U.S. Asylum Law as a Path to Religious Persecution

Jack C Dolance, II, West Virginia University
U.S. ASYLUM LAW AS A PATH TO RELIGIOUS PERSECUTION

Jack C. Dolance II

ABSTRACT

U.S. asylum law protects against persecution “on account of . . . religion.” But must the law protect a non-believer seeking religious asylum in the United States? Many may instinctively answer “no,” for a non-believer is by most definitions not “religious.”

Such a response misses the mark, however—at least in the context of U.S. asylum law, which is subject to the First Amendment. The protection of religious liberty enshrined in the First Amendment embodies freedom from persecution on account of one’s “religion”—in whatever form that religion may take. In the asylum context, then, “religion” must be defined broadly. Protection from persecution on account of one’s “religion” must include protection of one’s religious freedom not to believe in deities of any kind. To hold otherwise would be to inhibit the very religious liberty asylum law is intended to protect.

Yet under current U.S. law, a non-believer’s claim for asylum may well be denied on the ground that non-belief is not enough for religious asylum. This may serve to dissuade a would-be asylee from even attempting to apply for religious asylum as a non-believer—even where she would undoubtedly be subject to religious persecution if forced to return to her native country. She may thus feel the need to feign conversion to a traditional, mainstream religion. Such a result is unacceptable in a nation founded upon religious liberty.

This brief Article argues that if a non-believer is denied religious asylum in the United States, she can succeed on a claim that the law as applied to her violates both the Free Exercise and the Establishment clauses of the First Amendment.
INTRODUCTION

The law of asylum is undeniably intended to protect the religious liberty of victims of religious persecution.¹ But in a cruel twist of irony, it has the potential to become an impediment to the very religious liberty it is intended to protect.²

The tensions between asylum law and religious liberty are most visible in cases where asylum applicants seek to exercise a newfound freedom of religion—a matter of conscience that may have developed only recently (e.g., since being in the United States).³ Such a claim cannot be evaluated in the same manner as,

¹ The 1951 United Nations Convention Relating to the Status of Refugees was signed and ratified in the wake of World War II, with the Jewish experience in Nazi Germany and the Holocaust serving as the backdrop. See infra note 9.

² See, e.g., Michael Kagan, Refugee Credibility Assessment and the “Religious Imposter” Problem: A Case Study of Eritrean Pentecostal Claims in Egypt, 43 Vand. J. Transnat’L L. 1179, 1190 (2010) (noting that asylum credibility assessment, part of a process “intended to protect victims of religious repression[,] may actually impair religious freedom and compromise the state’s neutrality”); see also Bridgette L. Frantz, Note, Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms, 5 Ave Maria L. Rev. 499, 502 (2007) (“This Note contends that the United States has become one of the most difficult nations in which to win asylum from religious persecution, and thus the original intention of asylum has become skewed.”).

³ See discussion infra Part I.A.
for instance, one’s claim to be a persecuted ethnic or political minority. An American immigration official can find herself in the unenviable position of deciding what it means to be a Jew, a Christian, a Muslim, or an “apostate.” These government officials might be forced to make awkward and arguably unconstitutional judgments concerning an individual’s specific beliefs about deities, morality, gender-roles, interpretations of religious texts, metaphysics, or idolatry, among other things.

Yet such problems are most evident, and perhaps most controversial, where an individual seeks asylum protection in the United States due to a fear of religious persecution on account of her status as a non-believer. How does one prove that she does not believe—or at least does not believe in absolute or orthodox terms—in a god or gods? And how is such a claim to be neutrally evaluated by an asylum officer or immigration judge? One might ask if a non-believer seeking asylum can even invoke the protections of the Constitution’s religion clauses.

This brief Article argues that the current law for determining the eligibility of non-believers seeking asylum from religious persecution has the perverse potential to inhibit the very religious liberty asylum law purports to protect. Such a result is unacceptable in a country that claims to value and encourage freedom of thought and conscience; it is particularly abhorrent in a country founded upon religious liberty and protection from religious persecution.

---


5 “Apostasy,” which comes from the Greek word for “defection” or “revolt,” is the partial or complete abandonment or rejection of the beliefs and practices of a religion by a person who is (or, as the case may be, was) a follower of that religion. JUAN E. CAMPO, ENCYCLOPEDIA OF ISLAM 48 (J. Gordon Melton, series ed., 2009). In Islam, apostasy is regarded as a type of disbelief, together with “heresy” and “blasphemy.” Id. An “apostate” is one who rejects or denies one’s faith—either in favor of another faith (i.e., “conversion”), or as a renunciation of religious belief per se. See generally USCIS Asylum Officer Basic Training Course, Eligibility Part III: Nexus (March 12, 2009) at 19.

6 The answer to the latter question is yes, as the Supreme Court has interpreted the term “religion” rather broadly to include theistic, nontheistic, and other non-traditional forms of religion. See United States v. Seeger, 380 U.S. 163, 165–66 (1965); see also infra Part II.B.


The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation’s founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and as a pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy of religious freedom and honored this
asylum, a non-believer can succeed on a constitutional claim that U.S. asylum law as applied to her violates the First Amendment. First, the U.S. government positively inhibits the Free Exercise of religion if a non-believer asylum seeker is forced to choose between (a) supporting a religion she opposes in her home country, or (b) staying true to her conscience at the cost of facing religious persecution and possible death at the hands of her native country’s ruling regime. Second, unconstitutional Establishment results where a non-believer feels compelled to adhere to a United States government official’s version of what it means to be properly “religious,” under threat of return to a regime known to engage in religious persecution against non-believers.

Part I of this Article briefly explores the law of asylum in the United States, using a hypothetical Iranian national—a former Muslim, now a non-believer—to illustrate a critical (yet unaddressed) problem. Part II focuses on asylum’s interplay with religious liberty generally, and the First Amendment’s Religion Clauses specifically. Part III discusses the application of the Religion Clauses to noncitizens and then analyzes potential constitutional claims available to a non-believer upon being denied asylum. In conclusion, the Article argues that if religious liberty means anything, it must mean freedom from persecution because of one’s religion—including atheistic or agnostic religious views. U.S. asylum law must encourage, not inhibit, such liberty.

PART I: THE LAW OF ASYLUM IN THE UNITED STATES

To qualify for asylum protection in the United States, an applicant must first qualify as a “refugee” pursuant to 8 U.S.C. § 1101(a)(42)(A). The Immigration and Nationality Act (“INA”) defines a “refugee” as

heritage by standing for religious freedom and offering refuge to those suffering religious persecution.

Id. at § 6401(a)(1).

The First Amendment provides, in pertinent part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.

any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, or is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]  

The burden of proof is on the applicant for asylum to establish that she is a refugee as defined in § 101(a)(42) of the INA.  

The Supreme Court has interpreted the phrase “well-founded fear” to consist of both subjective and objective components. Thus, an asylum applicant must show that (1) she actually fears persecution “on account of” one of the five enumerated grounds; (2) there is an objectively “reasonable possibility” that such persecution will occur if she is forced to return to her home country; and (3) because of this fear she is unwilling or unable to return to her home country.  

