published decisions are precedent for the Immigration and Naturalization Service and immigration judges, appeared to adopt an intent-based analysis almost from the outset.

Campos-Guardado v. INS\(^3\) provides a graphic example of the Board's approach. The applicant in Campos-Guardado was a Salvadoran woman who had gone to visit her uncle, the chairman of a local agricultural cooperative. During her visit, three individuals arrived at the house and brutally killed Ms. Campos' uncle and male cousin and then raped her and her female cousins. Ms. Campos suffered a nervous breakdown and fled the country after she subsequently ran into one of the assailants, who threatened to kill her if she revealed his identity. The Fifth Circuit Court of Appeals affirmed the Board's finding that Ms. Campos

\( ^2 \) The Board of Immigration Appeals [hereinafter BIA] was created by regulation. 8 C.F.R. § 3.1(a) (1990). The jurisdiction of the BIA extends to the review of deportation and exclusion decisions of immigration judges, including requests for asylum and withholding of deportation. \textit{Id.}

\( ^3 \) Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987).
was ineligible for relief because the harm she had suffered in the past, or feared in the future, was not on account "of any political opinion she herself possessed or was believed by the attackers to possess." The Board's decision in *Campos-Guardado* was not exceptional but was consistent with its approach during this time period. The Board's analytical approach was affirmed by the Supreme Court in *Zacarias* and thus continues unchanged to the present.

Decisions of the Ninth Circuit Court of Appeals stood in stark contrast to those of the Board. Instead of focusing exclusively on the motivation of the persecutor, the Ninth Circuit examined the beliefs and motivation of both the persecutor and the victim and the relationship between the two. The Ninth Circuit was more flexible and protection-oriented in its approach in other ways. For example, the court issued a landmark ruling that under certain circumstances, neutrality could constitute a political opinion within the meaning of the Refugee Act. The Ninth Circuit also allowed for evidentiary presumptions in favor of the applicant. For instance, in *Hernandez-Ortiz v. INS*, the court held that persecutory acts by a government against a citizen who had engaged in

31. *Id.* at 288.

32. The Board repeatedly ruled that applicants who suffered severe harm inflicted at the hands of governmental or opposition forces were not eligible for relief because the motivation for the infliction of harm was not punishment for political beliefs. In cases where applicants suspected of antigovernmental activities had been beaten or tortured, the Board denied relief, characterizing the government's motivation as legitimate governmental investigation. *In re Ayala-Martinez*, No. A24 348 629 (BIA Aug. 2, 1988), remanded, Ayala-Martinez v. INS, 914 F.2d 261 (9th Cir. 1990); *In re Ramirez-Rivas*, No. A24 868 155 (BIA Sept. 20, 1988), rev'd and remanded, Ramirez-Rivas v. INS, 899 F.2d 864 (9th Cir. 1990). In cases where applicants feared execution by the guerrillas for desertion, the Board also denied relief, characterizing the opposition group's motivation as intending to impose a form of military discipline. *In re Maldonado-Cruz*, Int. Dec. No. 3041 (1988), rev'd, 883 F.2d 788 (9th Cir. 1990). For a thorough and thoughtful discussion of the Board's analysis in this type of case, see Carolyn P. Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to "Investigate Its Enemies,"* 28 WILLAMETTE L. REV. 719 (1992).

33. In *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985), the court stated:

"Persecution" occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate. For this reason, in determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor; we may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's, and we may examine the relationship between the two.


35. *Hernandez-Ortiz*, 777 F.2d at 509.
no criminal activity would be presumed to be on account of political opinion.  

In these and other cases the Ninth Circuit, which heard a substantial number of asylum claims relative to other circuit courts, was blazing a trail in refugee law. Its decisions were consistently more generous than the positions advocated by the Immigration and Naturalization Service and those adopted in many other circuits. Advocates appreciated the Ninth Circuit's innovative approach in attempting to provide protection for individuals who had suffered severe human rights violations. Some of its more conservative judges decried its approach and regretfully likened the Ninth Circuit Court to a ship "at some distance from the main fleet." It was only a matter of time before the jurisprudence of the Ninth Circuit was challenged in a petition of certiorari to the U.S. Supreme Court. The vehicle for such a challenge was the Ninth Circuit's decision in Zacarias v. INS.

36. The Hernandez-Ortiz court observed:

When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.

Id. at 516.

37. Daniel Compton, Recent Development: Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar, 62 WASH. L. REV. 913, 913 n.6 (1987). ("[T]he Ninth Circuit has generated a significant portion of these decisions owing to, in large part, the sobering numbers of Central Americans entering the United States and being apprehended in the Ninth Circuit's jurisdiction.").

38. The case of Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987), provides an example of this innovative approach. In Lazo-Majano, the Ninth Circuit characterized the repeated rape and beating of the applicant, Olimpia Lazo-Majano, by a Salvadoran army sergeant, as political persecution. The court reached this conclusion by imbuing the actions of the woman and her tormentor with political content. The army sergeant was asserting "the political opinion that a man has a right to dominate . . . ." Id. at 1435. The woman was expressing the political opinion that the "Armed Force is responsible for lawlessness, rape, torture and murder. Such views constitute a political opinion. And she has been persecuted for possessing it. Because she believes that no political control exists to restrain a brutal sergeant in the Armed Force she has been subjected to his brutality." Id.

39. In his dissent to the Lazo-Majano decision, Judge Poole derisively wrote that "the majority has outdone Lewis Carroll in its application of the term 'political opinion' and in finding that male domination in such a personal relationship constitutes political persecution." Id. at 1437.

40. Mendoza-Perez v. INS, 902 F.2d 760, 768 (9th Cir. 1990). In his dissent, Judge Sneed criticized the Ninth Circuit's acceptance of neutrality as political opinion, its rulings regarding applicant credibility, which discarded a requirement of corroboration, and its heightened standard of review of decisions of the Immigration and Naturalization Service. Id.

D. The Case of Jairo Elias Zacarias

Jairo Elias Zacarias was an indigenous Guatemalan who lived with his parents in the small town of Olintepeque in the province of Quiche, Guatemala. In January 1987, when he was eighteen years old, two guerrillas came to his house and “attempted to persuade him to join their ranks.” He refused to join, and they told him to “think it [over] well” because they would be back. Fearful that they would return and kill him for refusing to join, he fled Guatemala approximately two months later, in March of 1987.

Zacarias was arrested by the Immigration and Naturalization Service (INS) upon entering the United States in July of 1987, and applied for political asylum and withholding of deportation. The immigration judge denied relief, and was upheld by the Board of Immigration Appeals. Consistent with its earlier rulings, the Board held that Zacarias was ineligible for relief because the motivation of the guerrillas was not to harm him for his political opinion, but to recruit him.

The Ninth Circuit rejected the BIA’s reasoning, relying on its own framework, which evaluated the opinions and actions of both the victim and the persecutor. According to Ninth Circuit jurisprudence, Zacarias had a well-founded fear of persecution on account of political opinion. By resisting recruitment, Zacarias was expressing a political opinion hostile to his would-be persecutors, the guerrillas. Furthermore, the feared persecution was political from the perspective of the guerrillas because their motives in attempting to recruit him were also political.

42. The fact that Jairo Elias Zacarias was an indigenous Guatemalan was not raised as a basis of his claim for asylum. This was an unfortunate strategic decision because the recent history of genocide and repression against the indigenous Guatemalans, who were perceived to be guerrilla sympathizers, could have provided the basis for additional theories of persecution on behalf of the applicant. For an illuminating analysis of theories of persecution in indigenous Guatemalan cases, see Mel Greenlee, Asylum Policy in Action: The Case of Guatemala’s Kanjobals, 4 LA RAZA L.J. 44 (1991).

43. Zacarias, 921 F.2d at 847.
44. Id.
45. The Board referred to its previous ruling where it had held that “when a guerrilla organization attempted to recruit someone, the initial encounter was important to examine in order to determine the motivations of the guerrillas. In this case, the guerrillas wanted the respondent to join them . . . .” In re Zacarias, A27 926 183, slip op. at 4 (BIA Nov. 18, 1988). Therefore, the Board held, it could “hardly be said that the guerrillas . . . sought to harm the respondent for having opinions they found offensive.” Id.
46. Zacarias, 921 F.2d at 850.
47. Id.
The Zacarias decision provided the awaited opportunity for the INS to challenge developing Ninth Circuit jurisprudence. The INS petitioned for, and was granted, certiorari by the Supreme Court. In a decision remarkable only for its brevity and lack of analytical content, the Supreme Court reversed the Ninth Circuit's decision. The Court enunciated a rule formally adopting an intent-based analysis. To prevail, an applicant must demonstrate that the persecutor is motivated to harm him or her for status or beliefs. According to the Court, Zacarias, who desired to remain neutral, had failed to prove that he possessed a political opinion because neutrality is not "ordinarily" an expression of political opinion. Furthermore, even if Zacarias had established his political opinion, he would be required to show further that "the guerrillas [would] persecute [him] because of that political opinion, rather than because of his refusal to fight with them," which the Court held he had not done.

The Court's adoption of an intent requirement effectively accepted the interpretation of the Board of Immigration Appeals. It is significant, however, that the Court cast its holding not as one of deference to the BIA, but as one of straightforward interpretation of the plain meaning.

48. The INS was so eager to have the Supreme Court decide the case that it exempted Zacarias from the immediate benefits of a nationwide class action lawsuit. American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). The plaintiffs in Thornburgh had alleged, inter alia, that the INS had unfairly decided the cases of Salvadoran and Guatemalan asylum seekers. The negotiated settlement allowed for the termination of pending proceedings for class members and de novo adjudication under newly established procedures. Id. For a useful discussion of the settlement, see Carolyn P. Blum, The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum Seekers, 3 INT'L J. REFUGEE L. 347 (1991). The INS successfully insisted that Zacarias, and two other class members, not be permitted their de novo adjudications until their cases were decided at the level where they were pending. The other two class members were the applicants in Cañas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), vacated, 112 S. Ct. 1152 (1992), and modified, 970 F.2d 599 (9th Cir. 1992), and In re Pleitez Landos, A24 868 156 (BIA July 20, 1990). The Cañas-Segovia decision is discussed in significant detail infra.

49. Zacarias, 112 S. Ct. at 816.

50. Id.

51. Deference to agency interpretation is appropriate only when the courts are unable to interpret a statute by "[e]mploying traditional tools of statutory construction . . . ." Chevron U.S.A., Inc. v. Nat. Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984). The traditional tools include analysis of statutory language, legislative history and congressional objectives. See, e.g., Crandon v. United States, 110 S. Ct. 997, 1001 (1990) ("In determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") If after employing these traditional means of interpretation, the language at issue is ambiguous, the court may defer to the agency interpretation of the law, if it is "reasonable." Chevron, 467 U.S. at 844.

In determining the reasonableness of an agency interpretation, the court considers the consistency with which an interpretation has been applied, whether the interpretation was contemporaneous with the enactment of the statute, the thoroughness of the agency's consideration, the validity of its reasoning, and the need for agency expertise in complex technical areas. See, e.g., NLRB v. Food & Com. Workers, 484 U.S. 112, 124 n.20 (1987) ("We
of the statute. The Court's analysis is questionable, as the statute is silent on the issue of intent. The dissenting justices also disagreed that the majority's interpretation was compelled by the plain meaning, observing that "[t]he statute does not require that an applicant for asylum prove exactly why his persecutors would act against him . . . ."53

The Zacarias decision is devoid of any rationale other than the questionable assertion that its ruling is premised on the plain meaning of the statute. The majority chose to ignore other sources that could have informed its interpretation, including international interpretation of the 1967 Protocol, to which Congress sought to conform United States refugee law. The dissent castigates the majority for departing from its approach in INS v. Cardoza-Fonseca,54 which had reviewed the Act's legislative history and acknowledged the significance of the 1967 Protocol in interpreting key statutory language. This blindness to interna-

also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed . . . ."; FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 431 (1985) (noting that the agency's definition of a statutory term had been "developed and interpreted . . . for many years within the framework of the complex statutory scheme . . . ." and thus it was entitled to considerable deference); Chemical Mfrs. Ass' n v. NRDC, 470 U.S. 116, 134 (1985) (affirmed agency's position, and noted that "we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970s . . . ."). The Court rejected the INS' argument for heightened deference to agency interpretation in INS v. Cardoza-Fonseca because of the "inconsistency of the positions the BIA has taken through the years." Cardoza-Fonseca, 480 U.S. at 447 n.30.

For an illuminating critique of judicial deference to INS decisions, see Kevin R. Johnson, Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration, 71 N.C. L. REV. 413 (1993).

52. The Court explicitly stated that it was relying upon the plain language of the statute in reaching its decision:

In construing statutes, we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . The ordinary meaning of the phrase "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's. . . . The statute makes motive critical . . . .

Zacarias, 112 S. Ct. at 816-17 (citations omitted).

53. Id. at 820.

54. "The narrow, grudging construction of the concept of 'political opinion' that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in INS v. Cardoza-Fonseca . . . ." Id. at 818 (Stevens, J., dissenting).

