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PROTECTING THE PERSECUTED AND FULFILLING THE TRUE GOALS OF A WAR ON TERROR THROUGH IMMIGRATION POLICY

Samia A. Malik[†]

I. Introduction

September 11, 2001 awoke awareness in the world, and particularly in the United States, of the potential for religious and politically motivated terrorism instigated by a group of extremists who associate themselves with, but who do not represent, the Islamic faith. In Pakistan, a country that is at the center of and has played a key role in the Bush Administration's "war on terror,"¹ religious minorities have faced religious and politically motivated violent behavior and social ostracism triggered by the same extremists who sympathized with the September 11 terrorist attacks and support similar extremist ideologies.² One of these persecuted minority groups in Pakistan are the Ahmadis. Ahmadis consider themselves Muslims, but Pakistani law does not regard them as such.³ Unfortunately, these persecuted minorities have difficulty finding refuge in the United States. The September 11 attacks have hindered immigration from Muslim countries, including the immigration of persecuted minorities.⁴

Imagine an Ahmadi family escaping a country that does not allow them to practice and teach their faith freely to their children. They seek asylum in the United States, a country that is fighting a "war on terror" against those who prohibit others to freely and legally practice their religious beliefs. When the family arrives in the United States, because they hail from a specific country, in this instance Pakistan, it is presumed that they align themselves with similar views as other citizens in their home country and have ties to terrorism.⁵

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¹ Pakistan has been a key ally of the United States in the 'War on Terror' after September 11, 2001, particularly by providing logistical support to dissolve the Taliban regime and hunt for Al-Qaeda operatives on the border of Pakistan and Afghanistan and by providing ideological support to the United States in suppressing the terrorist groups within its borders. Prior to September 11, Pakistan recognized and supported the Taliban government in Afghanistan. See *Bush Renews Support for Musharraf*, BBC NEWS, Dec. 4, 2004, at <http://news.bbc.co.uk/1/hi/world/americas/4067881.stm>. (last visited March 14, 2005). See also Tony Karon, *Why the U.S. Anti-Terror War is a Crisis for Pakistan*, TIME ONLINE EDITION, Sept. 15, 2001, at <http://www.time.com/time/nation/article/0,8599,175058,00.html> (last visited March 14, 2005).

² See generally Amjad M. Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217 (2003).

³ PAK. CONST. pt. XII. ch. 5, arts. 260(3)(a), 260(3)(b).

⁴ Lori Adams, *U.N. Report: Refugee Rights in the U.S. Scaled Back by Recent Anti-Terrorism Legislation: Are We Violating the United Nations Refugee Convention?*, 19 N.Y.L. SCH. J. HUM. RTS. 807, 809-10 (2003).

⁵ Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1274-75 (2004).

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But in fact, they are simply trying to escape these fundamentalist ideologies. They are not of the country they left behind and are received with skepticism by the country they wish to accept. This scenario outlines the plight of the Ahmadiyya Muslim Community. The end result is a peaceful religious community effectively being ignored (by the United States) and given negative treatment (by Pakistan) from two countries that are integral to the “war on terror.”

Pakistan was partitioned from a mostly Hindu India in 1947 because Muslims desired an independent state—one that is not simply different based upon its foundation in a particular religious dogma.⁶ Founding Father Muhammad Ali Jinnah designed Pakistan on the proposition that religious and cultural minorities would have their place and equal rights in the new nation.⁷ Over time, the relatively secular state was transformed into an Islamic Republic that followed a rigid interpretation of Islamic law.⁸ Fundamentalist religious clerics, who have always maintained an increasing influence on the political structure of the country,⁹ approved and supported this transformation to the detriment of the religious minorities.

Ahmadi Muslims make up a peaceful, religious community that has been in existence for over a hundred years.¹⁰ However, because of differences in certain religious beliefs that some mainstream Muslims consider heretical and blasphemous, Ahmadi Muslims have been declared a non-Muslim minority by the Islamic Republic of Pakistan.¹¹ In addition, Ahmadi Muslims have been at the forefront of persecution by both individual citizens and the Pakistani government even before the country’s “Islamization.”¹² This eventually led to problematic amendments to the Constitution and anti-blasphemy provisions in its Penal Code.¹³ The current Constitution generally limits minority citizen rights¹⁴ and legally confirms that Ahmadi Muslims are non-Muslim.¹⁵ The Penal Code punishes minorities for what is considered blasphemy and specifically targets Ahmadi Muslims.¹⁶ Thus, the laws are the

⁶ Khan, *supra* note 2, at 220.

⁷ Muhammad Ali Jinnah, address at the Karachi Club (Aug. 11, 1947), available at http://www.pakistan.org/pakistan/legislation/constituent_address_11aug1947.html (last visited March 12, 2005). See also PAK. CONST., pt. I, ch. 1, art. 20. “Subject to law, public order and morality:—(a) every citizen shall have the right to profess, practice and propagate his religion: and (b) every religious denomination and every sect thereof shall have the right to establish, maintain manage its religious institutions.”

⁸ See Khan, *supra* note 2, at 224

⁹ Molly Moore, *Imposition of Strict Islamic Law is Transforming Once Moderate Pakistan*, WASH. POST, October 21, 1993, at A29.

¹⁰ See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*, at <http://alislam.org/introduction> (last visited Feb. 2, 2005).