Although the INA’s definition of refugee appears to be rather broad in its applicability, U.S. immigration officials have interpreted the INA definition narrowly in their evaluation of asylum eligibility. This is in part a reaction to a perceived threat of an overly liberal asylum policy—a variation on the well-known floodgates argument. Accordingly, an asylum seeker must estab-

---

11 See 8 U.S.C. § 1158(b)(1)(B); see also 8 C.F.R. § 1208.13(a).
12 See 8 C.F.R. § 1208.13(a).
14 I.e., race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).
15 See id.; see also 8 C.F.R. § 1208.13(b)(2)(i)(B).
16 See, e.g., 8 C.F.R. § 1208.13(b)(1)(i)(A)–(B) (asylum officers have considerable discretion in determining whether established “refugees” are nevertheless ineligible for asylum). In other words, “refugee” status is a necessary, but not sufficient, condition to being granted asylum in the United States.
17 See generally Samahon, supra note 4 (describing the perceived threat of the “religious imposter”).
lish: (1) past persecution or a well-founded fear of future persecution;\(^{18}\) (2) a causal nexus that renders the persecution “on account of” one of the five enumerated grounds;\(^{19}\) and (3) that the claimed ground is legitimate, or alternatively, that the adjudicator recognizes that the applicant can credibly claim membership in a persecuted group.\(^{20}\)

### A. Sur Place Asylum Claims

Notably, it is not necessary that an asylum applicant have fled her country because of a fear of persecution.\(^ {21}\) Noncitizens may come to the United States for several reasons—to work, to study, or for pleasure, to name a few. But just because a noncitizen does not enter the United States as a “refugee” does not mean that that person cannot become a “refugee” while in the United States. Such claims are known as asylum *sur place*\(^ {22}\) (French: “on site”; “on the spot”), and are recognized where an alien creates the conditions that support an asylum application when he or she is not otherwise in danger.\(^ {23}\)

*Sur place* claims differ in another key area. Generally, an asylum application must be filed within one year of the alien’s arrival in the United States.\(^ {24}\) However, the asylum statute provides for a potential exception, the one-year statutory bar notwithstanding, if the alien can demonstrate either (i) “changed circumstances which materially affect the applicant’s eligibility”, or (ii) “extraordinary circumstances” relating to the delay in filing the applica-

---


\(^{20}\) Samahon, *supra* note 4 at 2213–14. Notably, however, Samahon’s article expressly declined to address an issue central to this Article—namely, whether atheism should be considered a “religion” for purposes of asylum law. *Id.* at 2214, n.14.

\(^{21}\) See Wiransane v. Ashcroft, 366 F.3d 889, 899 (10th Cir. 2004) (“[A]n applicant need not have fled his home country out of fear of persecution to qualify as a refugee.”); see United Nations High Commission for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, 1992) (hereinafter “UNHCR *Handbook*”) at ¶94 (“The requirement that a person must be outside his country to be a refugee does not mean that he [or she] must necessarily have left that country . . . on account of well-founded fear.”); see also UNHCR *Guidelines On International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (hereinafter “UNHCR *Guidelines On International Protection*”) at ¶1 (“Religion-based refugee claims . . . may involve post-departure conversions, that is, *sur place* claims.”).

\(^{22}\) See UNHCR *Handbook, supra* note 21, ¶¶ 94, 96.

\(^{23}\) *Id.*

\(^{24}\) See 8 U.S.C. § 1158(a)(2)(B) (placing the burden on the alien to demonstrate “by clear and convincing evidence” that the application has been filed within one year of her arrival).
“Changed circumstances” may include “changes in the applicant’s circumstances that materially affect the applicant’s eligibility for asylum . . . including activities the applicant becomes involved in outside the country of feared persecution which put the applicant at risk.” Alternatively, the one-year bar can be waived if an applicant can demonstrate “extraordinary circumstances” that are “directly related to the failure to meet the one year deadline.” The burden of proof is on the applicant to demonstrate that the circumstances were (1) “not intentionally created by the alien” through her own action or inaction, (2) that those circumstances were “directly related to” the alien’s failure to file within the deadline, and (3) that the delay was “reasonable under the circumstances.”

A sur place claim exists where an asylum applicant claims that she has undergone a religious conversion—or, alternatively, that she has abandoned any religious beliefs—while the applicant is residing within the United States. Suppose, for example, that a female Iranian student, Ms. A, comes to the United States to study industrial engineering on an F-1 visa and to obtain a doctoral degree in that field. Suppose further that Ms. A is unmarried, well-educated, and intellectually curious. She arrives in the U.S. as an apparent adherent to Islamic law—she demonstrates this by wearing the Islamic veil or hijab—and she arrives with no intention of staying in the U.S. But Ms. A subsequently begins to observe the religious freedoms enjoyed by Americans, particularly those freedoms enjoyed by unmarried American women, and she begins to

---

28 See 8 C.F.R. § 208.4(a)(ii)(5) (providing non-exclusive list of possible “extraordinary circumstances”); see also Viridiana v. Holder, 646 F.3d 1230, 1238 (9th Cir. 2011) (“noting that [e]xtraordinary circumstances” can exist where an applicant is “fraudulently deceived” by a non-attorney immigration consultant).
29 See 8 C.F.R. § 208.4(a)(ii)(5).
30 Further, such an applicant may be entitled to an exception to the general one-year filing deadline if she can show that her “religious conversion” constitutes “changed circumstances” sufficient to “materially affect her eligibility for asylum.” See 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5).
31 The term hijab or veil is not used in the Qur’an to refer to an article of clothing for women or men; rather, the term refers to a spatial curtain that divides or provides privacy. GHAZALA ANWAR & LIZ MCKAY, 2 ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 721 (Richard C. Martin et al. eds., 2004). (The Qur’an uses the term libas for dress or garment. Id.) However, in modern usage, hijab has come to mean the headgear and outer garment of Muslim women, and is generally translated into English as “veil.” Id.
question her faith’s strict adherence to certain pre-modern laws inhibiting the freedoms of her sex.\textsuperscript{32} Eventually, she ceases to wear the \textit{hijab}. She ceases to attend services at the local mosque, where she says she feels uncomfortable. Among acquaintances, she openly criticizes the repressive theocratic regime of her home country and begins to think of herself as a freethinker and, eventually, a non-believer.

Such a situation would create a condition that would place Ms. A in danger if she were forced to return to her home country, where “apostasy” (or the practice by a former Muslim of any religion other than the official state religion, Islam) is punishable at law.\textsuperscript{33} Accordingly, at this point, Ms. A should be able to claim a “well-founded fear of persecution on account of ... religion”\textsuperscript{34} were she forced to return to the Islamic Republic of Iran.\textsuperscript{35} So Ms. A considers filing for asylum.

Indeed, Ms. A’s fear of persecution is particularly plausible. Iran, and certain other Islamic countries, are ruled by theocratic regimes which have retained pre-modern Shari’a law, which holds that it is a crime to abandon Islam (to convert to another religion or reject all religious claims).\textsuperscript{36} Furthermore, this “crime,” apostasy, is punishable by death or imprisonment.\textsuperscript{37} The government of Iran, for example, is widely known “to engage in systematic, ongoing, and egregious violations of religious freedom, including prolonged detention, torture, and executions based primarily or entirely upon the religion of the accused.”\textsuperscript{38} For these rea-
sons, “members of minority religious communities have fled Iran in significant numbers for fear of persecution.”

As previously noted, however, in order to prove this “well-founded fear” and obtain asylum protection, Mrs. A must demonstrate (1) both a subjective fear and an objectively sound basis for such fear, (2) a causal nexus, showing that any persecution would be “on account of” her religion, and (3) that the claimed ground, here Ms. A’s non-belief, is legitimate. In other words, she must prove that she is not merely feigning a non-religious or anti-Islamic outlook as a pretext to remain in the United States.

Ms. A’s hypothetical situation is not an unrealistic scenario. Moreover, the facts provide a foundation upon which to illustrate the delicate balancing act necessary to accomplish the aims of United States asylum law, on the one hand, while simultaneously respecting the religious liberties enshrined in the U.S. Constitution, on the other. This article demonstrates how this interplay can lead to rather unsettling results.

PART II. A BRIEF OVERVIEW OF RELIGIOUS LIBERTY IN THE UNITED STATES

The United States is forever linked with religious liberty. Many of the nation’s Founders arrived here only after fleeing religious persecution abroad. It is thus unsurprising that the Founders of the United States felt the need to forever enshrine the right to religious liberty to themselves and to posterity. This sentiment is clearly reflected in the secular U.S. Constitution. Furthermore, the right to freedom of thought, conscience, and religion is now considered one of the fundamental rights and freedoms recognized by modern international law.

---

39 Id.
41 Id. at 483–84.
42 See Samahon, supra note 4 at 2215–16.
43 U.S. CONST., amend. I.
44 See id.; see also International Religious Freedom Act of 1998:

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

45 See, e.g., U.S. CONST. amend. 1; U.S. CONST. art. VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or Public Trust under the United States.”).
46 See UNHCR Guidelines On International Protection, supra note 20, ¶2.
One prominent scholar, Professor Douglas Laycock, has articulated “three secular propositions to justify a strong commitment to religious liberty.” First, the Founding Fathers were cognizant of history. The drafters of our founding documents realized that governmental attempts to suppress disapproved religious views had caused vast human suffering in Europe and in England and similar suffering on a smaller scale in the colonies that became the United States. Second, religious beliefs “are often of extraordinary importance to the individual—important enough to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for.” And third, “beliefs at the heart of religion—beliefs about theology, liturgy, and church governance—are of little importance to the civil government.”