55. Justice Stevens excerpted a lengthy passage from the Cardoza-Fonseca decision, including the following:

Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted . . . .

tional precedent is all the more troubling given the paucity of a reasoned analysis supporting the majority’s decision, and leads one to question the motivation of the jurists. It is certainly plausible that the majority was less concerned with interpreting “on account of” with reference to congressional intent and the meaning of the 1967 Protocol than in narrowing the definition of refugee—a result advocated by the Executive, through its delegates in the INS and the BIA. The Court’s decision is consistent with its own trend of limiting the protection afforded through constitutional and statutory provisions by requiring proof of intent, rather than effects. Regardless of the motivation of the Zacarias majority, the results remain the same—an increased burden of proof for refugee applicants.

The Zacarias decision cannot be justified by the language of the statute, considered in light of congressional intent to interpret the Act consistently with the 1967 Protocol. The predominant purpose of the 1967 Protocol is humanitarian, and it should be interpreted “in a way which is consistent with its object and purpose.” While proof of intent would certainly be appropriate if a goal of the refugee regime were punishment of persecutors, it is of little relevance in a system whose focus is protection. For this reason, as discussed below, the United Nations High Commissioner for Refugees (UNHCR) itself has recommended against the imposition of an intent requirement, advice which the Court chose to disregard. As reviewed in Section V, there are numerous precedents drawn from other areas of U.S. jurisprudence where the requirement of proof of intent has been modified to accommodate overriding policy objectives. Examples of this are relaxation of proof of intent in the criminal area and the development of strict liability in tort law.

Aside from the fact that inquiry into the persecutor’s motive is inconsistent with the purposes of the 1967 Protocol, there is another concern regarding this requirement—the almost impossible evidentiary

56. The Chairperson of the Canadian Immigration and Refugee Board, R.G.L. Fairweather, criticized the Supreme Court’s decision for its seeming contempt for international precedent and for the decisions of other countries: “In these days of global interdependence perhaps even the Supreme Court might benefit from looking at how courts and refugee boards in like-minded countries have decided similar cases . . . .” Fairweather noted that the majority decision in Zacarias failed to “cite a single international precedent, judicial or academic” in reaching its conclusion. R.G.L. Fairweather, Political Persecution, N.Y. TIMES, Mar. 7, 1992, at A24.


58. See infra notes 70–75 and accompanying text.
burden imposed upon the applicant. Pursuant to Zacarias, the applicant must provide some proof "direct or circumstantial"\textsuperscript{59} of the persecutor's motivation. Proof of intent, or state of mind, is difficult under any circumstances. In the case of refugees, it is exceedingly difficult. Generally, the refugee is thousands of miles away from the place where the relevant events took place.\textsuperscript{60} The refugee does not have subpoena power over his or her persecutors, nor does the refugee have access to other instrumentalities available in normal civil or criminal proceedings in the United States. Furthermore, as the Ninth Circuit has observed, the matter is complicated by the fact that "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."\textsuperscript{61} The requirement that the applicant prove persecutor's motivation places the burden upon the party who does not have access to the critical information. This requirement runs counter to the wisdom that "a determination of which party should bear the burden of proof of a particular fact should be based on such common sense considerations as which party has access to the underlying information and which party is arguing from a disadvantaged position."\textsuperscript{62}

The Court's decision in Zacarias is consistent with a longer trend towards limiting the protection of individual rights afforded under constitutional and statutory provisions by imposing an intent rather than an effects analysis. The Court's recent decision in Oregon v. Smith,\textsuperscript{63} which dealt a blow to the constitutional guarantee of free exercise of religion, is an example of this approach. Congress has seen fit to remedy the damage of Oregon v. Smith through enactment of the Religious Freedom Restoration Act of 1993.

\textsuperscript{59} Zacarias, 112 S. Ct. at 817.

\textsuperscript{60} The Handbook addresses the issue of difficulty of proof:

\textit{It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.}

\textsuperscript{61} Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984).


II. RELEVANT DOMESTIC AND INTERNATIONAL AUTHORITY AND POLICY OBJECTIVES

A. Plain Language and Congressional Intent

The decision in Zacarias holds that the statutory phrase "on account of" requires proof of the persecutor's motivation. The majority based this ruling on the plain meaning of the statute. Notwithstanding the Court's reading, the relevant language "on account of" does not require proof of intent. The dictionary simply defines the phrase "on account of" as meaning "for the sake of, by reason of, because of."64 The plain language — "on account of" — requires a causal connection between the feared persecution and the race, religion, nationality, social group, or political opinion of the victim. The requirement of a causal connection does not, however, logically translate into proof of persecutor's motivation. On the contrary, the phrase "on account of" is sufficiently open-ended to permit eligibility to victims who suffer harm as a result of a protected status or belief, regardless of the persecutor's specific intent.

Proof of intent has not been requisite under various anti-discrimination statutes containing language similar to the Refugee Act's "on account of." The Equal Pay Act of 1963,65 which prohibits discrimination "on the basis of sex," considers the effects of the employer's actions rather than the intent.66 Title VII of the Civil Rights Act,67 which makes it unlawful to discriminate or adversely affect an individual "because of" race, color, religion, sex, or national origin, can be satisfied either by a showing of intent or effects. The varying interpretation of similar statutory language leaves open to question the assertion that the plain meaning of "on account of" compels an intent requirement.

Beyond the language of the statute, the legislative history of the 1980 Refugee Act does not support the Court's interpretation. Congress did not intend a rigid motive-based interpretation of the legislation, but contemplated a more elastic reading of the statutory language. The legislative history notes that a purpose of the Act was to give the United States

64. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (1961).
sufficient flexibility to deal with refugee crises. Requiring applicants to prove intent restricts, rather than provides, flexibility in the adjudication of these claims.

The fact that Congress intended to bring the United States into compliance with the 1967 Protocol and expected that the Act would be interpreted consistently with the 1967 Protocol provides a substantial basis for rejecting a proof of motivation requirement. The 1967 Protocol expresses the causal connection between the feared harm and the victim’s status or belief by the phrase “for reasons of.” The phrase “for reasons of” is sufficiently broad to permit a finding of causal relationship absent proof of the persecutor’s motivation. In addition, the U.N. Handbook, which the Court itself recognized as a source of significant guidance in interpreting the 1967 Protocol, notes the difficulty applicants may have in even identifying the reasons for which they may be persecuted. Significantly, Congress was aware of the Handbook when it enacted the 1980 Refugee Act and in all likelihood intended the standards within it to serve as an interpretive guide to the 1980 Refugee Act.

In addition to the guidance contained in the Handbook, the UNHCR has counseled against an intent requirement on other occasions, including its Amicus Curiae brief submitted to the U.S. Supreme Court in the Zacarias case. In its brief, the UNHCR argued that an intent requirement is misplaced because “refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof.” The Amicus Curiae brief quotes a 1990 UNHCR memorandum sent to field officers as instruction in the proper determination of refugee status. The memorandum directs

68. 126 Cong. Rec. 4499 (1980).
70. The U.N. Handbook directly addresses the issue of the required nexus between persecution and the applicant’s status or opinion in two paragraphs. First, the Handbook notes that “[o]ften the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail.” HANDBOOK, supra note 27, ¶ 66 (emphasis added). In the reference that deals with political persecution, the Handbook acknowledges that “it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant.” Id. ¶ 81.
71. M.A. A26851062 v. INS, 899 F.2d 304, 321 n.6 (4th Cir. 1990) (Winter, J., dissenting).
against a requirement of proof of intent "[a]s long as persecution or fear of it . . . [is] related to the grounds given in the definition." 73

In a July 1992 report, 74 the Executive Committee of the UNHCR addressed issues concerning implementation of the 1951 Convention and the 1967 Protocol and specifically focused on the question of proof of intent, which it identified as a source of concern.

Th[is] Office has been particularly concerned about a number of recent cases involving individual refugee status applicants whose claims have been denied . . . . Even where it has been accepted by the determining authorities that an individual has suffered serious human rights abuses, that he or she has a genuine fear and that there is a distinct likelihood of arrest and detention on return, the position has been taken that these factors are not attributable to any intention on the part of the authorities to persecute the individual concerned on account of one of the recognized grounds and that, accordingly, there is no issue of refugee status involved. 75

The United States is not bound by the Handbook, or by other UNHCR recommendations. Nonetheless, given congressional intent to conform United States law to the 1967 Protocol, the UNHCR's guidance is useful and relevant. 76 The Supreme Court's failure even to consider

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73. The full quotation is as follows:

The definition [of refugee] does not require that there must be a specific showing that the authorities intend to persecute an individual on account of [one of the five factors]. As long as persecution or fear of it may be related to the grounds given in the definition, it is irrelevant whether the [persecutor] intended to persecute. It is the result which matters.

Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum/Field Office Memorandum (unnumbered) (March 1, 1990), reprinted in UNHCR Amicus Curiae Brief at 15, Zacarias (No. 90-1342). The UNHCR also argued this same point in its Amicus Curiae Brief to the Ninth Circuit Court of Appeals in Cañas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990) (No. 88-7444), vacated, 112 S. Ct. 1152 (1992), partially rev'd, 970 F.2d 599 (9th Cir. 1992). At issue in Cañas-Segovia was the proper interpretation of “persecution on account of religion.” The UNHCR declared that “an 'intent to persecute' on the part of a government or other state authority is not a necessary precondition for the existence of a well-founded fear of persecution . . . .” Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Petitioners at 4, 5, Cañas-Segovia (No. 88-7444).

74. Implementation, supra note 57.

75. Id. at 7–8 (emphasis added).

76. As noted in Cardoza-Fonseca, the Supreme Court identified the Handbook as a significant source of interpretive guidance. Cardoza-Fonseca, 480 U.S. at 438. The Board of Immigration Appeals and the federal courts have consistently referred to the Handbook in interpreting the 1980 Refugee Act. Id. at 439. See also Barraza-Rivera v. INS, 913 F.2d 1443, 1451 n.10 (9th Cir. 1990), quoting Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.3 (9th Cir. 1985) (noting that the Handbook is consulted for “assistance in understanding many concepts related to our immigration laws.”); Ramirez-Rivas v. INS, 899 F.2d 864, 868 n.3 (9th Cir. 1990).
the Handbook as a source of interpretive authority undermines the credibility of the Zacarias decision.

B. History of the 1951 Convention and 1967 Protocol

The definition of "refugee" in the 1951 Convention and 1967 Protocol, which was incorporated into the 1980 Refugee Act, had its origins in the Constitution of the International Refugee Organization (IRO). The United Nations created the IRO in 1946 to address the refugee crisis precipitated by World War II. The IRO was conceived to be an organization "of limited duration to deal with what was expected to be a temporary problem." The IRO Constitution was adopted by the U.N. General Assembly in December 1946 and "contained the most detailed definition of a refugee drawn up during [this] era." Developed to address World War II refugees, the IRO Constitution applied only to certain categories of persons. Pursuant to the IRO Constitution, a refugee was defined as an individual in any of the specified categories who "expressed valid objections" to returning to his or her country of nationality or residence. A valid objection could be established by a showing of past persecution or a fear of persecution because of race.


78. Cox, supra note 77, at 337-38. "It was initially thought that the IRO could accomplish its work by 1950." Id. at 338 n.26.

79. IRO Constitution, supra note 77.

80. Hathaway, supra note 77, at 374.

81. "Included were the victims of Nazism, Fascism, and similar regimes, pre-war refugees, persons outside their country of origin and unable or unwilling to avail themselves of its protection, war orphans and displaced persons." Id. at 375 (footnotes omitted).

82. An exception to the "valid objections" requirement was made on behalf of "Spanish Republican refugees and Germans and Austrians who were detainees or returnees during the Nazi era." Id. at 374 n.278.
religion, nationality, or political opinion. A valid objection could also be established by demonstrating political disagreement or dissent to the regime in power.

Commentators have remarked upon the generous parameters of the IRO definition. "The basic notion . . . underlying the IRO definition was that an individual who might be described as a victim of state intolerance or as a genuinely motivated political dissident was a refugee . . . ." During the drafting of the IRO definition, the United States and its allies were among those groups advocating such a generous definition; they "argued strongly that individuals had the right to choose to migrate in search of personal freedom."

The IRO provided the original point of reference for the 1951 Convention. The U.N. Economic and Social Council (ECOSOC) appointed a committee, the Ad Hoc Committee on Statelessness and Related Problems, to "provide for an instrument for the protection of refugees to be available when IRO terminated." The representatives of thirteen nations participated in the drafting, and their task "was to devise a definition of the term refugee which would provide protection to the greatest number of persons while remaining politically acceptable to the majority of States." The countries that ultimately drafted the 1951 Convention were predominantly Western, and the 1951 Convention reflects European political objectives and values. Persons "who feared 'persecution' in the sense of being denied basic civil and political rights would fall within the international mandate."