¹¹ See PAK. CONST. pt. XII, ch. 5, arts. 260(3)(a), 260(3)(b).

¹² Islamization is in quotations because Islamization of certain laws need not mean it is the majoritarian or correct interpretation of Islamic law. Islamization, as referred to in this essay, is a term of art that will refer to the most extreme interpretation of Islamic law.

¹³ Profile Series Pakistan, United States Department of Justice Report (1993), available at <http://www1.umn.edu/humanrts/ins/pakistan.pdf> [hereinafter United States Department of Justice Report].

¹⁴ See PAK. CONST. pt. III, ch. 2, art. 51; PAK. CONST. pt. IV, ch. 2, art. 160.

¹⁵ See PAK. CONST. pt. XII, ch. 5, arts. 260(3)(a), 260(3)(b).

¹⁶ See PAK. PENAL CODE §§ 298B, 298C (collectively referred to as Ordinance XX).

crux of the current problem in Pakistan and legally justify any form of religious persecution that an individual citizen may practice against the minorities.

This article does not attempt to propose an unrealistic solution to the persecution and maltreatment of minorities in Pakistan. It is unlikely at this time that the government of Pakistan will have qualms about repealing constitutional amendments that limit minority rights and that it will abolish ordinances in its Penal Code that violate international human rights standards. Instead, this article will focus on solutions through immigration of those adversely affected by these laws, solutions that are consistent and not contrary to the goals of the "war on terror." By taking persecuted minority groups off the backburner and highlighting their problems in the global arena, the true war on terror can be legitimized in the eyes of the world.

In order to do this, we must first educate ourselves about these minority groups by looking at the history of their persecution. Part II will explain the crux of the problem in Pakistan and what has led to the "Islamization" and legitimization of the minority's inferior status in Pakistan. In Part III, the article will address the problem closer to home, particularly how Ahmadi immigration in the United States after September 11 has been hindered and greatly discouraged. Next, in Part IV, the article will discuss that limiting the immigration of foreigners, especially from Muslim nations, has had the greatest negative effect on Ahmadis, and in this sense the "war on terror" has fissures that are small, but significant. It will follow that the rationale of the "war on terror" may be deemed hypocritical. Finally, in Part V, I will make a humble attempt to offer solutions to the problems that Ahmadis are facing by proposing liberalized asylum for those who can clearly establish their ties to the Ahmadiyya Muslim Community which in turn may encourage the distant, yet feasible, goal of repealing rigid and inhumane laws in Pakistan.

II. Pakistan's Minority Problem

At its establishment in 1947 and years prior, Pakistan stood by its promise of religious freedom.¹⁷ Jinnah fortified this aim addressing the nation in the year of its birth:

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State.¹⁸

However, as a result of the increasing religious fundamentalism and the greater influence of the religious right and religious clerics, who have their own political agenda, Pakistan has slowly been transformed into a hub for religiously motivated persecution and related human rights violations toward minorities.¹⁹

¹⁷ See Khan, *supra* note 2, at 220-21.

¹⁸ Muhammad Ali Jinnah, address at the Karachi Club (Aug. 11, 1947), *available at* http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html (last visited February 2, 2005).

¹⁹ See Khan, *supra* note 2, at 224.

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Though the religious right is a minority, they are active enough in spreading political propaganda by using mosques and madrassas (religious schools) as forums to dominate society's views²⁰ that they now have a dominating presence.

For the purpose of background, one must understand the qualitative, theological differences in the beliefs of Ahmadis and other mainstream Muslims. The persecution of Ahmadis and the laws supporting this persecution are based in the differences of the theological beliefs of non-Ahmadi or mainstream Muslims (including the religious right who have exploited these differences for political purposes) and Ahmadis Muslims.²¹ Simply, mainstream Muslims do not believe that a new prophet or messenger will follow Muhammad even though they do believe that a Messiah will come, namely Christ.²² On the other hand, Ahmadis believe that although Muhammad was the prophet of Islam and revere him as such, he was followed by Mirza Ghulam Ahmad, who they consider to be the Messiah of the age prophesized by Muhammad himself and whom they believe has come not literally as Christ, but in his spirit.²³ It is this difference concerning the finality of the prophethood, caused by a different interpretation of scripture, that has led many mainstream Muslims to consider Ahmadis to be heretical and hence, not Muslims.²⁴ For mainstream Muslims, the belief that Muhammad was the last prophet is a necessary component to their Islamic faith, and any other interpretation would be considered *bi'dah* or innovation.²⁵ The Ahmadis do not read the scripture this way, and thus it is not a necessary component of their faith, nor is it considered *bi'dah* in their eyes.²⁶ As Pakistan deviates toward a more "Islamicized" nation, these differences in beliefs have attracted negative attention (beyond just a difference of opinion), and the consequences to Ahmadis have been grave.²⁷

The effect of this ever-increasing religious fundamentalism in Pakistan has had legal consequences on two fronts which have exacerbated the maltreatment of non-Muslim minorities, particularly Ahmadis. First, the original Constitution of Pakistan has been amended many times to limit the rights and participation of non-Muslim minorities in the government.²⁸ For example, two separate electorates were created in 1978—one for Muslims and one for minorities—in which

²⁰ U.N. Commission on Human Rights, 52d Sess., Provisional Agenda Item 18, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, available at <http://www1.umn.edu/humanrts/commission/country52/95-add1.htm>. [hereinafter U.N. Commission on Human Rights]. See also David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 35-36.