In dealing with matters of religious liberty, United States courts must be fully cognizant of the particular protection that the Constitution has accorded it. Few would dispute the notion that “[a]bhorrence of religious persecution and intolerance is a basic part of our heritage.”

Nonetheless, this article will demonstrate how a narrow reading of “religion” within the asylum statutes serves to inhibit religious liberty for non-believers and simultaneously functions as an enabler of precisely that religious persecution and intolerance which our heritage has traditionally abhorred. Not only is such a result facially undesirable—regardless of one’s own political or religious stance—it is also contrary to the long and important legacy of constitutionally-protected religious liberty in the United States.

A. The Religion Clauses of the First Amendment

The first phrase of the First Amendment to the United States Constitution begins, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These words can be thought of as containing two Religion Clauses—the Establishment Clause and the Free Exercise Clause—or as being a single Religion Clause. Although the two

---

48 Id. at 317.
49 Id.
50 Id.
51 Id.
53 Id.
54 U.S. CONST. amend. I.
clauses potentially (and often do) overlap, this article will generally consider the two clauses in turn.

In the abstract, the Free Exercise Clause prohibits governmental suppression of religion, whereas the Establishment Clause forbids governmental support of religion. The Supreme Court has recognized that “the two Clauses ‘often exert conflicting pressures’ . . . and that there can be ‘internal tension between the Establishment Clause and the Free Exercise Clause[].’” In any event, most commentators would agree that each clause must by construed in light of the other, and in light of the rest of the First Amendment.

B. Defining “Religion”

Prior to any serious analysis of how the law of asylum and the Constitution interact with religious liberty, certain questions must be asked: How is the law to define “religion”? How is the law to define the term within the meaning of the Religion Clauses, or within the confines of the INA’s asylum provisions and the international asylum laws upon which they are modeled?

In terms of the Religion Clauses specifically, Professor Laycock has argued that, “[t]o avoid incoherence . . . ‘religion’ [must be defined as] any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.” To prefer one set of answers to religious questions over other answers to the same questions is to violate the very core of the Religion Clauses. Such a result can only be avoided by recognizing that, “for constitutional purposes, any answer to religious questions is religion.”

This definition finds support in relevant Supreme Court jurisprudence articulating the constitutional principle of no discrimi-

---

56 Id.
57 See infra Part III.B–C.
58 See Laycock, supra note 47, at 340; but see Susanna Sherry, Lee v. Weisman: Paradox Redux, 1992 Sup. Ct. Rev. 123 (arguing that such a distinction renders the clauses inconsistent).
59 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, No. 10–553, slip. op. at 6, 565 U.S. ___ (2012) (internal citations omitted).
60 See Laycock, supra note 47, at 340.
61 See id. at 326.
62 See id. (emphasis added); see also Norman Dorsen, The Religion Clauses and Non-believers, 27 WM. & MARY L. REV. 863, 868 (1986) (“[T]he core purpose of the religion clauses applies to non-believers as well as to believers.”).
63 See, e.g., School District of Abington Township, Pa. v. Schempp, 374 U.S. 203, 319–20 (1963) (Stewart, J., dissenting) (“What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government.”).
64 Laycock, supra note 47, at 329.
nation against the irreligious.\textsuperscript{65} This principle generally stands for the proposition that any State discrimination based on an absence of religiosity or an absence of belief in a deity is presumptively unconstitutional.\textsuperscript{66}

In \textit{Torcaso v. Watkins}, for example, a provision in the State of Maryland’s Constitution was struck down as unconstitutional because it set up “a religious test ... [that put] the power and authority of the State ... on the side of one particular sort of believers—those who [were] willing to say they believe[d] in ‘the existence of God.’”\textsuperscript{67} The relevant statute “provide[d] that ‘no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.’”\textsuperscript{68} The Court went on to observe that “[n]either [the State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers[.]”\textsuperscript{69}

In another landmark religious liberty case, \textit{Welsh v. United States}, the Court explained that in determining which beliefs are “religious” within the meaning of a (conscientious objector) statute, “the task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.”\textsuperscript{70} The Court continued, “[t]he central consideration in determining whether the registrant’s beliefs are religious is whether those beliefs play the role of a religion and function as a religion in the registrant’s life [—whether they are] ... sincere and


\textsuperscript{66} See \textit{id}. at 495.

\textsuperscript{67} Id. at 489–90.

\textsuperscript{68} Id. at 489 (emphasis added); cf. U.S. Const., art. VI, cl. 3 (“no religious test shall ever be required as a qualification to any office or public trust under the United States.”).

\textsuperscript{69} See \textit{id}. at 492–93. Nor can the state and federal governments “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” \textit{Id}.

\textsuperscript{70} 398 U.S. 333, 339 (1970) (quoting \textit{United States v. Seeger}, 380 U.S. 163, 185 (1965)). The relevant statute (§ 6(j) of the Universal Military Training and Service Act) provided, at the time, as follows:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

\textit{See id}. at 336.
meaningful belief[s] which occup[y] in the life of [their] possessor a place parallel to that filled by the God of those admittedly qualifying for the [conscientious objector] exemption.”

The INA, like the First Amendment, uses but fails to define “religion.” Because the INA lacks any statutory or regulatory definition of religion, some have questioned whether U.S. immigration officials and reviewing courts should interpret the INA term “religion” coextensively with the Supreme Court’s interpretation of “religion” in other contexts. This article is generally in agreement with (now Professor) Tuan Samahon: “Constitutional concerns about the religion clauses require that the term ‘religion’ in the INA be read coextensively with the constitutional term.”

Furthermore, while there is no universally-accepted definition of “religion,” United States courts interpreting the term in the context of the INA can and should seek guidance from international conventions and treaties. For example, the United Nations Human Rights Committee has observed that religion is “not limited . . . to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.” Although the UN’s definition does not have the force of law, the Supreme Court has specifically cited the UN Handbook’s definitions, noting that “the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations . . . the Protocol establishes.”

71 Welsh, 398 U.S. at 339.
72 See, e.g., Samahon, supra note 4, at 2216.
73 See Samahon, supra note 4, at 2216. While Samahon’s position is arguably correct, it is worth noting that the Court has never clearly defined “religion” as it is used in the Constitution itself. In the landmark conscientious objector cases of Welsh and Seeger, for example, the Court dealt with statutory uses of “religion.” Neither case set out to define the term as it is used in the Constitution itself. Nevertheless, it is at least plausible to argue that the Supreme Court’s holding in Torcaso v. Watkins—invalidating as unconstitutional the Maryland State Constitution’s religious test oath—stands for the proposition that the denial of religion (i.e., “disbelief” or a lack of any traditional belief) is “religion.” See Laycock, supra note 47, at 326.
74 See, e.g., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 438–39 (1987) (“In interpreting the Protocol’s definition of ‘refugee’ we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status”) (footnote omitted); but see id. at 439 n.22 (“We do not suggest, of course, that the explanation in the UN Handbook has the force of law or in any way binds the INS [now known as the United States Customs and Immigration Services (USCIS), part of the post-Cardoza Department of Homeland Security (DHS)] with reference to the asylum provisions of § 208(a).”).
76 Cardoza-Fonseca, 480 U.S. at 439 n.22 (internal citations omitted).
ver, in guiding member states and signatories as to the adjudication of asylum claims under the 1951 Convention and 1967 Protocol, the UN has been clear: The definition of religion “broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief.”

Hence, asylum claims based on “religion” may involve “religion as belief (including non-belief),” religion as “identity,” or religion “as a way of life.” The UN Guidelines go on to define “belief,” as a term which denotes “theistic, nontheistic[,] and atheistic beliefs.” Asylum seekers “may also be considered heretics, apostates, schismatic, pagans[,] or superstitious, even by other adherents of their religious tradition and be [subject to persecution] for that reason.”