The Preamble to the 1951

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83. Id. at 375.
84. Id.
85. Id. at 376.
86. Id. at 374.
87. "The origin of the Protocol's definition of 'refugee' is found in the 1946 Constitution of the International Refugee Organization." Cardoza-Fonseca, 480 U.S. at 437. See also Cox, supra note 77, at 343 ("Committee members were in general agreement that the IRO definition was to serve as the point of departure in drafting the definition article for the Convention.").
88. Sautman, supra note 77, at 531.
90. The governments of Belgium, Brazil, Canada, the Republic of China, Denmark, France, Israel, Poland, Turkey, the former Union of Soviet Socialist Republics, the United Kingdom, the United States and Venezuela were appointed to the Ad Hoc Committee. Cox, supra note 77, at 342. The Polish and Soviet representatives left the first meeting of the committee in protest over the issue of China's representation, and never returned to participate further. Id. at 342–43.
91. Hathaway, supra note 89, at 148–49.
92. Id. at 149.
Convention articulates a broad commitment to the protection of "fundamental rights and freedoms" as defined in the U.N. Charter and the Universal Declaration of Human Rights.\(^93\)

In various respects, the 1951 Convention definition of refugee was broader in scope than the IRO. The IRO contained four grounds as the bases of persecution: race, religion, nationality, and political opinion. The Convention added a fifth ground, that of persecution because of "membership of a particular social group."\(^94\) A. Grahl-Madsen, a scholar whose expertise in this area is well recognized, has referred to the social group category as having a "broader application than the combined notions of racial, ethnic, and religious groups."\(^95\) Its inclusion, according to Grahl-Madsen, was "to stop a possible gap" in the scope of the 1951 Convention's coverage.\(^96\)

Significantly, the U.N. Charter and the Universal Declaration of Human Rights served as reference points for the 1951 Convention. Both instruments came into existence in the wake of World War II, and were part of a framework that forms the basis of the contemporary international human rights system.\(^97\) The Charter and the Declaration set forth those human rights and fundamental freedoms which governments are required to secure for individuals within their jurisdictions.\(^98\) Nothing in the U.N. Charter or Universal Declaration incorporates an intent require-

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93. The Convention Preamble begins:

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . .

1951 Convention, supra note 11, pmbl.

94. Id. art. 1(a)(2).


96. Id. See also JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 136 n.9 (1991). "[T]he history of the cognizable categories of persecution illustrates that they were intended to serve a liberal purpose, by creating a universally applicable and acceptable standard to replace ad hoc, situational responses to disparate refugee crises." Id. (quoting Donald P. Gagliardi, The Inadequacy of Cognizable Grounds of Persecution as a Criterion for Accordingly Refugee Status, 24 STAN. J. INT’L L. 259, 267-68 (1987-1988)); Austin T. Fragomen, Jr., The Refugee: A Problem of Definition, 3 CASE W. RES. J. INT’L L. 45, 54 (1970) ("The grounds of persecution set forth by the Convention are sufficiently broad so that the major grounds for discrimination or oppression have been included.").


98. Id.
ment upon the individual asserting that her fundamental human rights have been violated; recourse is not conditioned upon proof of the State’s intent to violate.

The 1951 Refugee Convention was informed by these international instruments and was part of the emerging framework developed in response to World War II. Viewed in this context, it is highly unlikely that the Convention’s drafters intended that victims of human rights violations be required to prove their persecutor’s intent in order to establish refugee status. Such a requirement would have been inconsistent with developing international human rights norms and would have subverted the humanitarian purpose of the refugee protection regime.

III. BURDEN OF PROOF & SUBSTANTIVE IMPLICATIONS

A. Burden of Proof

The asylum applicant bears the burden of proof as to the prima facie elements of her case.99 The term “burden of proof” encompasses both burden of production of evidence and the burden of persuasion of the factfinder.100 The Zacarias decision impacted both the burden of production and of persuasion. Zacarias assigned the burden of production of evidence of persecutor’s intent to the applicant, who must provide “some evidence of it, direct or circumstantial.”101 The Court in Zacarias

99. 8 C.F.R. § 208.13(a) (1990) (“The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in Section 1101(a)(42) of the Act.”). The assignment of the burden of proof to the applicant is consistent with the general rule that the party who brings a claim has the burden of proof to establish the requisite facts. See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 341 (Edward W. Cleary ed.) (3d ed. 1984). See also HANDBOOK, supra note 27, ¶ 196 (“It is a general legal principle that the burden of proof lies on the person submitting the claim.”).

100. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.5 (3d ed. 1985). The burden of production is the duty of a party to come forward with evidence to prove a particular fact. The burden of persuasion refers to the degree of certainty to which a fact-finder must be persuaded. Id. Professor Robert Belton has distinguished burden of proof from burden of persuasion as follows:

The term “burden of proof” has two independent meanings. On the one hand, it is used to denote the degree to which a factfinder must be subjectively persuaded — based upon the evidence presented — that a particular fact is more likely true than not. On the other hand, the term may refer to the duty of a party to come forward with evidence to prove a particular fact. This duty initially is allocated to the party seeking a change in the status quo, usually the plaintiff in a civil case or the prosecutor in a criminal case.

implicitly dealt with the burden of persuasion by acquiescing in the Board’s approach to adjudicating it. The Board’s decision in *Zacarias*, as well as in numerous other cases, imposed a prohibitively high burden of persuasion on the applicant regarding proof of the persecutor’s motivation, which the Court affirmed.

Professor Robert Belton, author of a classic article addressing burden of proof in discrimination cases, remarked upon the degree to which rules regarding the burden of proof affect the ultimate outcome of cases. Professor Belton noted that judges were able to do an end run around substantive law principles with which they disagreed through the application of burden of proof principles.

Professor Belton’s observations in the context of discrimination jurisprudence are equally true in the context of refugee law. The *Zacarias* decision substantially diluted the Supreme Court’s generous decision in *Cardoza-Fonseca*. *Cardoza-Fonseca* provided that an applicant who feared a one in ten possibility of persecution could meet the well-founded fear standard. *Zacarias* all but nullified *Cardoza-Fonseca* by requiring the applicant to produce evidence of the persecutor’s intent, and by deferring to the Board’s adjudication of whether the applicant had met her burden of proof on the intent issue. The decision in *Zacarias* has also had the effect of increasing the burden for withholding claims which had been established earlier by the Court in *Stevic*. The decision accomplished this by allowing the Board to impose a level of proof far higher than the preponderance standard established in *Stevic* on the issue of proof of intent.

102. The Supreme Court held in *Zacarias* that the Board of Immigration Appeals could be reversed only if the evidence presented by the applicant was “so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” *Zacarias*, 112 S. Ct. at 817. By adopting such a deferential standard of review, the Court was essentially acquiescing in the Board’s approach.

103. Belton, *supra* note 100.

104. Professor Belton observed:

A review of the discrimination cases also suggests that the burden of proof issue may well be the battleground upon which some judges are attempting to repudiate the disparate impact theory of discrimination. A court may be hesitant to repudiate outright well-established substantive theories of liability, even when there is a belief that these theories are misguided. As a result, a court instead may adopt procedural rules designed to achieve effectively the same result.

105. *Id.*
1. Burden of Production

Zacarias interpreted the statutory language "on account of" to require proof of the persecutor's motivation; henceforth intent is part of the prima facie case for which the asylum seeker bears the burden of proof. The applicant must produce evidence and persuade the decision-maker on the issue of the persecutor's motivation.

The requirement that the applicant provide evidence of the persecutor's intent is troubling because the refugee applicant is in a particularly disadvantaged position regarding proof of the persecutor's intent. The fact that the Court ruled that the evidence may be "direct or circumstantial" is of minor import in the face of the inherent difficulties for the asylum seeker.

Even under the best of circumstances, the motivation and state of mind of another individual are difficult to ascertain and even more difficult to prove. In the refugee context, various factors unique to the asylum seeker's situation compound this problem. First, the events at issue occurred in a different venue, thousands of miles away. Not infrequently, acts of persecution occur during situations of war and civil strife, which involve complex historical and political factors. The victim may not know the exact motivation of his or her persecutor, nor, as the Ninth Circuit remarked, are persecutors "likely to provide their victims with affidavits attesting to their acts of persecution." The persecutor can neither be put on the stand and questioned as to his motivation nor deposed or required to answer interrogatories. Because the relevant events took place far away from the present venue, witnesses with personal knowledge will likely be unavailable to testify. Thus, evidence of intent — direct or circumstantial — is exceedingly difficult to obtain. The Handbook recognizes the inherent difficulties of proof, and although it accepts the general rule that the applicant bears the burden of proof, it notes that "in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application."

Under these circumstances, the requirement that the applicant produce evidence of the persecutor's intent offends notions of fairness, which look to the likelihood that "evidence on a particular element may

106. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1985).
107. HANDBOOK, supra note 27, ¶ 196.
108. Id.
lie more within the knowledge or control of one party than another. . . .

2. Burden of Persuasion

The BIA's approach to the applicant's burden of persuasion on the issue of intent compounds the difficulty of meeting the requisite burden. The Board has required proof which exceeds the standards established by the Supreme Court in Stivic and Cardoza-Fonseca.

In Stivic, the Court interpreted the statutory language "life or freedom would be threatened on account of" to require proof by a preponderance. Proof by a preponderance is the most common standard in civil cases and has been described as proof that leads the factfinder to believe that the "existence of a fact is more probable than its nonexistence." Thus, withholding applicants must establish that persecution on account of an enumerated ground is more likely than not. In Cardoza-Fonseca, the Court turned to the statutory language "well-founded fear of persecution on account of . . ." and held that it did not require that persecution be more likely than not. A fear could be well-founded if it were a "reasonable possibility."

Neither the higher preponderance standard nor the more generous well-founded fear standard requires the applicant to prove with absolute certainty the elements of her claim, including the persecutor's intent. An applicant for withholding of deportation is simply required to establish that it is more likely than not that the persecutor is motivated by one of the enumerated factors, while an applicant for asylum need only show a reasonable possibility of the same. Neither of these standards requires

109. Belton, supra note 100, at 1218.
110. Professor C.M.A. McCauliff has explained the concept of burden of persuasion and its relationship to degrees of belief as follows:

When people take their disputes to court, or the state prosecutes an alleged offender for a crime, what has happened in the past must be determined. Determinations of past events, however, cannot recreate those events with perfect knowledge. . . . As a result of this lack of certainty about what happened, it is inescapable that the trier's conclusions be based on probabilities. In other words, because the trier of fact never can be absolutely certain that a particular fact is true, the parties only can persuade him to a particular degree of certainty that the fact is probably true. . . . Once the trier of fact makes a decision in accordance with the required probability ("beyond a reasonable doubt," "clear and convincing evidence," or "preponderance of the evidence"), the finding is "true" for the purposes of entering judgment and settling the dispute with finality.

111. JAMES & HAZARD, supra note 100, § 7.6.
112. Cardoza-Fonseca, 480 U.S. at 440.
the applicant to establish that there are no other possible explanations. Such a requirement is more akin to the criminal “beyond a reasonable doubt” standard.

Nonetheless, the Board has effectively applied a standard far more rigorous than a preponderance to claims for both political asylum and withholding of deportation with respect to the issue of proof of the persecutor’s intent. As detailed below, the Board has refused to accept the applicant’s proffered explanation of the persecutor’s motivation if there are any other alternative explanations. The Board’s adjudication, in effect, imposes a beyond a reasonable doubt standard insofar as it denies the asylum seeker’s claim if there is any reasonable doubt regarding the persecutor’s motivation.

The Board’s application of an exceedingly high burden of persuasion must be evaluated in the context of policy considerations related to the question of the burden of persuasion. It is well recognized that the varying burdens of persuasion reflect societal values regarding the consequences of a possible erroneous decision. The difference between the burden of persuasion in civil and criminal cases reflects these values. In a civil case, “a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant.”\(^{113}\) Therefore, the burden of persuasion is proof by a preponderance. In criminal cases, “society has judged that it is significantly worse for an innocent man to be found guilty . . . than for a guilty man to go free”\(^{114}\) and the prosecutor must persuade the factfinder of guilt beyond a reasonable doubt. Within this framework, the defendant need only raise a reasonable doubt as to his guilt to defeat a conviction.\(^{115}\) The Supreme Court has explicitly affirmed the relationship between the interest at stake and the application of the reasonable doubt standard: “[w]here one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on

114. Id.
115. Id.

[A] lawsuit is essentially a search for probabilities. A margin of error must be anticipated in any such search. Mistakes will be made and in a civil case a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant. However, this is not the case in a criminal action. Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. The consequences to the life, liberty, and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case.
the other party the burden . . . of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.\textsuperscript{116}

For this very reason the Court in Cardoza-Fonseca adopted a standard less rigorous than proof by a preponderance in asylum cases. The Court observed that "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country . . . Congress did not intend to restrict eligibility for [asylum] to those who could prove it is more likely than not that they will be persecuted if deported."\textsuperscript{117}

The following decisions of the Board demonstrate that although the Board gives lip service to the well-founded fear and clear probability standards, it imposes a burden of persuasion of proof beyond a reasonable doubt on the issue of persecutor's motivation.

B. Application of the Burden of Proof: In re Konesan, In re Thanapalan, In re R-

Three post-Zacarias decisions, In re Konesan,\textsuperscript{118} In re Thanapalan,\textsuperscript{119} and In Re R-,\textsuperscript{120} demonstrate the Board's application of an inappropriate burden of persuasion. In all three cases the applicants suffered various forms of torture\textsuperscript{121} and yet were found ineligible for relief. The Board ruled the applicants ineligible because they had failed to show that the torture was on account of an enumerated ground. Beyond the relevance of these decisions to the evidentiary issue, these cases have an even more disturbing significance. They stand for the

\textsuperscript{117} Cardoza-Fonseca, 480 U.S. at 449–50.
\textsuperscript{118} In re Konesan, A29 637 308, slip op. (BIA June 11, 1992).


any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, where such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
proposition that a victim of official state torture is not a refugee within the meaning of United States law. This result reinforces the argument that something is amiss with United States refugee jurisprudence.