²¹ See M. Nadeem Ahmad Siddiq, *Enforced Apostasy: Zahrudin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan*, 14 LAW & INEQ. 275, 278-81 (1995).

²² *Id.* at 279-80.

²³ Waheed Ahmad, *A BOOK OF RELIGIOUS KNOWLEDGE* 171 (1988).

²⁴ See Siddiq, *supra* note 21, at 278-81.

²⁵ Ali Khan, *Islam as Intellectual Property: "My Lord Increase Me in Knowledge,"* 31 CUMB. L. REV. 631, 661 (2001).

²⁶ See Ahmadiyya Muslim Community, *The Ahmadiyya Movement in Islam: An Overview*, at <http://alislam.org/introduction> (last visited Feb. 2, 2005).

²⁷ See Khan, *supra* note 2, at 223-230.

²⁸ United States Department of Justice Report, *supra* note 13.

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Muslims are authorized only to vote for Muslim candidates, and non-Muslims may only vote for non-Muslims.²⁹ This had the effect of limiting minority participation to the election of special representatives.³⁰ Also, particular to the Ahmadi situation, though Ahmadis consider themselves Muslim, the Second Amendment of the Pakistani Constitution was passed in 1974 that legally declared Ahmadis to be non-Muslim and thus subject to minority treatment under the law.³¹ This amendment was passed by the government as a result of the religious right who assert that those who do not believe in the finality of the prophethood cannot be a true Muslim.³²

Second, and more disturbing, is the Penal Code of Pakistan, namely Ordinance XX which was promulgated in 1984, otherwise known as the “blasphemy laws.”³³ This ordinance is an example of the powerful influence that the religious right in creating legislation. The religious right threatened to commit violence against Ahmadis if their demands for changing the Penal Code were not met.³⁴ Under this law, Ahmadis commit “blasphemy” if they call themselves Muslims or associate anything in their beliefs with Islam.³⁵ “Blasphemy” includes defiling the name of the Prophet, an example of which could be challenging the finality of the prophethood.³⁶ The ordinance makes “blasphemy” a crime punishable by fine or imprisonment and was amended in 1991 to include punishment by death without any possible form of appeal.³⁷ Human rights groups call the blasphemy laws draconian and believe that the prosecution can meet its burden of proof very easily.³⁸ No longer is this ordinance a formality that simply gives government and citizens an excuse to persecute and commit human rights violations against minorities. Its purpose to punish was fulfilled this very year when an Ahmadi citizen was sentenced to death and charged with the crime of “blasphemy.”³⁹ Inevitably, these legal justifications and succumbing to the religious rights demands has the intended consequence of a giving a *carte blanche* for

²⁹ See Pak. Const. pt. III, ch. 2, art. 51; Pak. Const. pt. IV, ch. 2, art. 160. See also U.N. Commission on Human Rights, *supra* note 20.

³⁰ United States Department of Justice Report, *supra* note 13.

³¹ See Pak. Const. pt. XII, ch. 5, arts. 260(3)(a), 260(3)(b).

³² See Khan, *supra* note 2, at 225. See also Pak. Const. pt. XII, ch. 5 arts. 260(3)(a), 260(3)(b) which defines Muslim as “a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or any description whatsoever, after Muhammad (peace be upon him).” Subsection (b) defines a non-Muslim as “a person belong to the Christians, Hindus, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or Lahori Group (who call themselves ‘Ahmadis’ or by any other name) or a Bahai, and a person belonging to any of the Scheduled Castes.”

³³ See PAK. PENAL CODE §§ 298B, 298C (collectively referred to as Ordinance XX).

³⁴ United States Department of Justice Report, *supra* note 13.

³⁵ See PAK. PENAL CODE §§ 298B, 298C.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *Pakistani Gets Life for Blasphemy*, BBC NEWS, Nov. 11, 2004, at http://news.bbc.co.uk/1/hi/world/south_asia/4055723.stm (last visited Feb. 2, 2005).

³⁹ *Id.*

the further persecution of non-Muslim minorities, particularly Ahmadis, with no end in sight.⁴⁰

It should be stressed that even before these laws were enacted, there was also anti-Ahmadi agitation.⁴¹ For example, religious clerics incited riots against Ahmadis when the government refused to declare Ahmadis as non-Muslims in 1953.⁴² Further riots against Ahmadis in 1974 and pressure from clerics led Prime Minister Zulfikar Ali Bhutto to eventually declare Ahmadis a non-Muslim minority.⁴³ Thus, these laws have been pushed into enactment by a growing movement of "Islamization," and they encourage further "Islamization."⁴⁴ Accordingly, a call for repeal will not come easily, as seen in 2000 when President Pervez Musharraf failed to repeal certain clauses in the blasphemy laws as recommended by human rights groups, most likely because the religious right continues to hold a strong grip on the affairs of government.⁴⁵ Furthermore, even if such laws are repealed in the near future, the conscience of the country cannot be changed on paper and overnight. In 1947, Jinnah's words show the conscience of the country in an opposite light:

Even now there are some States in existence where there are discriminations made and bars imposed against a particular class. Thank God, we are not starting in those days. We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.⁴⁶

It may take longer than the past 60 years to free Pakistan from these discriminations because of the rapid changes in both the sentiments of the people, the legal buttressing of these sentiments, and the justification of further anti-Ahmadi sentiment. A more feasible and immediate solution to protect Ahmadis who feel that they are physically threatened and denied basic human rights is through the facilitation and promotion of immigration to the United States.