Accordingly, in regard to the Religion Clauses, this article concurs with and adopts Professor Laycock’s definition of religion. That is, “religion” is “any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.” To prefer one set of answers to religious questions over other answers to the same questions is to violate the very core of the Religion Clauses. Such a result can only be avoided by recognizing that, “for constitutional purposes, any answer to religious questions is religion.” Because this definition is supported by the above-mentioned Supreme Court jurisprudence, along with the guidance provided by the relevant international conventions and treaties cited therein, the Supreme Court’s Free Exercise and Establishment Clause jurisprudence should apply to the United States government’s religious credibility determinations in asylum proceedings.

1. Why The Constitution Must Protect Both Theists and Non-believers

---

77 I.e., the bases of United States asylum law. See supra note 9.
78 See UNHCR Guidelines On International Protection, supra note 20, ¶ 4. However, “the term is not without limits.” Id.
79 Id., ¶5 (emphasis added).
80 Id., ¶6.
81 Id.
82 See id. (emphasis added); see also Norman Dorsen, supra note 62 at 868 (“[T]he core purpose of the religion clauses applies to non-believers as well as to believers.”).
83 See, e.g., Wallace v. Jaffree, 472 U.S. 38, 53 (1985) (“[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”); but see id. at 113 (Rehnquist, J., dissenting) (“[N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion[.]”).
84 Laycock, supra note 47, at 329.
85 See Samahon, supra note 4, at 2216.
In addition to such judicially pragmatic reasons for defining religion broadly,\textsuperscript{86} Justices of the Court have also expressly considered the philosophical and political implications of \textit{not} doing so. Justice Jackson once observed that “[t]he day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power.”\textsuperscript{87} That is, those who would define “religion” narrowly—consisting of only those “religions” which recognize a Supreme Being, deity, or \textit{the} God—must consider the implications of such a definition should a majority of the country suddenly convert to various fundamentalist sects of Catholicism or Islam, or so-called militant atheism, \textit{i.e.}, hostility towards all religions.

Would such a narrow definition of “religion” retain its allure if Congress passed a resolution declaring that, \textit{e.g.}, women shall no longer assume official leadership positions; a resolution mandating that \textit{only} Islamic conscientious objectors shall be exempt from the Selective Service; or a law banning any and all theistic worship or prayer in public?\textsuperscript{88} One would hope not.

Accordingly, the Constitution requires that “religion” be defined as any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.\textsuperscript{89} The Constitution should protect “conduct motivated by disbelief in God, if any there be, just as it should protect conduct motivated by more traditional religious beliefs.”\textsuperscript{90} Barring the repeal of the First Amendment, a majority of voters should never be deemed qualified to decide which “religions” qualify as authentic or bona fide, and are thus protected by law. The First Amendment requires that atheism be viewed as a “religion” in the eyes of the law. Consider the hypothetical ban on any and all theistic worship or prayer in public. “If atheism is not a religion for constitutional purposes, such an establishment would be perfectly constitutional.”\textsuperscript{91}

\textsuperscript{86} See supra Part II.B.
\textsuperscript{87} Zorach v. Clauson, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting); \textit{cf.} Emp’t Div. v. Smith, 494 U.S. 872 (1990) (essentially relegating enforcement of most Free Exercise claims to the legislature).
\textsuperscript{88} Such hypotheticals are not hyperbole. See, \textit{e.g.}, USCIRF Report 2011, \textit{supra} note 32, at 75 (stating that the Iranian Constitution dictates that “all laws and regulations, including the Constitution itself, be based on Islamic criteria.”); \textit{see also} Laycock, \textit{supra} note 47, at 330 (noting that it is quite possible to “imagine a government that established atheism, and even think of real examples; the Soviet Union did it”).
\textsuperscript{89} See Laycock, \textit{supra} note 47, at 329.
\textsuperscript{90} See \textit{id.} at 331.
\textsuperscript{91} \textit{Id.} at 330. Professor Laycock continues, 

If atheism is just a secular idea, government would be free to promote atheism to the same extent that it has ever promoted any other secular idea—say the war effort in World War II, or
However, this is not to say that the law of asylum’s interpretation of “religion” should be so broad as to define “religion” as any opinion doubting or tending to cast doubt upon organized religion. As the Court has noted in the conscientious objector context, there are limits. For example, the Court has observed that claimants would not be exempt from the war-time draft if their beliefs were “not deeply held [or if] their objection to war d[id] not rest upon moral, ethical, or religious principles, but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency.”

Therefore, in accordance with the Court’s proper limitations on what constitutes “religion,” nothing in this Article should be read to suggest that an asylum applicant whose non-belief is admittedly “not deeply held,” or whose claim of non-belief “rests solely upon considerations of policy, pragmatism, or expediency,” should be granted asylum in the United States. To the contrary, such claims should be denied. Non-belief must be a viable ground for asylum in certain situations. But the policy should not be simply that “if you are willing to express non-belief, then you can obtain asylum in the United States.” Rather, applicants must be required to provide evidence that the non-belief is “deeply held”; i.e., the claim of non-belief is not merely an opportunistic and insincere assertion (as well as satisfying the foundational requirements for asylum eligibility).

civil rights during the Second Reconstruction. Government could teach atheism in the schools, promote atheism in the mass media, subsidize the American Atheists and a network of local chapters, and ridicule God as the opiate of the masses. The only sensible interpretation is that this would be an establishment of religion—an establishment of a certain set of views about religion, of a certain set of answers to the fundamental religious questions.


93 Id.

94 Id.

95 Such a stance is perhaps at odds with the thrust of Justice Harlan’s concurring opinion in Welsh. 398 U.S. at 358 (Harlan, J., concurring in the result).

In determining whether beliefs that are not traditionally considered “religious”—i.e., those beliefs emanating from a purely moral, ethical, or philosophical source—entitle an individual to exemption from the draft as a conscientious objector, Justice Harlan observed that “[t]he common denominator must be the intensity of moral conviction with which a belief is held.” Id. Nonetheless, this Article assumes that the majority decided the case correctly. This article does not go as far as Justice Harlan would conceivably go in determining an applicant’s eligibility for asylum. This is due less to any subjective philosophical position than it is a result of a respect for judicial pragmatism and considerations of the workability of precedent.

96 See supra Part I.
The UN provides further support for such limitations on who should qualify for asylum protection. The UN Guidelines provide that “self-serving” activities most likely do not create a well-founded fear of persecution in the claimant’s country of origin.\textsuperscript{97} However, this is so only where (1) the opportunistic nature of such activities \textit{will be apparent to all}, including the authorities there, and (2) serious adverse consequences would not result if the person were returned.\textsuperscript{98} This is a rather liberal threshold, and rightfully so, considering that in certain countries, if a line between church and state exists, it is quite often illusory.\textsuperscript{99}

2. \textbf{Seeking Asylum From Countries Where “Apostasy” is a Capital Offense}

The importance of a broad definition of religion is further exemplified by the hypothetical situation of Ms. A, presented in Part I.A, \textit{supra}. Recall that Ms. A is an Iranian female who has decided that she will no longer adhere to the tenets of Islam, which is of course the official state religion of her home country, Iran.\textsuperscript{100} Among other things, she finds the idea of a supernatural creator highly implausible. Indeed, for this reason, she finds certain tenets of Islam to be utterly offensive and rife with misogyny.\textsuperscript{101} She sees these laws as suspiciously characteristic of something man-made—certainly not the work of a Supreme Being of any kind. Also recall that such a renunciation of Islam is punishable by law in Iran as “apostasy,” a capital offense.\textsuperscript{102} The judicial and philosophical implications of a narrow definition of religion, outlined above, inherit a particular significance when applied to these facts. If, upon evaluating her situation, an asylum officer decides that Ms. A’s non-belief does not qualify as a “religion”—and thus Ms. A’s non-belief is immaterial to her assertion of a well-founded fear of persecution \textit{on account of religion}—then Ms. A will be forced to return to Iran.\textsuperscript{103} There, Ms. A sincerely believes, the government will kill her. This is not an acceptable result in theory or in practice.\textsuperscript{104}

Of course, one who is skeptical of Ms. A’s religiously skeptical views may respond that it is highly unlikely the Iranian

\textsuperscript{97} See UNHCR Guidelines On International Protection, \textit{supra} note 21, ¶36.
\textsuperscript{98} \textit{Id.} (emphasis added).
\textsuperscript{99} Of course, in a theocracy such as the Islamic Republic of Iran, there is no such line.
\textsuperscript{100} See USCIRF Report 2011, \textit{supra} note 32 at 78.
\textsuperscript{101} See \textit{id.} at 81.
\textsuperscript{102} See \textit{id.} at 78.
\textsuperscript{103} This article assumes that Ms. A does not qualify for any other possible avenue for asylum (\textit{e.g.}, persecution on account of a political stance, or membership in a social group, etc.). “Religion” is Ms. A’s only shot at asylum.
\textsuperscript{104} See UNHCR Guidelines On International Protection, \textit{supra} note 21, ¶9.
authorities will discover anything about Ms. A’s lack of personal religious beliefs upon her return to the country. Thus, even assuming that Ms. A’s atheism does constitute “religion,” any fear of religious persecution she may have is, based on the available facts, most likely not well-founded. But this response is problematic for at least two reasons.