The applicant in *In re Konesan*, a Tamil Sri Lankan, was arrested on four occasions by the Sri Lankan Army, and on one occasion by the Indian Peacekeeping Force (IPKF) and the Eelam People’s Revolutionary Liberation Front (EPRLF). During these detentions, which ranged from several days to several weeks, Shantini Konesan was tortured and interrogated about her knowledge of the opposition group, the Liberation Tigers of Tamil Eelam (LTTE). The Board’s decision describes her capture and the treatment she suffered on one occasion:

The applicant worked as a teacher. She was taking a bus to work one morning when the bus came to a sudden halt . . . . Members of the Sri Lankan army boarded the bus and shot randomly at the passengers, most of whom were Tamil; the applicant was injured by flying shrapnel and one of her friends was killed. The applicant was taken to Jaffna Fort, an army camp. At this camp, the army kept her in a dark room, beat her on the leg with plastic pipes, applied chili powder to her eyes, and questioned her concerning her suspected ties to the LTTE. Following this beating, the applicant’s legs were swollen and she was unable to walk.

In addition to the five captures that Shantini Konesan herself suffered, her brother was arrested and tortured on four occasions, her sister on at least one, and their house was bombed and destroyed. The applicant was also fearful of the LTTE who wanted her and her family to “join their ranks.”

In denying Shantini Konesan’s claim to asylum, the Board cited *Zacarias* and ruled that none of these incidents constituted political persecution. The Sri Lankan Army, according to the Board, was motivated by a desire to “investigate a suspected security concern and to gain information about the LTTE.” The Board ruled the same regarding the IPKF and the EPRLF. The Board held that although the “methods employed” by these groups in interrogating the applicant were

122. The Ninth Circuit Court of Appeals has defined state torture as “acts of torture performed by or under the direction of government officials.” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 n.14 (9th Cir. 1992).
124. *Id.* at 3.
125. *Id.* at 10.
"to be condemned," the harm she suffered was not political persecution. To prove political persecution, the Board concluded, one "must do more than merely show . . . civil rights or human rights violations." The applicant in *In re Thanapalan* was also a Tamil Sri Lankan suspected of sympathizing with the LTTE. On occasion he had met the LTTE's demands for food and cigarettes when they came to his grocery store. He was arrested by the Indian Peacekeeping Forces and accused of assisting the LTTE. During this detention, as the Board decision recounts, he "was severely beaten by elements of the Eelam People's Revolutionary Liberation Front ("EPRLF") . . . suffering a broken nose and lacerations to his body." Subsequently the LTTE insisted that he collaborate with them, and he complied, becoming a process server for a mediation office the LTTE had created. He complied until the Sri Lankan military reasserted itself in his area, after which he decided to leave, going first to another region within Sri Lanka and then fleeing the country.

After a lengthy discussion of the background to the conflict in Sri Lanka, the Board ruled that neither the mistreatment Thanapalan had suffered in the past nor the harm he feared in the future came within the protection of the 1980 Refugee Act. According to the Board, his detention and beating by the IPKF and EPRLF could not constitute political or ethnic persecution, because these two groups were sympathetic to Tamil political demands, although opposed to the tactics of the LTTE, which included acts of "violence and terror." Therefore, Thanapalan's mistreatment resulted from his suspected allegiance to the LTTE, not his political views or ethnicity. This mistreatment of Thanapalan, which the Board characterizes as a possible act of "revenge" in response to LTTE terrorism, is "in the nature of a civil war . . . [and] does not amount to persecution within the meaning of the Act."

*In re R-* involved a Sikh from the state of Punjab in India. Members of the All India Sikh Student Federation had come to his home requesting collaboration. This contact was reported to the local police, who "arrested him as a suspected militant." He was interrogated about the group that had visited his house and was subjected to torture, including

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126. *Id.*
127. *Id.*
129. *Id.* at 2–3.
130. *Id.* at 6.
131. *Id.* at 8.
132. *In re R-, supra* note 120, at 3.
"having his arms and legs stretched, being stripped and whipped with a leather belt, being beaten with batons, and being denied food." The Sikh militants returned, beat him, and threatened him with death if he did not assist them. He was beaten again by the police three months before he decided to flee India.

The Board denied relief, finding that neither the Sikh militants nor the police had the intent to persecute him for one of the enumerated grounds. As to the Sikh militants, the Board found "no persuasive evidence, direct or circumstantial," that their motives were political rather than in response to his refusal to assist them. Likewise the torture by the local police was not political persecution because it was motivated by an intent "to extract information about Sikh militants," not to harm him for his political opinion.

In her partial concurrence to In re R-, Board member Mary Maguire Dunne criticized the Board for its improper adjudication of the applicant's burden of persuasion:

[A]n alien does not bear the unreasonable burden of establishing the exact motivation of a persecutor where different grounds for actions are possible. In this light, I find improper the majority's confident conclusion that the persecution suffered by the applicant at the hands of the Indian police was not premised upon one of the protected grounds.

In reality, the majority employs a standard diametrically opposed to that set forth in Matter of Fuentes . . . by implicitly suggesting that an alien must prove a persecutorial motivation anchored upon one of the enumerated grounds to the exclusion of all other possible motivations. Matter of Fuentes . . . recognized that there can be more than one possible basis for a persecutor's actions. The task of the alien is simply to demonstrate the reasonableness of a motivation which is related to one of the enumerated grounds. Concomitantly, it is irrelevant whether the majority's interpretation of the events is reasonable; the proper focus is whether the applicant's interpretation is reasonable.

Board member Dunne implicitly affirms Cardoza-Fonseca and rejects key aspects of Zacarias. Dunne's comment that the applicant

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133. Id. at 11.
134. Id. at 5.
135. Id. at 6.
136. Id. at 12-13.
need only demonstrate the reasonableness of the persecutor's motivation comes directly from Cardoza-Fonseca.\textsuperscript{137} Her assertion that the reasonableness of the Board's interpretation is "irrelevant" is a direct rejection of Zacarias to the extent that the Court in Zacarias insulated "reasonable" decisions of the Board from judicial reversal.\textsuperscript{138} Dunne's comments highlight the Board's distortion of the well-founded fear standard, a distortion that was ratified by the highly deferential standard of review articulated in Zacarias. This deferential standard to the Board's adjudication has had the result of saddling the applicant with the burden of proving his persecutor's intent beyond a reasonable doubt, a burden which was not intended by the Convention or the 1980 Refugee Act.\textsuperscript{139}

C. Substantive Implications: Torture Victims Excluded from the Act’s Protection

Although cases such as \textit{In re R-} are troubling for their evidentiary rulings, they are far more disturbing for their far-reaching substantive implications. \textit{In re R-}, \textit{In re Konesan}, and \textit{In re Thanapalan} stand for the alarming proposition that victims of torture were not intended to be beneficiaries of the 1980 Refugee Act. This appalling conclusion cannot be squared with any meaningful understanding of the purpose of the domestic and international refugee regime.

\begin{enumerate}
\item \textsuperscript{137} In Cardoza-Fonseca, the Court held:
\begin{quote}
As we pointed out in Stevic, a moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'
\end{quote}
\item \textsuperscript{138} The Court held that in order to obtain judicial reversal, the applicant in Zacarias would have to show "that the evidence he presented was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution." \textit{Zacarias}, 112 S. Ct. at 817.
\item \textsuperscript{139} Notwithstanding the deference accorded to the Board, federal courts have reversed a number of recent Board decisions on the issue of intent and have expressed incredulity at the Board's rationale. In Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994), the Board had held that a Guatemalan trade unionist whose colleagues had been assassinated, and who had received death threats, was ineligible for asylum or withholding of deportation because the threatened persecution was the result of an economic dispute and was not on account of political opinion. \textit{Id.} at 1028. In reversing, the court noted that pursuant to the BIA's analysis, Alexander Solzhenitsyn would not be eligible for political asylum because his dispute with the government was literary, rather than political. \textit{Id.} at 1028–29. In Sotelo Aquije v. INS, 17 F.3d 33 (2d Cir. 1994), the Board had denied relief to a Peruvian community leader who had suffered numerous threats from the Shining Path Guerrillas for his outspoken opposition to them. The Board had held that although the "applicant's work . . . and his open opposition to the Shining Path . . . were political acts and expressions of political opinion" the harm he feared was not on account of his political opinion. \textit{Id.} at 36–37. The court reversed, finding the Board's rationale to be untenable.
\end{enumerate}
Torture is universally and unequivocally prohibited in international law. The prohibition against official torture has attained the status of a peremptory or \textit{jus cogens} norm, a norm from which no deviation is permitted. The Ninth Circuit Court of Appeals described the international consensus regarding the prohibition of torture in \textit{Siderman de Blake v. Republic of Argentina}:

\text{T}he right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of \textit{jus cogens}. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being.

The Refugee Act was intended to give "statutory meaning to our national commitment to human rights and humanitarian concerns." It incorporated the definition of "refugee" in the Convention, which was drafted in the aftermath of the Holocaust. The Convention, as well as other postwar international instruments, were intended as an expression of commitment to the protection of individual human rights. These instruments were a part of the international community's response to the unspeakably horrendous crimes of the Nazi era. Viewed in this context, it is difficult to conceive that the Convention or the Refugee Act were intended to be interpreted in a way that would fail to protect the

140. "[T]he law of nations contains a 'clear and unambiguous' prohibition of official torture. This proscription is universal, obligatory, and definable." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).


143. \textit{Id.} at 717.

144. S. \textit{Rep. No. 256, supra note 9, at 1.}

145. The Convention Preamble begins as follows: "\textit{Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms . . . .}" 1951 Convention, supra note 11, at 150 (emphasis added).

146. One commentator has noted that the rights enumerated in the Universal Declaration of Human Rights "seemed to be designed specifically as a reaction to the Nazi horrors, granting individuals the right to be free from such acts of state terror." Steven Fogelson, \textit{The Nuremberg Legacy: An Unfulfilled Promise}, 63 S. CAL. L. REV. 833, 872 (1990).
victims of torture, as well as the victims of other violations of peremptory human rights norms.\textsuperscript{147}

Equally inconceivable is an interpretation of the Convention and Refugee Act that would find eligible for refugee status those individuals who are the perpetrators of prohibited human rights violations. Nonetheless, such a conclusion is compelled by \textit{Zacarias} and current Board precedent.

The 1980 Refugee Act excludes from its protection individuals who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{148} If the victim of torture is not persecuted on account of an enumerated ground but simply for the purpose of extracting information, then the person who tortured them is not excludable as a persecutor. The symmetry between the language of eligibility, the “well-founded fear of persecution \textit{on account of},” and the language of ineligibility, “persecution of any person \textit{on account of},” compel this conclusion. At least one Board member has noted that this is the case.\textsuperscript{149}

This interpretation of the Act, which finds torture victims ineligible for relief because the harm is not on account of an enumerated ground, while their torturers potentially are eligible since they are not perpetrators of others for this very same reason, is truly perverse, and is certainly not in consonance with the international instruments upon which the Refugee Act was based. Under the Convention, the intent of the torturer or other perpetrator of human rights abuses is irrelevant with respect to ineligibility. An individual is excluded from the protection of the Convention if “he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments

\textsuperscript{147} A state violates \textit{jus cogens} norms if it engages in genocide, slavery, murder, prolonged arbitrary detention, or systematic racial discrimination, or causes the disappearance of individuals. \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 702 (1987).


\textsuperscript{149} In his concurrence in \textit{In re R-}, Board member Heilman argued that if the applicant were found to have been persecuted, then the policemen would be considered to be perpetrators of others, a result with which he ardently disagrees. Heilman states that “[i]t ill behooves us to label as agents of persecution the very people the Sikh extremists murder with abandon when they have the opportunity.” \textit{In re R-}, \textit{supra} note 120, at 12. Heilman subscribes to the theory that two wrongs \textit{do} make a right. Since the Sikhs have violated the human rights of the police, the police should be able to violate the human rights of the Sikhs. “[H]ere I will be as blunt as possible: Given the viciousness with which the extremists have murdered so many persons, among them many policemen and their families, would one realistically expect gentle treatment [of the Sikhs]?” \textit{Id.}
drawn up to make provision in respect of such crimes." The 1945 London Agreement and Charter of the International Military Tribunal has been said to be "the most comprehensive definition" of these crimes. None of these crimes require proof of intent for culpability.

In light of Zacarias and Board precedent, one must question whether the victims of Nazi persecution would come within the protection of the 1980 Refugee Act. For instance, would the fact that persecution of the Jews was "carried out not only as an expression of the racist ideology of the Nazis but also with an eye toward confiscating as much of the Jews' personal wealth as possible" turn the claim into one that was not sufficiently motivated by an enumerated ground? What about the fact that "human beings were used for medical experiments in which pain, suffering, and death were the expected results"? Would the Board be likely to find that the perpetrator's motivation was to obtain scientific information, even though their "methods ... [were] to be

150. 1951 Convention, supra note 11, 189 U.N.T.S. at 150.
152. HANDBOOK, supra note 27, ¶ 150.
153. Art. 6 of the Charter of the International Military Tribunal defines crimes against peace, war crimes and crimes against humanity as follows:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurance, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Charter of the International Military Tribunal, supra note 151, art. 6.

154. Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2586 n.216 (1991) (discussing differences between war crimes and crimes against humanity, which do not require intent, with genocide, which does).
155. Fogelson, supra note 146, at 852.
156. Id. at 835.
condemned" \(^{157}\) because they implicated "civil rights or human rights violations?" \(^{158}\)

It is not far-fetched that such decisions, abhorrent and illogical as they appear, could be premised upon the current interpretation of the Refugee Act. An approach to determining refugee status which rejects the relevancy of fundamental human rights norms and which utilizes a proof of intent requirement can only lead to such results. The United States needs to reinvigorate its commitment to protect fundamental human rights and to reject an approach to refugee adjudication which makes it deaf to the cries of the victims, and complicit in the crimes of the perpetrator.