⁴⁰ See *Persecution of the Ahmadiyya Muslim Community, Facts and Figures*, at http://www.thepersecution.org/facts/facts_00.html (last visited March 15, 2005). In the year 2000 alone, 12 Ahmadis were murdered for their faith and 166 Ahmadis were prosecuted for practicing their faith.

⁴¹ See U.N. Commission on Human Rights, *supra* note 20.

⁴² Siddiq, *supra* note 21, at 285.

⁴³ *Id.* at 286.

⁴⁴ See U.N. Commission on Human Rights, *supra* note 20.

⁴⁵ See *Pakistan's Blasphemy Law U-Turn*, BBC NEWS, May 17, 2000, at http://news.bbc.co.uk/1/hi/world/south_asia/751803.stm (last visited Feb. 2, 2005).

⁴⁶ Muhammad Ali Jinnah, address at the Karachi Club (Aug. 11, 1947), available at http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html (last visited March 12, 2005).

III. Asylum Policy in the United States Post-September 11

The United States has seen historical patterns of change in immigration policy as the needs of American society change.⁴⁷ In early American immigration policy, aliens and immigrants were subject to the “classical immigration” policy, limiting the entry of immigrants and rights of aliens already present and to “retaining” American “sovereignty.”⁴⁸ Soon afterwards, the United States became more liberal in its immigration policy as the need for immigrants increased and the American image as a shelter for the “tempest-tossed” prevailed.⁴⁹ After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) in 1996⁵⁰ and even more significantly, after the September 11, 2001 terrorist attacks, the “immigration pendulum” has shifted again as the entrance of immigrants into the United States has been hindered particularly for immigrants who arrive from Muslim countries.⁵¹

Surprisingly enough, these post September 11 changes in the immigration policy have also affected those individuals seeking asylum, most poignantly, those individuals who are escaping persecution in these “terrorist” target countries.⁵² Just as troublesome is the fact that post September 11, there is no telling when the pendulum will shift back to a more open immigration policy or if it will ever shift back at all. As it stands now, as long as there is a fear of terrorism and a “war on terror,” immigration will be limited even to the refugees and asylees.

Asylum seekers have historically been one of the most protected groups under United States’ immigration policy.⁵³ In order to apply for asylum in the United States, one must have a credible fear of persecution in one’s country of origin.⁵⁴ This trend resonates with the ideological importance of the United States as giving hope to many across the globe who are persecuted by their own governments and people. The policy did not call for the detention of asylees in the initial processing of applications.⁵⁵ This all changed when a new policy, Operation Liberty Shield, was announced in March of 2003, which was quickly terminated by Secretary of Homeland Security Tom Ridge.⁵⁶ Under Operation Liberty Shield, asylees from certain suspect countries (mainly Muslim majority countries), who would have otherwise been granted asylum on their claims of perse-

⁴⁷ Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 12 (1984).

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 34.

⁵⁰ Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2001).

⁵¹ Tom McCann, *Lawyers Scramble to Help Immigrants Caught in the Net of Tighter Enforcement*, CHICAGO LAWYER, Aug. 2003, at 9.

⁵² See Adams, *supra* note 4, at 809-10.

⁵³ Karen C. Tumlin, *Comment: Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF L. REV. 1173, 1190 (2004).

⁵⁴ Immigration and Nationality Act § 235 (b)(1)(B) (2004).

⁵⁵ Tumlin, *supra* note 53, at 1190.

⁵⁶ Stephen H. Legomsky, *The Ethnic and Racial Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 196, n.8 (2005).

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cution, remained in custody and were detained throughout the processing period.⁵⁷ Effectively, this policy would even apply to Iraqis fleeing the torture chambers of Iraq because they hail from an “al-Qaeda” nation⁵⁸ and would similarly apply to Ahmadis escaping the potential of being put in prison for their beliefs under the blasphemy laws. Furthermore, even if an immigration judge ordered the release on bond of someone seeking asylum, the Department of Homeland Security had the power to intercept and overrule the judge.⁵⁹ Thus these immigrants, who simply originate from the “wrong” country and have no personal links to terrorism, are left “without a court system through which they can clear their names.”⁶⁰ They are treated as suspects first (under the presumption that they have terrorist ties), and as a persecuted people in search of a haven second.