First, the facts on the ground in Iran suggest otherwise. More, the assertion that the authorities will not discover Ms. A’s “apostasy” impliedly acknowledges that Ms. A will be required to act contrary to her own conscience in Iran by, for example, wearing the full Islamic veil in public at all times (even if she abhors the thought of it). The argument that Ms. A’s “apostasy” will not be known impliedly presumes that there is no harm in Ms. A being required to pretend to adhere to a religion her conscience has rejected. As recently observed by the Ninth Circuit, however, “a finding that an applicant would have to practice her faith in hiding would support, not defeat, her application for asylum.”

The law of asylum is intended to encourage and protect religious liberty, including the freedom not to believe. The law is not intended to require asylum seekers to return to their home country and pretend they believe by hiding their skepticism, doubt, or outright rejection of religion. As articulated by the UN, “religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change[,] or renounce this in order to avoid persecution.” It is highly important to remember that at issue is not whether there is a possibility that the Iranian regime will in fact discover that Ms. A is an apostate. Rather, the issue for the purposes of asylum is whether Ms. A has a well-founded fear of persecution on account of her religion.

105 See USCIRF Report 2011, supra note 32, at 78 (noting that Iran has imprisoned and executed so-called apostates in the past and continues to do so); see generally id. at 74–87 (providing extensive documentation and analysis of egregious examples of religious persecution within Iran).
106 See Toufighi v. Mukasey, 538 F.3d 988, 994 (9th Cir. 2008) (emphasis added).
107 See UNHCR Handbook, supra note 21, ¶ 6.
108 Id.
109 See UNHCR Guidelines On International Protection, supra note 21, ¶13 (“Indeed, the [1951] Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps—reasonable or otherwise—to avoid offending the wishes of the persecutors.”).
110 See Bastanipour v. INS, 980 F.2d 1129, 1133 (7th Cir. 1992) (“Nor must the applicant for asylum prove that he will be persecuted—only that a reasonable person in his shoes would fear persecution.”).

Judge Posner went on to note that if the applicant had committed apostasy, then the applicant had committed a capital crime under Islamic law. Id. “No doubt there are people walking around today in Iran, as in every other country,
In any event, there is no reason to doubt Ms. A’s fear that the Iranian authorities will discover that she has turned away from Islam. As Judge Posner has noted, there is no indication that U.S. immigration officials make an effort to conceal their asylum proceedings from foreign states.\textsuperscript{111} Moreover, Ms. A is convinced that the government of Iran has for years paid spies to live in the U.S. and has required them to report back to the ruling regime in Tehran the activities of Iranian nationals living in the U.S. The question this presents to the courts is not whether Ms. A’s claims are objectively verifiable; the question is whether Ms. A’s fear that they are true is well-founded. And based on the available intelligence, her fear is indeed well-founded.\textsuperscript{112}

Second, such a skeptical response is, based on Ms. A’s specific situation, expressly contrary to procedure mandated by the pertinent U.S. Department of Justice regulations.\textsuperscript{113} In evaluating an asylum applicant’s asserted well-founded fear of persecution,

[an] asylum officer or immigration judge \textit{shall not} require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her country of nationality . . . of persecution of a group of persons similarly situated to the applicant on account of . . . religion . . .; and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.\textsuperscript{114}

In Ms. A’s case, subsection (A) could be satisfied by citing the reports of Congress, the U.S. Department of State, the UN, and various other human rights organizations, all of which establish that there is a pattern and practice in Iran of persecution of religious minorities, including non-believers.\textsuperscript{115} Subsection (B) refers to the list of countries that have committed a capital offense but have managed to avoid any punishment for it at all. [The asylum seeker] might be one of those lucky ones. But his fear that he will not be is well founded.” \textit{Id.}
\textsuperscript{111} \textit{Id.} at 1133.
\textsuperscript{114} See \textit{id.} (emphasis added).
quires first that Ms. A demonstrate that she is in fact a part of a religious minority in Iran—those who are skeptical, agnostic, or lack any faith whatsoever. Because she has openly criticized her religion and expressed her strong doubts concerning all things supernatural, she would no doubt qualify under this first prong. Subsection (B) also requires that Ms. A demonstrate that she would be “identified” with (or as a member of) this group.

Concerning the second prong of subsection (B), it may be argued that Ms. A is merely a non-believer, not actively or outwardly atheistic, and therefore not likely to be “identified” as a member of any particular group. She is not, for instance, a member of any atheist organizations, she does not spend her days quoting the late Christopher Hitchens or Dr. Richard Dawkins, and she has never attempted to proselytize others or influence her religious acquaintances. In other words, she appears to be a rather passive skeptic, not likely to gain the attention of the government in Iran. This argument finds some support from the UN, which has pointed out that “Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status.”

However, the same UN document goes on to specify that there may be “special circumstances where mere membership suffices [to qualify for religious asylum protection], particularly when taking account of the overall political and religious situation in the country of origin, which may indicate a climate of genuine insecurity for the members of the religious community concerned.” Again, in this example, Ms. A has openly criticized her home country’s religion and, since being in the U.S., she has ceased wearing the hijab and ceased attending any mosques. Even if Ms. A is found to be merely a member of a persecuted group in Iran—here a group known as “apostates”—this membership, when coupled with her gender and nationality, should qualify her for asylum protection due to the particularly egregious nature of the violations.


116 Both men are among the most strident atheists of the modern era. The title of the late Mr. Hitchens’s polemic, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING, (Twelve, 2007), provides an example of this style of outspoken irreligiosity. (Hitchens often observed that he considered himself not just an atheist, but an “anti-theist.”)


118 Id.
of religious freedom that occur daily in the notoriously violent and oppressive theocratic regime.\textsuperscript{119}

Thus, the premise of the potential objection—that Ms. A’s fear is not well-founded because the authorities will never find out about her—while not prima facie unreasonable, is misplaced. The law does not require that Ms. A prove there is a reasonable probability that the authorities will single her out for persecution individually as a prerequisite to proving that her fear is well-founded.\textsuperscript{120} Rather, the law requires her to prove that her fear (that the authorities will find out about her) is well-founded—and that is all that is required.

3. Danger of Fraud and Abuse

It can also be argued that a broad interpretation of “religion” in asylum proceedings will function as an incentive to fraud and abuse by insincere charlatans and “religious imposters.”\textsuperscript{121} Further, the argument goes, a liberal interpretation of religion in asylum proceedings at best minimizes (and at worst ignores) the important governmental interest in limiting fraudulent claims of asylum. This governmental interest requires that the term be given a narrow reading within the INA.\textsuperscript{122}

However, this concededly important governmental interest notwithstanding, it is unlikely that in enacting the INA’s asylum provisions Congress sought to alter the definition of “religion” to something \textit{narrower} than the Supreme Court’s use of the term.\textsuperscript{123} If Congress did so, the statute would arguably run afoul of the Es-


\textsuperscript{120} See 8 C.F.R. § 1208.13(b)(2)(iii)(A)–(B).

\textsuperscript{121} See Samahon, \textit{supra} note 4, at 2215–16 (observing that there are several incentives for fraud in the asylum context: \textit{inter alia}, “[a]sylees avoid deportation, receive welfare benefits, and obtain immediate work authorization.”).