IV. THE PARADIGM OF THE INTENT TEST'S INADEQUACY: PROTECTION OF RELIGIOUS FREEDOM

The preceding section surveyed the troubling results of an intent-based analysis, which essentially divorces international human rights norms from the determination of refugee status. As illustrated by *In re Konesan*, *In re Thanapalan*, and *In re R-*, an intent-based approach fails to provide protection from the violation of fundamental human rights, such as the right to be free from torture.

The right to freedom of thought, conscience, and religion is another internationally accepted fundamental human right. The international approach to protection of religious freedom highlights the inadequacy of an intent-based test. A comparison of the United States' and international approaches to the protection of religious liberty shows an expansion under international norms, with a corresponding trend toward shrinking protections under domestic law. The reduction of protections for religious freedom in United States jurisprudence can be traced to the incorporation of an intent-based analysis by the Supreme Court in *Oregon v. Smith*, which held that limitations of religious freedom do not offend the Constitution absent intent to impair religious freedom. In the refugee context, religious persecution will not be found absent a showing of intent. This contrasts markedly with international practice, which does not have intent as a frame of reference. To the contrary, irrespective of intent, limitations on freedom of thought, conscience, and religion may only be permitted upon a showing that the limitation is necessary "to protect public safety, order, health, or morals or the fundamental rights

\(^{157}\) Konesan, supra note 118, at 10.

\(^{158}\) *Id.*
and freedoms of others." The United States Congress has seen fit to reinvigorate the promise of religious freedom guaranteed in the Constitution by enacting the Religious Freedom Restoration Act of 1993. The Religious Freedom Restoration Act places United States free exercise jurisprudence once again on a course consistent with international norms. Unfortunately, Congress has not seen fit to follow the same path regarding religious persecution in the refugee context.

A. Freedom of Religion in International Practice

Although the concept of freedom of thought, conscience, and religion was articulated in the teachings of virtually all of the major world religions, the practice fell far short of the theory, and religious persecution "on a domestic or national level was for centuries the rule and seldom the exception." This fact notwithstanding, freedom of thought, conscience, and religion received limited recognition in international law as early as the sixteenth century. In this time period, protection took the form of treaties, known as "capitulations," which ensured "rights to individuals or groups professing a religion different from that of the majority." An example of such an arrangement was a 1556 treaty between France and the Sultan of the Ottoman Empire, guaranteeing religious freedom for French merchants in Turkey.

Following World War I and the establishment of the League of Nations, many countries entered into multilateral treaties for the protection of minorities, including religious minorities. During World War


161. Burns, supra note 160, at 83. See also Krishnaswami, supra note 160, at 1 ("While most religions and beliefs are imbued with a sense of the oneness of mankind, history probably records more instances of man's inhumanity to man . . . Not infrequently, horrors and excesses have been committed in the name of religion or belief."). Well-known examples of religious persecution over the centuries include persecution of Christians by the ancient Romans, and the suppression of Huguenots in France, Jews and Protestants in Spain, and Catholics in England. See Burns, supra note 160, at 83. The conflict in the former Yugoslavia, in which Bosnian Muslims have been the targets of genocide, presents an unfortunately all too contemporary example of "excesses committed in the name of religion or belief."

162. Burns, supra note 160, at 87. See also Krishnaswami, supra note 160, at 11.

II, the allied leaders stated that the protection of religious freedoms was a central objective of their war goals. They declared that “complete victory over [the] enemies is essential to defend . . . religious freedom and to preserve human rights and justice.”\(^{164}\) The treaties signed at the end of World War II also focused on the guarantee of freedom from religious discrimination and persecution. The Paris Peace Treaties of 1947 provided that the vanquished countries were to undertake “all measures necessary to secure to all persons under its jurisdiction, without distinction as to race, sex, language, or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom . . . of religious worship . . . .”\(^{165}\)

It was with the establishment of the United Nations, following World War II, that the right to freedom of thought, conscience, and religion, as an international norm, had its basis. The Charter of the United Nations\(^{166}\) encourages respect for “human rights and fundamental freedoms for all, without distinctions as to race, sex, language or religion.”\(^{167}\) The Universal Declaration of Human Rights provided a specific and more detailed approach to religious freedom. Article 18 of the Universal Declaration of Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.\(^{168}\)

The Universal Declaration’s travaux reveals that the drafters conceptualized freedom of thought, conscience, and religion as comprehending both belief and actions.\(^{169}\) A preliminary draft prepared by Rene

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164. Id. at 12.
165. Id.
166. The U.N. Charter is the “constituent statute of an intergovernmental organization . . . [and] has the status of a multilateral treaty.” Paul Sieghardt, The International Law of Human Rights 51–52 (1983), quoted in Scott A. Burr, The Principle of Religious Liberty and the Practice of States: Seek and Ye Shall Find a Violation of Human Rights Violations, 6 DICK. J. INT’L L. 237, 246 n.43 (1988). Although there is debate over its binding effect, some commentators contend “that it is now almost universally agreed that the Charter obligation is binding in international law on all U.N. members.” Id.
168. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., 183d mtg. at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The Declaration also provides that all persons are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Id. art. 2.
Cassin, the representative of France, declared that inner freedom, which includes freedom of belief in all its forms, is absolute, whereas external freedom, the freedom to practice one’s beliefs, could be subject to restrictions.\footnote{Id.} This distinction between the absolute nature of freedom of belief and the more relative right to manifest these beliefs is reflected in the Declaration, which provides that the exercise of guaranteed rights may be subject “only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”\footnote{Universal Declaration, supra note 168, art. 29.2.} As discussed below, the principle that freedom of thought, conscience, and religion is subject to limitations only when justified by significant societal interests is carried through all the major international instruments addressing religious freedom. Neither the neutrality of a regulation nor the absence of malicious intent will insulate it from a challenge of impermissible infringement. Instead, the determination will turn on the nature of the competing societal interest.

In 1956, the United Nations appointed a Special Rapporteur, Arcot Krishnaswami, to study and evaluate the degree of compliance with the Universal Declaration’s guarantee of freedom of thought, conscience, and religion.\footnote{See Krishnaswami, supra note 160, at v-vii.} Krishnaswami’s report, submitted in 1960, is considered to be a landmark treatise\footnote{“The human rights literature, voluminous in many areas, is surprisingly sparse on the issue of religious intolerance. One of the most noteworthy writings is A. Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices . . . .” Roger S. Clark, The United Nations and Religious Freedom, 11 N.Y.U. J. INT’L L. & POL. 197, 197 n.1 (1978). A subsequent U.N. study noted that the Krishnaswami report was: welcomed not only because of the profound analysis of the problem of discrimination in the matter of religious rights and practices which it contained, based upon voluminous information which had been collected . . . but also for its scrupulous objectivity and for the excellence of its literary style. It was characterized as a landmark in the efforts of the United Nations to eradicate prejudice and discrimination based on religion or belief. Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief: Report by Mrs. Elizabeth Odio Benito, Special Rapporteur, U.N. ESCOR, Hum. Rts. Comm., 39th Sess., Prov. Agenda Item 13, at 1, U.N. Doc. E/CN.4/Sub.2/1987/26 (1986) [hereinafter Benito Report].} which attempted to clarify the principles set forth in Article 18 of the Universal Declaration. His report reaffirmed the principle that a government could interfere with religious freedom only when religious practices are so “obviously contrary to morality, public order, or the general welfare that public authorities are . . . entitled to limit
them."  

Krishnaswami provided examples of the types of religious practices which governments would have a justifiable interest in prohibiting, listing human sacrifice, mutilation of self or others, and forced slavery or prostitution. In the absence of a legitimate governmental interest, "everyone should be free to comply with what is prescribed or authorized by his religion or belief, and free from performing acts incompatible with the prescriptions of his religion or belief."  

The International Covenant on Civil and Political Rights was the next significant international instrument to address, among other rights, freedom of religion. The relevant provisions in the covenant are tailored after Article 18 of the Universal Declaration and includes language that allows limitation of the guaranteed right only when the "limitations...are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."  

In 1962, the U.N. General Assembly initiated the preparation of a draft declaration and convention to eliminate all forms of religious intolerance. After many delays in its completion the General Assembly finally adopted, by unanimous vote, the Declaration on the Elimination of All

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174. KRISHNASWAMI, supra note 160, at 29.
175. Id.
176. Id. at 63.
177. International Covenant on Civil and Political Rights, supra note 159, 999 U.N.T.S. at 171. While the binding effect of the Universal Declaration is subject to controversy, the International Covenant is a binding treaty.
178. Id. at 178. The International Covenant on Civil and Political Rights provides, in relevant part:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Id.

Forms of Intolerance and of Discrimination Based on Religion and Belief. 181 While the provisions of the Declaration are not binding, "they represent the most comprehensive and unambiguous codification of the ideal of religious liberty to date."182 The Declaration on Religious Intolerance proclaims the right to freedom of thought, conscience, and religion and reiterates the same limitation on the right contained in the International Covenant on Civil and Political Rights. 183 Subsequent to the adoption of the Declaration on Religious Intolerance, the United Nations considered various measures to ensure its implementation, including the appointment of a Special Rapporteur to study and report on appropriate measures, 184 an appointment which the United States supported. 185

Through these various conventions, declarations, and resolutions, the international community has developed a framework for defining and protecting freedom of religion, which is defined as encompassing both beliefs and actions. From the earliest statement contained in the Universal Declaration, an analytical approach was instituted which protected freedom of religion in the absence of compelling countervailing state interests. This approach was incorporated into subsequent instruments, including the International Covenant and the Declaration on Intolerance. Pursuant to this analysis, the focus is on the nature of the countervailing state interests. Therefore, neither the neutrality of a regulation nor the absence of invidious intent will immunize a regulation which is not "necessary to protect public safety, order, health, or morals."

As discussed in the following section, the protection of religious freedom in the United States mirrored international practice for a period, but abruptly retreated from this approach with the Supreme Court's


183. The Declaration on Religious Intolerance provides that the right to "manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Declaration on Religious Intolerance, supra note 181, at 2.


decision in *Oregon v. Smith*.\textsuperscript{186} Prior to *Smith*, the courts balanced the free exercise of religion against the interests of the state: *Smith* eliminated this balancing requirement and replaced it with an intent-based analysis. The *Smith* approach resulted in the virtual evisceration of First Amendment free exercise protection and necessitated congressional action to restore it. Refugees who flee religious persecution have not benefited from Congress’ enlightened approach to the Free Exercise Clause. *Zacarias* still controls, and refugees fleeing religious persecution still must prove intent to persecute on the basis of religion. For the same reasons that an intent requirement is inadequate to secure constitutional free exercise of religion, it falls short of providing protection from religious persecution in asylum cases. Although congressional action put the United States back in step with the international community with respect to the free exercise of religion, similar action is necessary to restore protections against religious persecution.

**B. Free Exercise Under the First Amendment of the Constitution**

Protection of religious freedom in the United States has its basis in the First Amendment, which provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”\textsuperscript{187} *Reynolds v. United States*\textsuperscript{188} was the first case in which the Supreme Court interpreted the Free Exercise Clause. It held that although Congress could not regulate an individual’s beliefs, it could legislate against religiously motivated actions.

*Reynolds*, a Mormon, had been charged with polygamy. He had defended against the charge by arguing that polygamy was a requirement of the Mormon faith. The Court determined that Congress could prohibit polygamy, even if it were a religious practice, without violating the Free Exercise Clause.

The rationale in *Reynolds* was reaffirmed in *Minersville School District v. Gobitis*\textsuperscript{189} where two Jehovah’s Witness children were expelled from school for refusing to salute the American flag, in conformance with their religion’s tenets. In *Reynolds* and *Gobitis*, the Court interpreted the Free Exercise Clause as affording protection only to beliefs and as not requiring any exemption to neutral governmental

\textsuperscript{187} U.S. Const. amend. 1.
\textsuperscript{188} Reynolds v. United States, 98 U.S. 145 (1878).
legislation. In neither of these cases did the Court balance the interests of the religious adherent against those of the State.

The Court's decision in Cantwell v. Connecticut190 evidenced a different approach from Reynolds and Gobitis. Cantwell involved a Jehovah's Witness who had proselytized by playing an anti-Catholic record in the public streets of New Haven. He had been charged and convicted of inciting a breach of the peace. In recognition of the existence of some right to the manifestation of religious beliefs, the Court overturned the conviction, ruling that the state's interest in keeping the peace did not outweigh Cantwell's right to spread his religious beliefs.191

In West Virginia State Board of Education v. Barnette,192 the Court reversed Gobitis and for the first time expressly articulated that the government was required to balance the right of religious freedom against the interests of the state. Barnette, like Gobitis, involved the punishment of Jehovah's Witnesses who violated a statute that required public school students to salute and pledge allegiance to the American flag. In affirming the enjoined enforcement of the law against them, the Court held that freedom of religion could be limited "only to prevent grave and immediate danger to interests which the State may lawfully protect."193

In 1963, in the case of Sherbert v. Verner,194 the Court took a giant step forward in the protection of religious liberty and established strict scrutiny analysis for cases involving the free exercise of religion. Pursuant to this test, a state may infringe on an individual's freedom of religious action only when the state has a compelling interest in regulating the behavior and can show no alternative, less burdensome means of achieving its goal.195

The petitioner in Sherbert was a Seventh-Day Adventist who had been fired from her job for refusing to work on Saturday, the day of Sabbath in her faith, and had been denied unemployment benefits. The denial had been upheld by the state supreme court. The Supreme Court reversed, holding that the conditions of employment had forced her to violate her religious obligations and that there was no compelling state interest in the denial of unemployment benefits to her under these circumstances.