Even after Operation Liberty Shield was terminated, there are still policies including the profiling of immigrants from Muslim nations⁶¹ and the IIRIRA’s mandatory detention provision⁶² that when combined have the same effect as Operation Liberty Shield. Post-September 11 policies of the federal government include mass arrests and the preventative detention of Muslim immigrants, conducting secret immigration hearings for Muslims who were arrested and detained, mandatory registration of Muslim immigrants, interviewing young immigrant based solely on age, date of arrival, and country of origin.⁶³ The mandatory detention provision of the IIRIRA requires asylum seekers to be detained pending the outcome of the “credible fear” interview and they remain in detention until their hearing before an immigration judge.⁶⁴ Effectively, Operation Liberty Shield remains alive in theory since asylum seekers originating from Muslim countries will undergo more heightened scrutiny.⁶⁵

The government defended Operation Liberty Shield and continues to defend the current policies in the interest of national security as a way to prevent terrorists from entering the United States under false asylum claims.⁶⁶ It is also a true tenet of international law that a country has no duty to lower its borders for immigrants, even those who are persecuted, but that it does so at its own discre-

⁵⁷ Philip Shenon, *Threats and Responses: Immigration*, N.Y. TIMES, March 19, 2003, at A22; See also Press Release, Secretary Ridge, U.S. Dep’t of Homeland Security, Operation Liberty Shield: Press Briefing by Secretary Ridge (Mar. 18, 2003), available at <http://www.dhs.gov/dhspublic/display?content=525>.

⁵⁸ See Shenon, *supra* note 57.

⁵⁹ Adams, *supra* note 4, at 811.

⁶⁰ *Id.*

⁶¹ Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter Productive in the “War on Terrorism”?*, 16 PACE INT’L. L. REV. 19, 25-26 (2004).

⁶² Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT’L. L. 117, 143 (2001).

⁶³ McDonnell, *supra* note 61, at 25-26.

⁶⁴ Ramji, *supra* note 62, at 143.

⁶⁵ Farish A. Noor, *Morally Bankrupt War on Terror by the US*, available at <http://www.worldrevolution.org/article/263>.

⁶⁶ Shenon, *supra* note 57.

tion and out of its own generosity.⁶⁷ Yet, the United States is a nation that has generously welcomed immigrants throughout its history, and such a generous immigration policy is something that has proved to be a defining American value that should not be quickly discarded.

Despite these possible arguments from the government and critics defending Operation Liberty Shield, mandatory detention under the IIRIRA and post-September 11 immigration policies targeting immigrants from Muslim countries, the policies are flawed in that they are so broad that they will have the same effect on those genuinely escaping persecution and the potential terrorists themselves (who often cause the persecution in the first place).⁶⁸ Thus, instead of severely limiting the American value of giving refuge to the persecuted, the asylum policy should instead be supplemented with more appropriate and effective security measures. The goal should be to create a balance between the two interests of American values and American security.⁶⁹

Furthermore, these changes in asylum policy for the persecuted undermine standards of international law and thus the international ties that the United States has made.⁷⁰ If the United States wishes to hold strong ties with its allies in the “war on terror,” it must stand by its values of freedom and make sure these values extend to those who are persecuted by the same individuals or groups who have created the necessity for a war against terrorism. Another response to the proponents of these rigid asylum policies is that detention of asylum seeking refugees has done little to advance the goals of the war on terror.⁷¹ That is to say, in hindsight none of the nineteen hijackers who carried out the September 11 attacks would have been identified under such method. Furthermore, there are alternative methods that may better fulfill the goals for the war on terror. For example, proceeding in the criminal justice system on specific knowledge so that detainees may have access to an attorney would fulfill the same goal of discovering any possible terrorist action and acting on it, but without a violation of fundamental rights.⁷²

With particular respect to the Ahmadi situation, Ahmadis have historically immigrated to Western nations because not only do they feel threatened and restricted to practice their faith freely under the blasphemy laws, but they feel as though they will not be able to flourish in a society that openly discriminates in the employment and education sectors.⁷³ Though it is true that not every Ahmadi

⁶⁷ Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980*, 28 VA. J. INT'L. L. 1, 3-4 (1987).

⁶⁸ Adams, *supra* note 4, at 814.

⁶⁹ *Id.* at 817-18.

⁷⁰ James F. Smith, *United States Immigration Law as We Know it: El Clandestino, The American Gulag, Rounding up the Usual Suspects*, 38 U.C. DAVIS. L. REV. 747, 791 (2005).

⁷¹ See Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as War on Immigrant Offenders and Immigration Violators*, 40 NO. 6 CRIM. LAW BULLETIN 2 (2004). Proponents, including Former Attorney General Ashcroft, argue that asylum seekers especially those that hail from Pakistan are presumptive security risks and more likely terrorists than persecuted asylum seekers.

⁷² Adams, *supra* note 4, at 813.

⁷³ United States Department of Justice Report, *supra* note 13.

will be openly persecuted in Pakistan or subject to the blasphemy laws, the potential is very possible and in the discretion of the one who brings the action and the enforcer of the law.⁷⁴ Furthermore, just the potential of being prosecuted under the laws wreaks constant fear and would make even the simplest of activities like saying the Islamic greeting of “peace be upon you,” an issue of life or death, freedom or imprisonment.⁷⁵

In 1993, the United States Department of Justice reached the conclusion that though cases may differ greatly, the discrimination of Ahmadis in Pakistan reaches the level of persecution.⁷⁶ The conclusion was made after looking at the history of Ahmadis in Pakistan, social discrimination, and prosecution for blasphemy crimes.⁷⁷ Thus, a broad definition was given to the term “persecution” which included acts of social ostracism like job discrimination and discrimination in admission to universities and schools.⁷⁸ Accordingly, the Department of Justice recommended to asylum officers that asylum should be granted to Ahmadis if the individual can authenticate that he is a member of the community.⁷⁹ Just from this report, one can see that under the United States asylum policy before September 11, 2001, Ahmadis who had their specific situation evaluated were generally one of the protected groups of immigrants.