\textsuperscript{122} A further issue is whether the risk of fraud is perceived to be greater where an asylum applicant claims to have “converted” to atheism, as opposed to a more mainstream “religion.” This question and its implications, if any, are outside of the scope of this article. But it is a question worth pursuing. See, e.g., PENNY EDGELL, et al., \textit{Atheists As “Other”: Moral Boundaries and Cultural Membership in American Society} in AMERICAN SOCIOLOGICAL REVIEW, Vol. 71 No. 2 (2006) at 211–234, available at http://www.sociology.psu.edu/graduate/Fall%202010%20Prosem/Readings-Trinitapoli/REL_Edgell_2006.pdf. Edgell’s study employs empirical data showing that atheists are the least trusted group in American society, and that “atheists are less likely to be accepted, publicly and privately, than any others from a long list of ethnic, religious, or other minority groups. \textit{Id.} Moreover, “[f]rom a list of groups that also includes Muslims, recent immigrants, and homosexuals, Americans name atheists as those least likely to share their vision of American society.” \textit{Id.}

\textsuperscript{123} See Samahon, \textit{supra} note 4, at 2217.
A PATH TO RELIGIOUS PERSECUTION

establishment Clause. Indeed, the Court has intervened to broadly interpret other laws that attempted to define religion in the narrow terms of theism (to the exclusion of all other forms of religion).

The Court in United States v. Seeger found that the use of religion in the conscientious objector provisions of the Universal Military Training and Service Act (UMTSA) needed to be interpreted broadly to include all “religions,” whether theistic, traditional, or neither. Similarly, in order to prevent the INA’s asylum provisions from running afoul of the Religion Clauses as interpreted by the Supreme Court, the INA’s use of religion must be interpreted broadly, so as to include all “religions”—theistic, traditional, or neither.

And there are at least two other reasons to reject the argument for a narrow definition of religion within the asylum context. First, such a view is impliedly based on the premise that a strict, narrow interpretation of “religion” will minimize fraud and lead to only the most deserving applicants being granted asylum protection. However, there is no evidence that this is so. In fact, a strict interpretation of the word “religion”—e.g., requiring asylum applicants to possess certain pieces of knowledge and certain interpretations of “religions”—may well lead to an increase in fraud, while simultaneously harming those the law was intended to protect.

Indeed, it is clear that in some cases “fraudulent converts might appear more credible than their legitimate counterparts. A well-practiced imposter will impersonate the perfectly orthodox, straight-arrow religionist whereas actual converts may still be learning the formalities of their newly chosen faith.”

Insincere asylum applicants can quite clearly (and quite easily) learn the

---


125 See Seeger, 380 U.S. at 165–66.

126 See, e.g., Kagan, supra note 2, at 1190. Kagan criticizes asylum adjudicators’ use of religious knowledge quizzes because, among other things, they require the assumption that “a certain type of religious person would necessarily know a certain piece of information and an insincere applicant would be unlikely to possess the knowledge.” Id. at 1213. Kagan shows this assumption to be flawed. First, such quizzes involve a significant risk of false negatives: i.e., “the risk of errantly judging a genuine applicant to be insincere because she does not know a particular piece of information.” Id. at 1213. Second, these quizzes also lead to an increase in false positives: the risk that fraudulent religious asylum seekers are judged sincere because they do possess detailed knowledge about a religion. See id. at 1214; see also Samahon, supra note 4 at 2227 (arguing that asylum law’s credibility determinations are “both under- and over-inclusive; they exclude sincere, heterodox converts who will be persecuted abroad while admitting adept imposters who have studied the model of religious orthodoxy.”).

127 Samahon, supra note 4, at 2215–16 (emphasis added).

“correct” answers prior to an interview. Thus, strict requirements that an asylum applicant affirm certain beliefs (or a lack thereof), or certain versions of beliefs, not only raise constitutional Establishment questions—they are utterly ineffectual.

Second, this article illustrates how actual apostates—e.g., a former Muslim who has rejected his or her faith—might be presented with an even greater challenge than that of a new convert to one of the traditional religions. For example, an apostate such as Ms. A who is applying for asylum on that ground can expect to be asked to articulate how and why she no longer believes in Allah; or why she believes that Mohammad existed but was not a prophet or possessed no supernatural powers; or how or why she rejects any other central tenets of the Islamic faith. If she cannot answer these questions to the satisfaction of an asylum officer or immigration judge, then she will most likely be sent back to Iran, where she may well face indefinite imprisonment, torture, or death. Asylum hearings of this sort present unique evidentiary issues—unique even in the context of the already delicate task of conducting a religious asylum credibility determination. Such hearings also raise constitutional issues.

PART III. CONSTITUTIONAL CLAIMS AVAILABLE TO NON-BELIEVERS DENIED RELIGIOUS ASYLUM IN THE UNITED STATES

A. The Religion Clauses and Asylum Law

Immigration law practitioners, judges, and asylum officers may wonder what the Religion Clauses of the United States Constitution have to do with asylum law. This is not an unreasonable

---

128 See Kagan, supra note 2, at 1221 (“[T]here is little reason to assume that the sincerity test really keeps out imposters because it actually opens the door to clever fraudsters who can effectively learn to look and talk like a genuine believer.”).

129 These ideas are by no means novel or radical. During the founding era, similar arguments were advanced in the debate over religious test oaths. See, e.g., the statement of former Chief Justice Oliver Ellsworth, who was previously a member of the Federal Constitutional Convention, arguing against religious test oaths [in 1787]:

In short, test-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences[.]

Quoted in Torcaso v. Watkins, 367 U.S. 488, 494 n.9 (1961); see Ford, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES at 170; see also 4 Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION at 193.

130 See generally Kagan, supra note 2.
question—the Religion Clauses are seldom mentioned in the context of asylum law. But this Article explains why, in certain circumstances, the two areas of law can and should be viewed together. Accordingly, the author hopes this Article might one day find its way to the desks of immigration practitioners, asylum officers, and judges.

1. Noncitizens Present Within the U.S. Enjoy the Protection of the Substantive Provisions of the First Amendment

It is well-established that noncitizens who are physically present within the United States enjoy certain constitutional protections.\(^{131}\) The Supreme Court has observed that “once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.”\(^{132}\) Most significantly for the purposes of this Article, the Court has explained that aliens are protected by the substantive provisions of the First Amendment.\(^{133}\)

It is critical to note that the Court’s prior precedent does not avail those who are seeking admission to the United States for the first time.\(^{134}\) Hence, a persecuted atheist who is living in Baghdad cannot invoke the protection of the Religion Clauses in an appeal of a denial of religious asylum handed down by a U.S. asylum officer stationed in Baghdad.

B. Free Exercise Issues in Asylum Law

If Ms. A’s asylum application is denied on the ground that her non-belief does not entitle her to religious asylum, she may argue that she has been improperly denied the statutory benefit of

---

\(^{131}\) See, e.g., Plyer v. Doe, 457 U.S. 202, 211–212 (1982) (holding that illegal aliens within the U.S. are protected by the Equal Protection Clause.); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that a resident alien is a “person” within the meaning of the Fifth Amendment.).

\(^{132}\) Kwong Hai Chew, 344 U.S. at 596 n.5.

\(^{133}\) See, e.g., Bridges v. Wixon, 326 U.S. 135, 148 (1945) (“[F]reedom of speech and of press is accorded aliens residing in this country.”). Note, however, that the import of this language was later narrowed by Chief Justice Rehnquist. See United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (stating that prior Supreme Court precedent establishes only that aliens receive Constitutional protections “when they have come within the territory of the United States and developed substantial connections with this country.”) (emphasis added).

\(^{134}\) See Kwong Hai Chew, 344 U.S. at 596 n. 5 (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.”).
asylum. Further, she can argue that, upon being deported and returned to Iran, she will be denied the free exercise of her religion.

One may immediately respond by pointing out that any violation of free exercise, if any can be shown, would occur independent of the United States. The free exercise being restricted (1) is that of an Iranian national, Ms. A; (2) it is being restricted by the theocratic government of the Islamic Republic of Iran; and (3) it is being restricted in Iran. Thus, the argument goes, while this is clearly an unsavory result, the problem lay not with the United States, but with Iran.