191. Id.
193. Id. at 639.
195. Id. at 403, 406–07.
The compelling interest test established in *Sherbert* was consistently applied in cases involving the free exercise of religion until the mid-1980s. On the basis of the compelling interest test, Amish children were exempted from mandatory school attendance requirements, and a Jehovah's Witness was awarded unemployment benefits even though he had quit his job rather than be involved in the manufacturing of military armaments in violation of his beliefs. The adoption of the compelling interest test constituted the recognition of the fact that the existence of a neutral statute did not insulate a governmental regulation from challenge.

In *Oregon v. Smith*, the Court reversed the precedent established in *Sherbert* and applied in subsequent cases. The Court in *Smith* held that no violation of the Free Exercise Clause is found when the interference with a religious practice is effectuated by the application of a "valid and neutral law of general applicability." Because there is no interference, the government is not required to establish a compelling interest to justify the ensuing restrictions upon the individual's free exercise of religion.

*Oregon v. Smith* involved the unemployment compensation claims of two Native Americans, Alfred Smith and Galen Black, who had been dismissed from their jobs at a drug rehabilitation center as a result of their use of peyote in a religious ceremony. The case came before the Supreme Court on the issue of whether the state of Oregon could constitutionally prohibit the religious use of peyote, "a sacrament of the..."
Native American Church... regarded as vital to respondents’ ability to practice their religion.” The majority held that the state of Oregon could indeed forbid the sacramental use of peyote and ruled that no violation of the Free Exercise Clause will be found where the interference with religious practice is effectuated by the application of a “valid and neutral law of general applicability.” The Court contended that it had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”

In making this ruling, the Court effectively reversed the preceding thirty years of free exercise precedent, which had in fact required the state to demonstrate a compelling interest when a neutral law interfered with religious practice. The Court attempted to distinguish the precedent by portraying it as limited to specific circumstances not implicated in Smith. According to the majority, the compelling interest test was limited to unemployment insurance claims and claims of a similar nature where criminal conduct was not involved, and to hybrid constitutional claims, such as cases implicating the Free Exercise Clause as well as other constitutional rights, “such as freedom of speech and of the press.”

Justices O’Connor, Blackmun, Brennan, and Marshall challenged the majority’s attempt to distinguish its precedent in order to reach the conclusion in Smith. Justice O’Connor observed that the holding “misreads settled First Amendment precedent,” and she reprimanded the majority for disregarding its own precedent. Justice Blackmun, joined

This disposition was odder than it might appear, since the Oregon Supreme Court had already held that the criminality of peyote use is “immaterial” to eligibility for unemployment benefits as a matter of state law. Under Oregon law, being fired for the use of peyote was like being fired for not working on Saturday; both are work-related derelictions which, if religiously motivated, could not be treated as misconduct under the First Amendment.

Id. (citation omitted). The Oregon court ruled that the state law provided no exemption for the sacramental use of peyote, but that this fact was irrelevant since enforcement of the law under these circumstances would violate the free exercise clause. The Supreme Court again granted certiorari, this time to decide whether the Oregon statute could constitutionally prohibit the religious use of peyote. Smith, 494 U.S. at 874.

200. Smith, 494 U.S. at 903.
201. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
202. Id. at 878–79.
203. Id. at 876.
204. Id. at 881.
205. Id. at 903 (O’Connor, J., concurring in judgment).
206. Justice O’Connor disputed the central rationales of the majority’s decision. In
in his dissent by Justices Brennan and Marshall, observed that application of the compelling interest test was "a settled and inviolate principle of this Court's First Amendment jurisprudence."207

The Court's decision in Smith was roundly criticized from many quarters and prompted successful congressional action to effect its reversal.208 The legislation that Congress enacted explicitly states that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."209 The Court's Smith decision was also criticized for distorting the original intent of the Constitution's framers. Professor McConnell, who has written extensively about the Free Exercise Clause,210 believes that the historical context of the First Amendment argues against the Court's conclusion in Smith.211 According to Professor McConnell, the drafters of the Free

response to the assertion that the Court had never allowed religious beliefs to justify exemption from a generally applicable law, Justice O'Connor noted that "in cases such as Cantwell and Yoder we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct . . . ." Id. at 895. "The Court endeavors to escape from our decisions in Cantwell and Yoder by labeling them 'hybrid' decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause." Id. at 896 (citation omitted).

207. Id. at 908.

[T]he bill . . . has facilitated the establishment of an extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended the interests of the various religious faiths in our country.


When I looked at the list of people who were sponsoring this . . . my first impression was to say, "Hey, wait a minute; do I belong among these folks?" The answer clearly is yes, because the decision by Justice Scalia, for whom I have the greatest respect — I don't know what he had for dinner the night before . . . he produced this decision . . . .

Id. at 7 (statement of Rep. Dannemeyer).
211. McConnell, Free Exercise Revisionism, supra note 199, at 1116-17. The failure of the Court to examine the historical context is "particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning." Id. at 1117.
Exercise Clause intended it to exempt religious practitioners from generally applicable laws.\textsuperscript{212} In reaching this conclusion Professor McConnell examines the history of free exercise of religion from the colonial period\textsuperscript{213} through the process of the framing of the Free Exercise Clause,\textsuperscript{214} as well as its early interpretations in federal and state constitutions.\textsuperscript{215} His conclusion, based on this exhaustive study, is that “[t]he modern argument against religious exemptions . . . is historically insupportable. Likewise insupportable are suggestions that free exercise of religion is limited to opinions or to profession of religious opinions, as opposed to conduct.”\textsuperscript{216}

The Smith decision abdicated the Court’s responsibility to protect the free exercise of religion guaranteed through the First Amendment. It held that governmental regulations which are neutral do not offend the Constitution, even if they may have the effect, as in Smith, of criminalizing activities that are essential to religious practice. By making the neutrality of the regulation the dispositive factor, Smith turned a blind eye to the impact on the individual in the practice of her religion. This approach is inconsistent both with Court precedent and with international norms defining the meaning of freedom of religion.

\textsuperscript{212} See id. at 1116–19. See also McConnell, Historical Understanding, supra note 210.

\textsuperscript{213} Professor McConnell states:

The idea of exemptions had deep roots in early colonial charters. . . . From the beginning it was thought that the solution to the problem of religious minorities was to grant exemptions from generally applicable laws.

The practice of the colonies and early states bore this out. Most of the colonies and states . . . exempted religious objectors from military conscription and from oath requirements expressly in order to avoid infringements of their religious conscience.

\textsuperscript{214} McConnell, Free Exercise Revisionism, supra note 199, at 1118.

\textsuperscript{215} Jefferson and Madison both played central roles in framing the free exercise clause of the Constitution, although Madison was the principal author of and floor leader for the First Amendment. Id. at 1119. Jefferson’s view of free exercise was narrower than Madison’s in that he “espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not.” McConnell, Historical Understanding, supra note 210, at 1451. According to McConnell, Madison believed that freedom of religion included exemption from generally applicable laws, and that his “generous vision of religious liberty[,] more faithfully reflected the popular understanding of the free exercise provision that was to emerge . . . in . . . the Bill of Rights.” Id. at 1455.

\textsuperscript{216} 215. “The language of the free exercise and liberty of conscience clauses of the state constitutions, from the early Rhode Island, Carolina, and New Jersey charters to the new constitutions passed after 1776, strongly supports this hypothesis [that free exercise includes the possibility of exemptions from generally applicable laws].” Id. at 1512.

\textsuperscript{216} Id. at 1511–12.

The decisions in *Smith* and *Zacarias* demonstrate a unified approach although they arose in distinctly different areas of jurisprudence. The Ninth Circuit decision of *Cañas-Segovia v. INS*²¹⁷ (*Cañas II*), which addresses the issue of religious persecution under the 1980 Refugee Act, represents a metaphorical marriage of the *Smith* and *Zacarias* decisions. In *Cañas II*, the court ruled that persecution suffered because of one’s religious beliefs is not religious persecution absent a showing of the persecutor’s intent. This constituted a reversal of the court’s earlier decision, *Cañas I*,²¹⁸ rejecting intent as dispositive.

The *Cañas-Segovia* cases raised the issue of religiously motivated conscientious objection as a basis for refugee status. The applicants in *Cañas-Segovia* were Jehovah’s Witnesses from El Salvador.²¹⁹ A central tenet of Jehovah’s Witness faith is abstention from participation in military service.²²⁰ During the time the case was litigated, military service in El Salvador was mandatory for all men from eighteen to thirty. The country did not recognize conscientious objectors, but treated them as deserters, imprisoning them for up to fifteen years.²²¹ Human rights violations were pervasive during this time period, and there was evidence that young men who refused to serve in the military for any reason were considered to be disloyal to the government and were subject to extrajudicial sanctions in the form of torture, disappearance, and assassination.²²²

The applicants claimed that under these circumstances, at a minimum, they would be imprisoned for refusal to serve, and it was likely that they would be tortured or disappeared because their refusal would be interpreted as opposition to the government.²²³ The Board had held that the evidence was insufficient to establish the requisite likelihood of extrajudicial sanctions, and that the applicants’ imprisonment could not constitute persecution on account of religion because the government

²¹⁷. *Cañas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1989) [hereinafter *Cañas I*], vacated and remanded, 112 S. Ct. 1152, remanded, 970 F.2d 599 (9th Cir. 1992) [hereinafter *Cañas II*].
²¹⁸. *Cañas II*, 970 F.2d at 601.
²¹⁹. *Cañas I*, 902 F.2d at 720.
²²⁰. *Id.*
²²¹. *Id.*
²²². *Id.* at 720–21.
²²³. *Id.* at 720.
was not motivated to punish them because of their religion, but because of their refusal to serve. The Board had characterized the conscription requirement as a neutral statute and ruled that its uniform application could not, as a matter of law, constitute “persecution on account of religion” within the meaning of the 1980 Refugee Act.

In Cañas I, the Ninth Circuit Court of Appeals reversed the Board’s decision. It found the applicants eligible for relief and characterized the imprisonment they faced for adhering to their beliefs as religious persecution. The risk of torture or disappearance was persecution on account of imputed political opinion. In reaching its decision, the court ruled that “[i]ntent or motive to persecute is merely one relevant consideration in the analysis of an asylum claim.”

The court relied to a great extent upon the recommendations of the Handbook, which provides for two exceptions to the axiom that punishment for refusal to serve in the military is not a basis for refugee status. The exceptions in the Handbook are where the applicant would suffer disproportionate punishment on account of race, religion, nationality, political opinion, or membership in a particular social group, or where the military service is “contrary to . . . genuine political, religious or moral convictions, or to valid reasons of conscience.” The rationale underlying the recommendation of refugee status is that individuals should not be punished for adherence to deeply held religious or political convictions. Punishment under these circumstances is, in reality, persecution.

In addition to the Handbook’s guidance, the Ninth Circuit relied, by way of analogy, upon pre-Smith First Amendment jurisprudence, observing that an “elementary tenet of United States constitutional law . . . [is] that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons.” Observing that “United States jurisprudence is relevant to analysis of new issues of . . . refugee status.”

225. Id.
227. Id. at 726.
230. For a more extensive discussion of the argument that religiously motivated conscientious objection should provide the basis for a claim to refugee status, see Karen Musalo, Swords Into Ploughshares: Why the United States Should Provide Refugee Status to Young Men Who Refuse to Bear Arms for Reasons of Conscience, 26 San Diego L. Rev. 849 (1989).
231. Cañas I, 902 F.2d at 723–24.
law," the court held that the uniform application of a neutral statute could interfere with an individual's free exercise of religion.

The INS petitioned for certiorari of *Cañas* I to the Supreme Court. Shortly after the Supreme Court decided *Zacarias* it vacated the Ninth Circuit's decision in *Cañas* I and remanded it for a decision in light of *Zacarias*. On remand, the Ninth Circuit reversed the portion of the *Cañas* I decision that held that imprisonment of the applicants for refusal to serve in the military would constitute religious persecution. The court in *Cañas* II ruled that *Zacarias'* adoption of a motive requirement precluded a finding of religious persecution absent proof of intent.

In light of the fact that conscientious objection has been broadly recognized "as a legitimate expression of the right to freedom of thought, conscience, and religion," the decision in *Cañas* II is even more troubling. The case stands for the problematic rule that the imprisonment of an individual for the exercise of the internationally recognized right to freedom of religion is not religious persecution.

*Cañas* II and *Oregon v. Smith* reflect the same rationale, although Congress wisely reversed *Oregon v. Smith* through legislative action. In both cases, religious freedoms are interpreted in a way that conflicts with the developing international trend. As the international community has increased its protection of religious freedoms, the U.S. Supreme Court has moved toward an increasingly formalistic analysis. Were it not for congressional action in the free exercise area, the United States' promise of religious freedom and protection from religious persecution would be little more than lip service to an ideal.