The tides, however, seem to be changing for Ahmadis just as they have changed generally for many who wish to immigrate to the United States from countries “associated” with or harboring terrorist organizations. There is more scrutiny of those seeking asylum, even if they are a known persecuted minority as seen by current post-September 11 policies emulating Operation Liberty Shield. Hence, one may infer that this greater scrutiny also applies to Ahmadis since they hail from an “al-Qaeda linked” country. Operation Liberty Shield type polices would even scrutinize and apply to Iraqis who have escaped prison chambers for asylum in the United States.⁸⁰

Since these, when combined, have a new affect on asylum seekers, the overall effect on persecuted minorities remains to be seen. Relevant to the Ahmadi situation even before post-September 11 policies were implemented, there is some evidence that the definition of persecution has been limited in the case of Ahmadis who often must prove physical harm and threat of immediate persecution for their beliefs.⁸¹ This notion can be highlighted in a case that was decided a few months after September 11. In *Hakeem v. INS*, there were several factors that led the Court to deny Hakeem asylum in the United States.⁸² One of these reasons, relevant to stricter scrutiny of Ahmadis, was that Hakeem did not show

⁷⁴ *Id.*

⁷⁵ See PAK. PENAL CODE §§ 298B, 298C.

⁷⁶ See United States Department of Justice Report, *supra* note 13.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Shenon, *supra* note 57.

⁸¹ *Hakeem v. INS*, 273 F.3d 812 (9th Cir. 2001).

⁸² *Id.* at 816.

that he would be unable to practice his religion freely if he returned to Pakistan.⁸³ The Court also said that he did not face any threat to his physical person.⁸⁴ Thus, the Court did not believe that there was “credible persecution,” as required by the statute.⁸⁵ The decision was surprising even though there was sufficient evidence and statistics showing that the Ahmadi situation in Pakistan is not a safe one and that there is always the potential for prosecution under the law.⁸⁶

Cases such as this one and the new immigration policies set forth post-September 11 demonstrate that perhaps the administration is not realistically standing by its ideological goals for the war on terror—to spread freedom throughout the world which will secure the homeland from terrorism.⁸⁷ Immigrants are not welcomed and instead are considered suspects, even those who genuinely seek asylum from “al-Qaeda nations.”⁸⁸ If we cannot provide freedom for immigrants escaping countries where terrorism is rampant, how can we spread freedom throughout the world and successfully win the war on terror? Though security is an important goal for the nation, by studying which groups historically have been persecuted in each country, a balance can be reached between issues of security and issues of upholding American values, so as not to leave a particular immigrant group, like the Ahmadis, in a no man’s land.

IV. Limitations On U.S. Asylum Policies and the Impact on Ideological Goals of the U.S. War on Terror

Perhaps more consequential than the technical effect of Operation Liberty Shield and similar policies on asylum seekers is the message it sends to the world about the United States-led “war on terror.” The Bush Administration has offered two main goals for the war on terror. The first is to protect the homeland from further terrorist attacks, thereby preserving our freedoms in the United States.⁸⁹ The second is to spread the American idea of freedom through democracy throughout the world, which in turn will protect the homeland from terrorist attacks.⁹⁰ In his 2004 State of the Union address, Bush declared: “God has planted in *every human heart the desire to live in freedom.*”⁹¹ An example of this second goal, of course, is the “liberation” of Iraq from a dictatorship, which according to the current administration has also shielded the United States from future terrorist attacks.

⁸³ *Id.* at 816-17.

⁸⁴ *Id.* at 817.

⁸⁵ *Id.* at 816.

⁸⁶ United States Department of Justice Report, *supra* note 13.

⁸⁷ See *Waging and Winning the War on Terror*, at <http://www.whitehouse.gov/infocus/achievement/chap1.html>.

⁸⁸ Tumlin, *supra* note 53, at 1174.

⁸⁹ See *Waging and Winning the War on Terror*, *supra* note 87.

⁹⁰ See *id.*

⁹¹ President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html>.

After understanding the legal ramifications to the Ahmadis of persecution in Pakistan and being effectively ignored by United States' immigration policy, it is necessary to see what implications these actions by both Pakistan and the United States will have in the broader scheme, that is, on the ideological goals of the war on terror. With respect to both goals, we have already established that detaining asylum seekers and refugees does not necessarily aid the war on terror in the technical sense. The question that follows is: "Do these policies give an overarching negative impression to our allies that our words do not correlate with our actions? And accordingly, are these impressions from our allies causing the goals for the war on terror to internally destruct?"

Though policies that have the combined effect of creating an Operation Liberty Shield in theory are not given much attention domestically, human rights organizations who frown upon these policies have brought them to the attention of the international community.⁹² These policies violate international treaties and conventions.⁹³ For example, a policy detaining refugees who seek asylum from their country of origin violates Article 3 of the 1951 Refugee Convention.⁹⁴ Parties to this Convention, including the United States, must apply the provisions of the Convention without "discrimination as to race, religion, or country of origin."⁹⁵ Because the United States is clearly violating this provision and allied nations have not taken similar drastic steps to hinder immigration to their countries,⁹⁶ these nations will look at the United States' led war on terror with a skeptical eye.⁹⁷ This skeptical eye cast toward United States initiated policy that denies basic rights to immigrants who are escaping persecution (or immigrants in general) for the interest of American security is not a new phenomenon.⁹⁸ Of course, as stated previously, the United States is under no duty to lower its borders for immigrants at the instructions of an international custom,⁹⁹ especially when its national security is at issue. Nonetheless, the United States cannot disregard years of lowering its borders to immigrants, something that remains a strong value for American ideology and an American policy that the international community respects.