However, this article illustrates how the infringement of Ms. A’s right to believe (or not) as her conscience dictates would not occur were it not for the denial of asylum protection at the hands of a United States government official and her resulting deportation to Iran. Therefore, Ms. A’s free exercise of religion was made impossible (1) as a result of a determination of a United States government official, (2) while Ms. A was lawfully present within the United States. In other words, the denial of Ms. A’s free exercise of religion in Iran was proximately caused by the denial of her asylum claim in the United States. The fault, then, for the purposes of asylum law, rests with the United States. It is of no moment that the theocrats in Iran persecute their own citizens independent of the United States. The United States, being a signatory to the 1967 Protocol, has assumed a legal obligation to protect past and future victims of religious persecution. It is for this reason, among others, that the United States should not be absolved of responsibility in circumstances where U.S. asylum law openly leads a non-believer down a path to religious persecution in another country.

But if Ms. A wishes to appeal a denial of her asylum claim on constitutional grounds, the road to success is not well paved. In the Supreme Court’s controversial 1990 decision in Employment Division v. Smith, Justice Scalia reinstated the old rule of Reynolds v. United States, which generally bars free exercise claims

---

135 To be clear, asylum is a statutory (not constitutional) right. As previously observed at note 9, supra, the U.S. Congress did not enact the Refugee Act until 1980, twelve years after the UN Protocol. If it were so inclined, the U.S. Congress could repeal the asylum provisions of the INA and rid itself of any Protocol obligation. See 1967 Protocol, art. 9 (“Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the U[N].”).

136 See supra note 9.


138 98 U.S. 145, 167 (1878).
challenging neutral laws of general applicability. Nevertheless, *Smith* is not fatal to Ms. A’s possible claims; a reviewing court would most likely conclude that *Smith* is inapplicable to cases involving aliens appealing denial of religious asylum applications.

First, *Smith* did not overrule the former compelling state interest test of *Sherbert v. Verner*; rather, Justice Scalia’s opinion for the Court in *Smith* distinguished the *Sherbert* rule as one that developed in a “context that lent itself to *individualized governmental assessment.*” As observed by Samahon, a government determination of an individual’s religious credibility and eligibility for asylum protection is an individualized governmental assessment. More, the language of the *Smith* opinion itself lends itself to such an argument. “[W]here the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”

In Iran, Ms. A’s home country, her non-religious, perhaps anti-Islamic views would lead the government to consider her an “apostate.” In Iran, “apostasy” is a capital offense. She can thus argue that unless the United States can provide a compelling reason for doing so, it may not refuse to extend its system of individual exemptions—here, an exemption from deportation—to the “religious hardship” of being sent back to a regime which is known to punish “apostasy” with persecution, indefinite imprisonment, and death.

Ms. A can analogize her situation to that of the asylum applicant in *Bastanipour v. U.S.* In that case, an Iranian facing deportation claimed to have converted from Islam to Christianity—which would of course constitute “apostasy” in Iran—while in prison in the United States. The applicant sought asylum in the U.S. based on a claimed fear of religious persecution in Iran, as a result of his status as an “apostate.” An immigration judge denied the religious asylum claim on the ground that the applicant did not

---

139 In response, Congress passed the Religious Freedom and Restoration Act (RFRA), which arguably legislatively overrules *Smith* and reinstates the former compelling state interest test. See RFRA 42 U.S.C. § 2000bb-1; but see *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997) (wherein the Court declared RFRA unconstitutional as applied to the States).


141 See *Smith*, 494 U.S. at 884.

142 See Samahon, *supra* note 4 at 2226 (“INS [now known as USCIS] asylum adjudication occurs during a highly individualized examination of religious membership and invites consideration of particular circumstances behind the applicant’s asylum proceeding.”).

143 *Emp’t Div. v. Smith*, 494 U.S. at 884.

144 980 F.2d 1129, 1134 (7th Cir. 1992) (reversing immigration judge’s denial of an Iranian’s *sur place* asylum application, which was based on the applicant’s fear of persecution in Iran as an “apostate” for his claimed conversion to Christianity while in the United States).
appear sincere in his conversion.\textsuperscript{145} On appeal, Judge Posner did not definitively decide the issue whether the applicant was entitled to remain in the United States (through cancellation of removal); he merely vacated and remanded the decision of the immigration judge below.\textsuperscript{146} However, his opinion notes that among the equities which must be considered by the Board of Immigration Appeals (BIA) is the consideration of potential “hardship” to the applicant if his or her relief is not granted. Considering the Iranian theocracy’s punishment of “apostasy” as a capital offense, Judge Posner concluded his opinion by noting that “[d]eath is a hardship.”\textsuperscript{147}

Second, there is a further limitation on \textit{Smith}. The \textit{Smith} opinion, by its own terms, applies only to neutral laws of general applicability.\textsuperscript{148} As Samahon notes, an asylum applicant challenging an adverse credibility determination is not challenging a generally applicable law. “[I]n the asylum context, there is no generally applicable law barring an applicant’s religious conduct—such as the criminalized peyote use at issue in \textit{Smith}.”\textsuperscript{149} Rather, the government’s determination that Ms. A’s status as a non-believer does not entitle her to protection from religious persecution is an example of “imposing special disabilities on the basis of religious views or religious status”, which is impermissible even under the rather relaxed \textit{Smith} rule.\textsuperscript{150} Accordingly, the United States government violates Ms. A’s free exercise rights by imposing a special disability—denying Ms. A asylum protection from religious persecution in Iran—solely on the basis of Ms. A’s status as a non-believer.\textsuperscript{151}

A former Muslim who demonstrates that she is a sincere non-believer, or who declares that she is sincerely agnostic as to all questions of faith, is an “apostate” in Iran. This much is beyond dispute. But when this person is denied asylum in the United States because a government official decides that a non-believer cannot receive the benefit of asylum from religious persecution, this person has been denied the right to freedom of religion. This person

\begin{footnotesize}
\textsuperscript{145} \textit{Id.} at 1132 (noting that the IJ took issue with the fact that the applicant had never been formally baptized, had never joined a church, and he was on a pork-free diet).
\textsuperscript{146} \textit{Id.} at 1133.
\textsuperscript{147} See \textit{id.} at 1132
\textsuperscript{148} See \textit{Smith}, 494 U.S. 872.
\textsuperscript{149} Samahon, \textit{supra} note 4, at 2226.
\textsuperscript{151} See Samahon, \textit{supra} note 4, at 2227 (“Because a sincere, but heterodoxical, new convert may not squarely fit an administrative judge’s conception of what it means to be a member of a certain faith, the government may violate the religionist’s free exercise rights by imposing a special disability—an adverse credibility finding that denies asylum benefits—solely on the basis of the applicant’s religious views.”).
\end{footnotesize}
will now be forced to either pretend to believe, or face persecution. Neither option is justifiable.

It is most likely that the Sherbert compelling state interest test, not the more relaxed Smith rule, would apply to a non-believing asylum applicant’s appeal of a denial of religious asylum. But even if this is not so, aliens such as Ms. A may still find relief from a denial of asylum through the provisions of the Religious Freedom and Restoration Act (RFRA). RFRA was the Congressional reaction to the Smith decision. Enacted in 1993, RFRA purports to reinstate the compelling state interest test of Yoder, thus legislatively overruling the Supreme Court’s decision in Smith. In 1997, the Court struck down RFRA as applied to the states; however, this is not to say that RFRA is inapplicable to the federal government and to federal statutes such as the INA.

In any event, “[c]oercing citizens to support a religion in which they do not believe will often, and arguably always, violate the Free Exercise Clause.” Such coercion would arguably occur where Ms. A feels compelled to support any religion other than her own skeptical views, under fear that the “wrong” answer may lead an asylum officer to conclude that her fear of religious persecution is not well-founded. If Ms. A feels compelled to go through the Christian ritual of baptism and regular church attendance, for example—as opposed to simply living her life and doing what she considers moral without any religious affiliation or belief—then she can argue not only that her right to the free exercise of religion has been violated, but that it has been violated as a result of an unconstitutional establishment of religion.

C. Establishment Issues in Asylum Law


(a) In general
Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain relief against a government[.]

153 In City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997), the Court held RFRA unconstitutional, as applied to the states, because the law exceeded Congress’s enforcement power under Section 5 of the Fourteenth Amendment.

154 Laycock, supra note 47, at 339.
It is well-recognized in the Supreme Court’s Establishment Clause jurisprudence that the State may not impose a religious orthodoxy. The Court has often analyzed alleged establishment of religious orthodoxy in terms of both (1) “coercion” and (2) “endorsement.”