V. CONCEPTS OF INTENT IN THE CONTEXT OF JURISPRUDENTIAL OBJECTIVES

Relying on the plain language of the 1980 Refugee Act, the Supreme Court in *Zacarias* adopted an intent requirement. As discussed in the preceding sections, an intent requirement is compelled neither by the plain meaning nor the statutory language of the 1980 Refugee Act. Furthermore, the requirement of proof of intent is contrary to the ap-

232. *Id.* at 723 n.11.
233. *Cañas II*, 970 F.2d 599.
proach advocated by the UNHCR. Cases such as *In re Konesan*, *In re Thanapalan*, and *In re R* demonstrate the absurd results of an intent-based analysis. The application of the intent rule in cases involving freedom of religion, such as *Cañas II*, demonstrates its inadequacy in protecting the interests at stake and trivializes the concept of religious freedom.

It is a well recognized principle that statutes are to be construed in a manner consistent with their objectives. In this respect, interpretation of the Refugee Act should be flexible enough to accomplish the underlying legislative purpose, which is to provide protection to the individual who has a reasonable fear of persecution related to her race, religion, nationality, political opinion, or membership in a particular social group.

In counseling against an intent requirement in *Zacarias*, the UNHCR distinguished the very different policy goals of refugee and criminal law, noting that "refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof." In the same way that the underlying purpose of a particular statute influences its interpretation, overarching jurisprudential objectives are taken into consideration in the development of particular areas of law. The requirement, or lack thereof, of proof of intent in three distinct areas of law, criminal, tort, and statutory civil rights, demonstrates judicial flexibility in the accommodation of jurisprudential objectives. The requirement of proof of intent in criminal cases has often been modified to protect perceived societal interests, and tort law has evolved away from proof of negligence towards absolute or strict liability. Perhaps most instructive is the treatment of intent in cases arising under Title VII of the Civil Rights Act, where an effects analysis was substituted for an intent requirement more than two decades ago. The evolution of concepts of intent in these areas provides a valuable counterpoint to the Supreme Court’s decision in *Zacarias*.

A. Criminal Law

In criminal law, proof of mens rea has long been a requirement.

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235. See, e.g., Crandon v. United States, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” (emphasis added)).

236. UNHCR Brief Amicus Curiae, *Zacarias*, supra note 72, at 16.


It is a sound principle of criminal jurisprudence, that the intention to commit the crime is of the essence of the offence; [sic] and to hold, that a man shall be held
In the criminal context, proof of intent makes sense and is rooted in the principle that "only conscious wrongdoing constitutes crime." Therefore, an individual should not be punished in the absence of a guilty state of mind. The justice rationale underlying the requirement of proof of intent is emphasized by the requisite burden of proof applicable in criminal prosecution; the guilt of an individual must be established beyond a reasonable doubt before punishment will be imposed.

Even in the criminal area, the requirement of proof of intent has not been rigidly or blindly followed. There were exceptions to the rule in early common law to serve other countervailing societal interests. For example, statutory rape required no mens rea regarding the victim's age. In addition, certain acts which endangered the public welfare were considered criminal in the absence of proof of intent.

Modern criminal law also recognizes the existence of criminal culpability in the absence of traditional notions of intent. This trend

_criminally responsible for an offence, [sic] of the commission of which he was ignorant at the time, would be intolerable tyranny._

_Id. See also 21 AM. JUR. 2d Criminal Law § 129 (1981) ("At common law, a crime required two elements: an act and an evil intention. This view is expressed in the maxim that an act does not render one guilty unless the mind is guilty.") (footnotes omitted)._  

238. 21 AM. JUR. 2d, supra note 237, § 129.  

239. MCCORMICK, note 99, § 341.

The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted... as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.

_Id. (footnotes omitted). See also In re Winship, 397 U.S. 358, 364 (1970), which states:_

_use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the common law not be diluted by a standard of proof that leave people in doubt whether innocent men are being condemned._

240. See Matthew T. Fricker & Kelly Gilchrist, United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law, 65 NOTRE DAME L. REV. 803 (1990). The authors discuss two early exceptions to the mens rea requirement: crimes for which ignorance of the law was no defense, such as statutory rape, and "public welfare" offenses, which "came into existence when the legislature decided to promote the public good by enacting regulations accompanied by criminal sanctions."_Id. at 817._

241. See id. at 822, which states, "[m]odern criminal law is moving away from traditional notions of criminal states of mind and towards more sophisticated conceptions regarding states of mind and how they should be determined." The authors point to the Model Penal Code, the Criminal Code Reform Act of 1979 and the Supreme Court decision in United States v. Bailey, 444 U.S. 394 (1980)._Id. at 822. In Bailey, the Supreme Court noted with approval the decision in United States v. Feola, 420 U.S. 671 (1975), which held that a defendant could be convicted for assaulting a federal officer under 18 U.S.C. § 111 even if the defendant did not know his victim was a federal officer._Id. at 825 n.102._
has been evident in the area of environmental criminal prosecutions, where corporate officials have been held criminally liable even though they did not know about, or intend to cause, the prohibited harm. The underlying rationale in many of these cases is that "[i]n the interest of the larger good . . . a person otherwise innocent but . . . in responsible relation to a public danger" may be held guilty. Prosecutions of women who ingest drugs while pregnant under statutes that prohibit the delivery of drugs to a minor demonstrate this same erosion of the concept of intent in pursuance of perceived societal interests. Courts that have entered such convictions have been criticized for "manipulat[ing] a statute" to reach what it perceives to be a socially desirable result. Regardless of what one thinks of the elasticity of the mens rea concept as evidenced in the context of criminal law, it demonstrates that the courts are willing to make it easier to prove intent if it serves public policy goals.

B. Tort Law

Developments in tort law are also illustrative of the way in which public policy concerns influence rules regarding intent and liability. The overriding purpose of tort law is to make the injured person whole. For this reason, from early common law, the fault of the actor was less 242. See Ruth A. Weidel et al., The Erosion of Mens Rea in Environmental Criminal Prosecutions, 21 SETON HALL L. REV. 1100 (1991), which states, "[t]he enactment and judicial interpretation of criminal environmental statutes . . . has eroded the traditional requirement of mens rea." Id. The authors discuss the modification of the mens rea requirement and observe that "[t]he development of regulatory statutes designed to protect the public welfare has resulted in responsible corporate officials being exposed to criminal liability even though they lack personal knowledge and did not personally participate in the illegal act." Id. at 1101.

243. Id. at 1102 (quoting United States v. Dotterweich, 320 U.S. 277, 280–81 (1943)).
244. See Michelle D. Wilkins, Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches, 39 EMORY L.J. 1401 (1990), discussing the use of statutes criminalizing delivery of drugs to minors to pregnant mothers. Charges were brought under these statutes in the states of Georgia, Florida, Michigan, Massachusetts and South Carolina in 1989. In Florida, a court convicted a woman who had been using cocaine when her two children were born. State v. Johnson, No. E89-890-CFA (18th Cir., Seminole County, Fla., July 13, 1989). The court found that the delivery of cocaine to the children occurred when it passed "from the body of the mother into the body of her child through the umbilical cord after birth occurs." Wilkins, supra, at 1410 (quoting State v. Johnson, No. E89-890-CFA, slip op. at 1).

245. Shona B. Glink, Note, The Prosecution of Maternal Fetal Abuse: Is This the Answer?, 1991 U. ILL. L. REV. 533, 558. "These statutes are not intended to apply to mothers because mothers do not 'intend' to deliver drugs to their fetus within the intended meaning of the statute." Id. at 558.

246. See 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.3(b) (1986) ("The function of tort law is to compensate someone who is injured for the harm he has suffered.").
significant than the harm to the victim, and liability could be established upon a showing of ordinary negligence. Negligence inquires into state of mind only to the extent that it assesses whether the defendant "knew or should have known that his activity would cause the type of injury charged." Development of the theory of "absolute" or "strict" liability eliminated the requirement of establishing negligence under certain circumstances. There are several policy rationales for this shift, including "the extreme practical difficulty of proving the negligence of a manufacturer or supplier." Because of the difficulty of proof, "an approach which conditions a plaintiff's recovery on the ability to prove negligence is inadequate."

In certain respects, the policy objectives of tort law share greater similarity to refugee law than do the objectives of criminal law. In both tort and refugee law, the focus is on providing a remedy for the victim rather than on punishing the actor — a central preoccupation of criminal law. To the extent that they share this similarity, the shift away from intent to negligence or strict liability in tort law supports the argument that the requirement of proof of intent in refugee law is misplaced. Moreover, although the underlying purposes of criminal law are quite distinct from those of the refugee regime, the erosion of an intent re-

247. As Richard Faulk noted in his historical analysis of absolute liability:

As early as 1681, the common law of torts recognized that "the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." Although individual morality remained a consideration in some forms of action, tort law gradually evolved toward broader considerations of social welfare. In this perspective, "fault" was determined by the interests of society in compensating injury and in deterring unacceptable conduct; considerations of individual blame were increasingly neglected.


248. 1 LAFAVE & SCOTT, supra note 246, § 1:3(b) ("Ordinary negligence is a common basis of tort liability, but more than ordinary negligence is usually required in the criminal law.").

249. Faulk, supra note 247, at 569.


251. Policy rationales for strict liability include: (1) social fairness; i.e., even though the defendant is faultless, the victim has no relation to the cause of injury; (2) economic efficiency; i.e., the tortfeasor is in the best position to distribute the costs to the community; and (3) environmental factors, i.e., that such a rule encourages companies to make products safer to bring down the costs of production. Id. at 385–86.


253. Id. at 26.
requirement in criminal law highlights the elasticity of the concept of intent and its adaptation to serve societal interests.

C. Anti-Discrimination Law

An even tighter analogy may be drawn between the jurisprudential objectives of the refugee regime and statutory anti-discrimination law as codified in Title VII of the Civil Rights Act. Both jurisprudential systems seek to redress mistreatment, for example, "persecution" in the refugee context and "discrimination" in the civil rights context,254 which is imposed as a consequence of an individual's status or beliefs. Title VII protects against employment discrimination on the basis of race, gender, national origin, or religion; the 1980 Refugee Act attempts to redress persecution which is suffered on account of race, religion, nationality, political opinion, or membership in a particular social group. Because of the similarity in the language describing the required nexus — "on the basis of" and "on account of" — as well as the parallel objectives of the statutory schemes, Title VII jurisprudence regarding proof of intent provides a useful comparison.

Shortly after the enactment of the Civil Rights Act of 1964, the Supreme Court ruled that individuals seeking redress under Title VII of the Act were not required to demonstrate intent to discriminate. In 1971, in the landmark case of *Griggs v. Duke Power Co.*,255 the Supreme Court held that Title VII addressed effects and did not require proof of discriminatory intent: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."256 The *Griggs* decision articulated the principle that reliance upon proof of intent was inadequate to implement the legislative ideals of the Civil Rights Act.

254. The concepts of "discrimination" and "persecution" are not mutually exclusive, but in fact often overlap. For example, cumulative measures of discrimination may often constitute persecution, and persecution oftentimes results from prejudice or discrimination. The Handbook recognizes the interrelationship of the two concepts and discusses circumstances under which discrimination amounts to persecution. *Handbook*, *supra* note 27, ¶ 54–55.
256. *Id.* at 432.
257. In addition to addressing the issue of intent, the *Griggs* decision also established rules allocating the burden of proof in Title VII claims. This aspect of *Griggs* is also useful for evaluating the issue of burden of proof in asylum claims, and will be discussed in Section VI, *infra*. 
Title VII jurisprudence is not the only statutory antidiscrimination scheme to dispense with intent as a requirement. For example, under the Voting Rights Act, Congress made it clear that it "meant to allow plaintiffs . . . to prevail if they demonstrated either intent or effects." Effects alone are also sufficient under the Equal Pay Act of 1963.

Constitutional claims of discrimination arising under the Equal Protection Clause of the Fourteenth Amendment do require proof of intent. Nonetheless, it is worth noting that this has not always been the case. As several commentators have noted, during the course of this century, the Court's decisions "followed a confusing and contradictory path" and fluctuated between intent and effects. The adoption of an intent requirement has met with a significant amount of criticism.


259. See supra note 66 and accompanying text.


261. Kousser, supra note 258, at 690.

262. "The Supreme Court's route to this basic principle [the necessity of proof of discriminatory intent] has been rather schizophrenic." Karlan, supra note 258, at 111 n.3.

263. The criticism has focused both on the difficulty of proving intent, as well as the inadequacy of an intents test to protect the interest at stake. Eisenberg & Johnson, supra note 260, at 1160–62.

Dissatisfaction with the discriminatory purpose standard has two distinct facets. One is the difficulty of proving discriminatory purpose. . . . Several commentators have argued that sophisticated discriminators will conceal their purposes.

Drawing on developing social science data concerning the prevalence and manifestations of unconscious racism, recent writers have contended that race-based decisionmaking is common, and have pointed out the impossibility of adducing evidence that a decision was made "because of" race when the decisionmaker himself is unaware that race influenced his choice.

A second facet of the anti-Davis commentary argues that intentional, "because of" race discrimination provides a too limited vision of the goal of equality embodied in the fourteenth amendment. Most broadly, Alan Freeman has argued that intent tests wrongly adopt a perpetrator's perspective on discrimination; from the victim's perspective, effects are of greater importance.