In the past, the United States has sacrificed liberties of immigrants based on their race and national origin to "secure" the nation, like the rights of Russian immigrants at the height of the Cold War, even if they may very well have been

⁹² Adams, *supra* note 4, at 813.

⁹³ *Id.* at 812.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Smith, *supra* note 70, at 813-14.

⁹⁷ See *id.* The author explains that a stricter asylum policy in the United Kingdom would be met with great opposition. Accordingly, a change in American asylum policy that violates the Convention would also be seen in a negative light in the UK.

⁹⁸ Elizabeth M. McCormick, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, 19 CONN. J. INT'L L. 423, 435 (2004).

⁹⁹ Anker, *supra* note 67, at 3-4.

escaping the same Communist regime for which they faced suspicion.¹⁰⁰ The end result is that these measures do not secure the nation, but to the contrary, have undermined the goals of national security because the international community cannot legitimize such actions as appropriate or necessary and thus cannot work together in cooperative alliance with the United States.¹⁰¹ Thus, if we are not able to keep a coalition of allies fighting against terrorism, the national security of the United States will be less secure than when our allies are involved and satisfied that the war on terror is a legitimate one. Some nations may not look to these policies with a skeptical eye, but may try to emulate these policies thereby further hindering the true goals for the “war on terror.” Arbitrary detention of immigrants (especially asylum seekers and refugees) sets a poor example for the international community, specifically because of the assumption that by following this template, the threat of terrorism will be annihilated.¹⁰²

We are punishing the innocent and the-already-persecuted. For instance, the Ahmadis are caught between a rock and hard place. First, the stricter asylum policies hinder and discourage Ahmadis, who consider themselves to be Muslim, from entering this country even though there is a well-founded, historical fear of persecution. And second, if they are left in their homeland, they will be persecuted on the same basis and by the same individuals against which the war on terror is being fought. Thus, the plight of Ahmadis is forgotten by those who are waging a war on terror (at least the United States) and they are persecuted by those who are creating the terror.

Though we are focused on the United States, we can look at other nations who are also involved in the “war on terror” and their correlating immigration policy. Such a model will emphasize that though the United States’ goal for the war on terror may be simply to protect within its boundaries, other nations just as determined to fight terror have not ignored the plight of immigrants seeking a new life for the sake of security. Canada, a nation that has an open immigration policy, has also taken pre-emptive steps to fight terrorism by implementing stricter immigration policy post September 11, 2001.¹⁰³ For example, the Immigration and Refugee Protection Act brings a strengthened security element to Canada’s immigration and refugee program by interviewing *all* refugee claimants to verify their backgrounds and past activities,¹⁰⁴ something the United States has always done.¹⁰⁵ However, Canada’s immigration policy is still more liberal than the United States’ and there is no sign of Canada exchanging its democratic principles for security, despite being pressured by the United States to adopt a stricter

¹⁰⁰ McCormick, *supra* note 98, at 435 citing David Cole, ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

¹⁰¹ *Id.* at 437-38.

¹⁰² Adams, *supra* note 4, at 813.

¹⁰³ Denis Coderre, address at the Renaissance Club (Mar. 11, 2003), available at <http://www.cic.gc.ca/english/press/speech/detroit.html>

¹⁰⁴ *Id.*

¹⁰⁵ See U.S. Citizenship and Immigration Services, Case Presentation to the USCIS, available at <http://uscis.gov/graphics/services/refugees/Presentation.htm>

system of immigration.¹⁰⁶ Critics may argue that Canada has not faced a terrorist attack, and for this reason the situations between the United States and Canada are not analogous.¹⁰⁷ The threat of terrorism, however, is a global threat, and any ally in the war against terrorism has the potential to be the target of a terrorist activity, whether or not it is instigated by al-Qaeda or other terrorist groups. Therefore, whether or not a terrorist attack has happened in a particular country does not matter when the government has a duty to protect its citizens from terrorism of any kind. Furthermore, as mentioned earlier, Canada continues to take steps to secure its borders effectively, but has not shut out genuine immigrants seeking better lives for themselves. Canada remains steadfast with its goal for immigration policy: “to promote domestic and international interests that take into consideration demographic requirements as well as international agreements to which Canada is a signatory.”¹⁰⁸ Thus Canada’s immigration policy seems to go hand in hand with an effective war on terror.¹⁰⁹ That is to say, it is able to secure its borders from potential terrorists but does not allow for any cracks in the system, like the plight of persecuted minorities coming from Muslim countries.