First, the Court in Lee v. Weisman made it clear that “[t]he Constitution guarantees that government may not coerce anyone to participate in religion or its exercise[.].” In Weisman, the Court was asked to determine whether a public school could constitutionally use prayer during graduation ceremonies. The Court, agreeing with the plaintiff, held that the public school’s use of prayer amounted to establishment because it forced the plaintiff to either (a) participate in the graduation prayer—i.e., stand up and remain silent with the rest of the audience throughout the prayer—or (b) face the stigma from her peers that would likely follow if she remained seated during the prayer.

Thus, a majority of the Court has in the past been willing to prohibit a government actor—in that case, a public school—from using prayer in school because of the risk that an individual would feel coerced to participate in the prayer with her peers. The facts of Weisman provide a foil against which to contrast the risks involved in asylum hearings.

Indeed, assume that Ms. A does not yield to the arguably coercive environment of a religious credibility determination during an asylum hearing and thus does not appear sufficiently “religious” or “credible” to an asylum adjudicator. As a result, she will face deportation to a country where she may face persecution, indefinite imprisonment, or death. “In this instance, an implicit governmental dictate of what it means to be [religious] is associated with governmental power to deport.” Thus, the current method of determining the credibility of non-believing religious asylum seekers involves “indirect coercive pressure . . . to conform to . . . [an] officially approved religion.”

Credibility assessment in these cases requires a government official—in a situation where the adjudicator’s judgment is effec-

---

156 Id.
157 See id. at 599 (Blackmun, Stevens, and O’Connor, JJ., concurring); Lynch v. Donnelly, 475 U.S. 668, 687 (O’Connor, J., concurring).
158 See Weisman, 505 U.S. at 587.
159 See Weisman, 505 U.S. at 583, 593.
160 Id. at 587.
161 Samahon, supra note 4, at 2229 (“The Supreme Court [in Weisman] has found governmental coercion in situations with much lower stakes than the asylum setting.”).
162 See id.
tively an assertion of power over an applicant for asylum—to wrestle directly with the ambiguities of religious identity and faith.\textsuperscript{164} As noted by Michael Kagan,

If the adjudicator adopts a narrow conception of the alleged religious identity, refugees with a genuine fear of persecution will feel pressure to conform to the adjudicator’s orthodox views to avoid deportation. . . . This pressure [thus] arguably violates the prohibition against compelling a person to adhere to a certain form of religious belief.\textsuperscript{165}

It follows that a non-believer asylum applicant such as Ms. A faces indirect coercive pressure to act “religious,” as defined by a U.S. government official, lest she be sent to a country where she justifiably believes that she will face religious persecution.\textsuperscript{166} Moreover, where an asylum officer or immigration judge imposes his or her own preconception of what does (or does not) constitute a “religious” experience, the asylum officer deprives the asylum seeker of the freedom to experience “religion” though individual choice.\textsuperscript{167} To paraphrase both Kagan and Samahon, the inquiry into an asylum seeker’s pious conduct and knowledge opens the door to disciplined frauds while casting suspicion on genuine but imperfect non-believers.\textsuperscript{168}

Second, several prominent justices have taken the analysis one step further—stating that the State may not “endorse” a religious orthodoxy without violating the Establishment Clause.\textsuperscript{169} These justices have indicated that not only does the Establishment Clause prohibit the government from coercing individuals into adopting the prevailing religious orthodoxy, the Clause prevents the government from even lending religion any recognizable form of an \textit{imprimatur}.\textsuperscript{170} The principle against endorsement has generally been articulated as a test of whether an objective “reasonable person” would find that the government conduct at issue is somehow endorsing a religion, or all traditional theistic religions, to the

\textsuperscript{164} See Kagan, \textit{supra} note 2, at 1190.

\textsuperscript{165} See \textit{id.}

\textsuperscript{166} See Samahon, \textit{supra} note 4, at 2233 (“[A]n applicant confronted with the prospect of deportation to a hostile home country will feel compelled to capitulate to the orthodox practice rather than face death at the hands of religious courts in [her] home country.”).

\textsuperscript{167} See Kagan, \textit{supra} note 2, at 1220.

\textsuperscript{168} See \textit{id.} at 1220; see also Samahon, \textit{supra} note 4, at 2215–16.

\textsuperscript{169} See Lee v. Weisman, 505 U.S. 577, 599 (Blackmun, Stevens, and O’Connor, JJ., concurring); see also \textit{id.} at 609 (Souter, Stevens, and O’Connor, JJ., concurring); Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

\textsuperscript{170} \textit{Id.}
detriment of non-believers or adherents to other non-traditional or less-established religions.  

United States courts must seek to avoid the imposition of a religious orthodoxy through the law of asylum. Courts can do so by refusing to narrowly define what it means to be religious. In order to prevent asylum law from facilitating religious persecution abroad, courts in the United States must recognize that those persecuted as a result of their religion do not necessarily fit into neat, distinct categories. Those in need of asylum may come in many forms: they may appear as quiet yet sincere non-believers, as outspoken skeptics, as devout Christians, as intimidated “apostates”, or as quasi-secular Jews. Courts can and should improve how the law functions in this country through careful review of asylum applicants’ claims of wrongful denial of religious asylum. If Ms. A is able to demonstrate to a reviewing court that an immigration judge or an asylum officer used particular religious practices or beliefs as a baseline or standard in evaluating her sincerity in renouncing Islam (and all religion), then Ms. A should be able to state a claim alleging that the adverse determination resulted in an unconstitutional establishment of religion.

CONCLUSION

The United States, a country founded on religious liberty, continues to outwardly express the importance of religious liberty in the country today. In 2009, for example, President Barack Obama articulated the country’s commitment to the Founders’ vision of religious pluralism: “We are a nation of Christians and Muslims, Jews and Hindus, and non-believers.” The United States’ continuing commitment to religious liberty is clearly at odds with the oppressive and often brutal theocratic regimes that persecute their own citizens on account of those citizens’ religious beliefs or lack thereof.

The contrast between the United States and the Islamic Republic of Iran, for instance, could not be starker. In several public speeches before his own people, the United Nations, and other international bodies, Iranian President Mahmoud Ahmadinejad has remarked that, among other things, “They [i.e., “the Western Powers”] launched the myth of the Holocaust. They lied, they put on a

---

171 See Weisman, 505 U.S. at 600; see also Emp’t Div. v. Smith, 494 U.S. 872, 891 (1990) (O’Connor, J., concurring) (“[L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.”).

172 See the full text (and video) of President Obama’s inaugural address, available at http://www.whitehouse.gov/the-press-office/president-barack-obamas-inaugural-address (emphasis added).
Ahmadinejad has also publicly called the Holocaust “a lie based on an unacceptable and fantastical claim.”\(^{173}\) These claims are of course ridiculous and abhorrent in any setting. But they are particularly poignant in the context of asylum law, a law that was formally recognized in the wake of the Holocaust itself, with the experience of Jews in Nazi Germany fresh in the world’s collective memory.

Yet to those who examine America’s asylum law in detail, the assertion that the United States was founded upon (and continues to promote) religious liberty may ring hollow. The law of asylum in the United States has the serious potential to be an impediment to the very religious liberty it was and is intended to protect. For the reasons outlined in this Article, the law must evolve. Asylum law must not dance to the tune of a majoritarian religious orthodoxy. Rather, the law and procedure of asylum must foster religious liberty—including the liberty not to believe (or believe) as one chooses. In certain situations, non-belief should be sufficient to obtain asylum protection in the United States.

Current law, however, can be read to dictate otherwise. By rejecting the claim of a non-believer asylum applicant such as Ms. A simply because she is not “religious”—she is not a Christian, a Jew, or a Muslim, for example—the United States sends an “apostate” back to a paranoid and oppressive theocratic regime in Iran; the United States sends Ms. A back to what will be, at best, a dismal, daunting future. To send an asylum applicant to her possible imprisonment and death at the hands of a regime that publicly denies the Holocaust is to disgrace the legacy of the law of asylum in the United States. Of broader import, such moral obliquity is an insult to the principal of religious liberty upon which the United States was founded.


\(^{174}\) September 2009. \textit{Video available at} \url{http://www.youtube.com/watch?v=1YG6E_MZgXs}. 