Id. at 1161–62 (footnotes omitted).

primary policy argument often proffered in defense of an intents test in equal protection cases is that an effects test would have potentially “disruptive consequences of wholesale invalidation of facially neutral laws.” 264

In the context of refugee law, the same policy reasons that support a Title VII effects-based analysis apply. Reliance upon intent is inadequate to implement the legislative ideals of the 1980 Refugee Act. None of the policy arguments relied upon to defend against an effects test in equal protection cases are applicable. The grant of protection to an individual who has suffered a violation of his or her rights is a humanitarian action between the State and the individual. As such, it does not implicate any of the alleged adverse consequences raised in the equal protection area. Given the absence of compelling countervailing policy objectives, an effects rather than intent framework should apply to refugee claims. 265

264. Karlan, supra note 258, at 111-12. See also Kousser, supra note 258, at 697, in which Professor Kousser notes that an effects test in Equal Protection cases was rejected by the Court at least in part because its application raised the specter of a slippery slope of the invalidation of neutral laws which had racially disproportionate impacts:

Under the equal protection clause, said Justice White for a 7-2 majority in Washington v. Davis, “a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” It would not be unconstitutional “solely because it has a racially disproportionate impact.” Otherwise — this was the slippery slope on the effect side — all sorts of tax, welfare, regulatory, and other policies that bore more heavily on members of one race than of another would be drawn into question.

Id. at 697 (footnotes omitted).

265. The argument is made in this article that the question of the meaning of “on account of” can be answered by reference either to an intents or to an effects based analysis, and that the latter approach more faithfully conforms to the purposes of the 1951 Refugee Convention. I want to thank my colleague, Professor James C. Hathaway, for challenging me with his analysis, which embraces neither an intents nor an effects framework. Professor Hathaway reads the phrase “for reasons of race, religion, nationality, membership in a particular social group, or political opinion” as identifying statuses or beliefs which might lead to marginalization, and therefore a failure of protection, within the home country:

Refugee law exists in order to interpose the protection of the international community in situations where resort to national protection is not possible. Because it is fundamentally a form of surrogate or substitute protection, the beneficiaries of refugee law have always been defined to exclude those who enjoy the basic entitlements of membership in a national community, and who ought reasonably to vindicate their basic human rights against their own state. Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part in order to exercise those human rights. Their position within the home community is not just precarious; there is also an element of fundamental marginalization which distinguishes them from other persons at risk of serious harm.


Viewed in this framework, Professor Hathaway argues that the on account of clause is “about neither intent nor effect per se but is rather an attempt to identify particularly critical
VI. PROPOSED SOLUTIONS

This article has made two main arguments against Zacarias' imposition of an intent requirement: (1) proof of persecutor's intent subverts the humanitarian objectives of the international refugee regime, and (2) proof of intent poses a virtually insurmountable barrier given the difficulty of producing evidence on the issue of state of mind of the persecutor. It is recommended that the damage worked by Zacarias be rectified by eliminating the requirement of proof of intent or by establishing certain rebuttable evidentiary presumptions in favor of the applicant on the issue of the "on account of" nexus. These changes could be brought about through congressional amendment to the 1980 Refugee Act or by executive action in the form of regulations interpreting the already existing legislation.

Precedent certainly exists for Congress to reverse or overrule Supreme Court decisions. Congress' response to Oregon v. Smith was to nullify it by enactment of the Religious Freedom Restoration Act of 1993. The Civil Rights Act of 1991 overturned, in substantial measure, a number of Supreme Court decisions diluting civil rights protections. Referring to the Civil Rights Act of 1991, one commentator noted that "[t]his is not the first time Congress has had to respond to the current Supreme Court in this way." The Justice Department has issued a legal memorandum softening the effect of Zacarias, but the memorandum does not go far enough in dealing with the decision's major defects.

A. Elimination of Intent of the Persecutor as a Requirement

It is recommended that the intent requirement of Zacarias be eliminated and replaced with a more flexible analysis, consistent with the language and purpose of the Refugee Act and with international prac-

forms of social marginalization which warrant the unusual response of disengagement, rather than the normal response of seeking internal redress." Memorandum from James C. Hathaway to Karen Musalo (Apr. 8, 1993) (on file with author). "[W]hat matters is whether there is a nexus between lack of a genuine ability to 'right the wrong' internally and membership in a group defined by one of the five grounds, whether or not the harm itself was inflicted because of one of the five grounds. Id.

I do not disagree with Professor Hathaway's understanding of the "on account of" clause; nor are we in disagreement that the Supreme Court's imposition of an intent requirement in Zacarias thwarts the objectives of the 1951 Refugee Convention. Nonetheless, in the context of American jurisprudence I believe that the intents-effect analysis provides a more familiar and useful framework for adjudicating claims under the 1980 Refugee Act.

267. Id.
tice, as recommended by the UNHCR. It is proposed that the approach developed by the Ninth Circuit prior to Zacarias, in such cases as Hernandez-Ortiz v. INS,268 Desir v. Ilchert,269 and Cañas I,270 serve as the model for determining the required relationship between persecution and one of the enumerated grounds.

In Hernandez-Ortiz v. INS, the Ninth Circuit explicitly rejected an analysis which devolved exclusively on the persecutor’s motivation. The Court set forth its approach and explained it as follows:

“Persecution” occurs only when there is a difference between the persecutor’s views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate. For this reason, in determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor; we may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim’s, and we may examine the relationship between the two.271

In Desir v. Ilchert, the Ninth Circuit applied this approach, which examines both sides of the persecution equation, to the claim of a Haitian asylum seeker. The applicant, Fritz Desir, had been arrested and severely beaten by Tonton Macoutes because of his refusal to pay bribes to them.272 The BIA denied the application, holding that the Tonton Macoutes had not beaten Desir for a reason enumerated in the 1980 Refugee Act, but “because they wished to extort money from him for personal reasons.”273 The Ninth Circuit held that the persecution was indeed political, rather than personal. It reached this conclusion by finding that although extortion in individual cases may have benefited members of the Tonton Macoutes, in the larger context of repression in Haiti, “the intimidation and fear thereby engendered accrued to the

268. Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985).
269. Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).
270. Cañas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990).
271. Hernandez-Ortiz v. INS, 777 F.2d at 516 (citation omitted).
272. Haitian dictator François Duvalier, also known as “Papa Doc,” created his own personal security force, the Volunteers for National Security (VSN). The VSN quickly became known as “Tonton Macoutes,” the mythical bogeymen of Haiti. PAUL FARMER, THE USES OF HAITI 107-08 (1994). The Tonton Macoutes were responsible for “large-scale corruption, violence and harassment, including illegal arrests, detention in unknown places, interrogation under torture, and killings; they also engaged in activities of extortion and raids on public meetings.” EDWARD LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS 696 (1991).
benefit of the Duvalier regime."\textsuperscript{274} From this perspective, "the treatment endured by Desir is more properly understood as motivated by ‘political’ rather than ‘personal’ interests."\textsuperscript{275}

In \textit{Cañas I}, discussed in detail above in Section IV.C, the Ninth Circuit found the requisite nexus absent proof of perpetrator's intent because the risk of persecution was directly related to the applicant's adherence to religious beliefs. The Cañases had a well-founded fear of being imprisoned because their religious beliefs precluded their participation in the Salvadoran military. Pursuant to the Ninth Circuit's approach as articulated in \textit{Cañas I}, harm which would not befall an applicant \textit{but for} her race, religion, nationality, political opinion, or membership in a particular social group, is harm \textit{on account of} the enumerated ground, regardless of the perpetrator's motivation.

The Ninth Circuit's framework allows the type of flexibility necessary to implement the goals of the 1980 Refugee Act. It does not limit itself to a rigid correlation between the perpetrator's intent and the victim's status or beliefs. Rather it examines the beliefs, statuses, and motivations on both sides of the perpetrator equation, the victim and the perpetrator. Within this framework, harm which is imposed in order to implement the perpetrator's political objectives, as well as harm which would not have occurred but for the victim's status or beliefs, satisfies the "on account of" requirement.

\textbf{B. Establishing Presumptions in Favor of the Applicant}

The Court in \textit{Zacarias} ruled that the applicant must produce some evidence "direct or circumstantial" of the perpetrator's intent. Evidence of state of mind is difficult to produce, and cases such as \textit{In re Konesan}, \textit{In re Thanapalan}, and \textit{In re R-} demonstrate the inappropriately high burden of persuasion being imposed on asylum applicants. The allowance of evidentiary presumptions\textsuperscript{276} in favor of the applicant would go a long way toward redressing this dilemma. It is proposed that rebuttable presumptions on the issue of "on account of" be established whether or not the intent requirement is eliminated in recognition of difficulties of proof confronting the asylum seeker.

\textsuperscript{274} \textit{Id.} at 728.

\textsuperscript{275} \textit{Id.}

\textsuperscript{276} "A presumption . . . is a rule of law that deals with the assumption . . . of a certain factual situation based upon proof of other usually logically related facts." Belton, supra note 100, at 1222.
1. Presumptions Establishing Proof of Intent

Once again, pre-Zacarias Ninth Circuit jurisprudence provides a model for the recommended approach. In Hernandez-Ortiz the court ruled that persecutory actions by a government against an individual who has not "engaged in criminal activity or other conduct that would provide a legitimate basis for governmental action" will be presumed to be politically motivated. The Hernandez-Ortiz presumption could be expanded to provide that acts of persecution by governmental or non-governmental entities which have a political agenda, such as guerrilla groups, in the absence of a legitimate purpose, will be presumed to be politically motivated.

2. Presumptions Arising from Disparate Impact

In conjunction with the Hernandez-Ortiz presumption, it is recommended that a second presumption be developed to provide that acts of persecution which disparately impact groups of a specific race, religion, nationality, political opinion, or particular social group give rise to a rebuttable presumption that the acts are on account of the status or belief disparately impacted. This presumption would shift the burden of persuasion to the government to establish that there is no reasonable basis for believing that the harm was on account of the victim's status or beliefs.

This type of disparate impact analysis is not unfamiliar to courts, which have utilized it in Title VII employment discrimination cases since Griggs. Pursuant to Griggs, business practices that had a disparate impact upon a protected class were unlawful. Upon a showing of disparate impact, the burden of proof shifted to the defendant to establish that the practice was required by business necessity. The Supreme Court reversed much of Griggs in its 1989 decision, Wards Cove Packing Co. v. Atonio. Congress, however, restored Griggs through passage of the Civil Rights Act of 1991.

The development of an evidentiary rebuttable presumption in favor of the applicant would constitute a long overdue recognition of the difficulty of proof in refugee cases. Furthermore, it would shift the focus away from the persecutor's intent and bring it back to the effects of the persecutor's actions. Finally, and perhaps most importantly, it would

277. Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).
begin to redress the bias that results in the virtual requirement of proof beyond a reasonable doubt of the prima facie elements of an applicant's claim.

Under the proposed presumptions, the gravity of the harm already suffered, or feared in the future, should be a relevant factor. The greater the violation of the individual's fundamental rights, the more difficult it should be to rebut the presumption that it is on account of one of the enumerated grounds. This would have the effect of better incorporating international human rights norms into the refugee adjudication process. It would also be consistent with burden of proof principles that take into consideration the gravity of a wrong decision.

Canada, which is also a signatory of the Convention on the Status of Refugees, is an example of a country that has moved toward more directly incorporating international human rights norms into its refugee determinations. Its recently released Guidelines on Women Refugee Claimants Fearing Gender Related Persecution illustrate this movement. These guidelines came into existence to address the specific analytical issues presented by the claims of women seeking asylum. Women often suffer persecution because of their status as women; they are subjected to dress code requirements, limitations on their educational and professional options, and other forms of discriminatory treatment. The application of a strict "on account of" analysis often results in the failure of protection to women claimants. In response to the inadequate protection provided by traditional analysis, the Canadian guidelines recommend liberal use of the "social group" enumerated ground. Whenever the feared harm constitutes a violation of internationally guaranteed rights, the guidelines suggest that the adjudicator find that the harm is "on account of" membership in a particular social group. The group is defined by reference to the female claimant and her particular situation. In effect, this liberal use of the social group basis incorporates international human rights norms and guarantees protection when there is a reasonable risk of their violation.

CONCLUSION

The decade of the 1990s has already witnessed major transformations and developments in the international community; the dissolution of the former Soviet Union and the subsequent unleashing of ethnic violence are but a few of the many significant contemporary changes. In the
midst of increasing uncertainty and change, the importance of international standards and rules of law is heightened. The increased role of the United Nations in both peacemaking and peacekeeping operations, for example, is an implicit recognition of the importance of international norms. The international definition of refugee articulated in the Refugee Convention and Protocol was acceded to by the United States in 1968. Although legislation bringing the United States into compliance with the international standard was long in coming, Congress is to be lauded for conforming U.S. law to international law in its enactment of the 1980 Refugee Act.

The 1980 Refugee Act was an expression of lofty American ideals to conform with international refugee protections and to extend a genuine welcome to individuals fleeing persecution in their homelands. Zacarias and its progeny have transformed the promise of an extended hand to fleeing refugees into a meaningless gesture. The time has come for a reassessment of United States policy and an examination of the extent of national commitment to international norms. An appropriate place to begin would be a reevaluation of the incorporation of an intent requirement into the refugee definition. This requirement has led to indefensible decisions, which deny protection to individuals fleeing the infliction of torture and other human rights violations. If the United States aspires to be a leader in the "new world order," then it should lead — and hopefully it will do so in a direction worthy of following.