One may argue that perhaps it is not ironic at all that Ahmadis are forgotten by those waging a war on terror, particularly the United States. Instead, the denial of asylum or making the asylum process so much more difficult to Ahmadis and those who legitimately must escape from human rights abuses in Muslim nations highlights that perhaps the sole goal of the war on terror may be just to protect the homeland for the citizens of the United States. That is to say, that the liberties and freedoms enjoyed by immigrants coming to this country for fear of persecution in their homeland have become less important to the United States, even though the United States is not necessarily more secure by making asylum more difficult for genuine asylees. The Ahmadi situation is clearly unfortunate. As the leader in the war on terror, the United States must be consistent in its goals and its subsequent methods for carrying out these goals.

V. Realistic Solutions

Now that we have determined that shutting out persecuted minority groups is not consistent with the American value of accepting persecuted minorities, the question becomes, what can the United States specifically do to help persecuted minorities who emigrate from Muslim countries, particularly the Ahmadis, who have faced rejection from both Pakistan and the United States in what seems to be the most unfortunate of circumstances and are the unfortunate by products of this war on terror. Other proposed solutions to address this problem may not be realistic or viable.

¹⁰⁶ See Colin R. Singer, *Should Canada Harmonize Immigration Policies with the U.S.?*, Canadian Citizenship & Immigration Resource Center (CCIRC), Inc., available at <http://www.immigration.ca/us/>.

¹⁰⁷ But see Brad Johnston, *Canada—Tracking the Terrorist Threat*, available at <http://www.lifesafety.ca/documents/ls0009.htm>.

¹⁰⁸ Singer, *supra* note 106.

¹⁰⁹ See *id.*

From the history of Pakistan, described in Part II, appealing to the international community to alter the Constitution or the Penal Code would not be a realistic solution. The effect would be minimal in Pakistan since a broad spectrum of the nation has been tainted with years of hatred for this minority community. In 1986, a House of Representatives Resolution calling for a repeal of Ordinance XX and an end to the discrimination of Ahmadis in Pakistan was a bold effort by the United States and pioneered an awareness of the Ahmadi situation.¹¹⁰ More recently, in 2002, a House of Representatives resolution urged Pakistan to repeal Ordinance XX, the anti-blasphemy provisions of the Penal Code, and the Second Amendment which declares Ahmadis to be non-Muslim.¹¹¹ Unfortunately, such a measure has proved to be ineffective, as Ordinance XX and the discrimination of Ahmadis in Pakistan continue.

As this article has emphasized previously, the solution lies in the hands of Western nations who have always promoted immigration of minority and persecuted groups—and should continue to promote, not hinder, the immigration of these persecuted peoples through asylum and conventional immigration. The solution is a local one for each nation who supports the war on terror and has a history of promoting immigration for asylum seekers and refugees. We cannot expect a solution to this problem by influencing the politics of other nations or by nation-building because the mindset of these nations will not be easily molded and is deeply rooted in a particular interpretation of the faith which is often set in stone because it is of divine origin.

With respect to the United States, policies such as mandatory detention and the post September 11th immigration policies targeting immigrants from Muslim nations should be re-evaluated. First, they may not be effective. Second, they defeat the true goals for the “war on terror,” as defined by the Bush administration, because these policies often target those escaping persecution from “terrorists.” Thus, a legislative solution by the United States that would liberalize asylum immigration for Ahmadis, even if they originate from Pakistan, an “al-Qaeda nation,” may directly help fulfill the legacy of America as a haven for the “tempest tossed” and not sacrifice security at the same time. This can be done by verifying the identity of an Ahmadi, as recommended by the Department of Justice in its 1993 report, by contacting the worldwide Ahmadiyya Community who keeps records of its members.¹¹²

Promotion of asylum for Ahmadis will also legitimize the war on terror in the eyes of those who continue to be skeptical about its true goals. In addition, allowing the Ahmadis to find asylum in the United States will not make the United States look like it is meddling in the politics of Pakistan, a nation where United States foreign policy continues to be unpopular. Furthermore, liberalizing asylum will not spark as much retaliation toward Ahmadis who continue to live in Pakistan. If the United States were to directly influence Pakistani politics and

¹¹⁰ H.R. Res. 370, 99th Cong. (1986).

¹¹¹ H.R. Res. 348, 107th Cong. (2002).

¹¹² United States Department of Justice Report, *supra* note 13.

legislation for the sake of Ahmadi dignity, it is likely that Ahmadis and Americans would be colored the same in the eyes of Pakistanis.

Finally, promotion of asylum for Ahmadis might have a long term positive effect on the situation that Ahmadis face in Pakistan. Granting asylum to Ahmadis can indirectly cause the changing of the laws of Pakistan by empowering this persecuted sect and giving them a voice in American society that can be heard rather than stifled as it is now in Pakistan.

VI. Conclusion

The Ahmadiyya Muslim Community has much in common with the citizens of the United States in a post September 11th world. They both have been victims of terrorism caused by small, yet powerful groups of extremists who support the same ideologies. Yet Ahmadis have been shut out by both Pakistan and the United States and seem to be trapped in a virtual no man's land. First, this is true because the government of Pakistan supports the blasphemy laws that have been promulgated due to increasing "Islamization" and this has resulted in further "Islamization" of the country. And second, because the United States immigration policy has disfavored those immigrants who seek asylum, even those who are escaping persecution in their homeland, which includes Ahmadis.

If we are to find an immediate solution for this "loophole" in the war on terror, we must look to our borders as a gateway to freedom rather than as an iron clad fortress. Only time will tell whether the situation in Pakistan improves for Ahmadis so that they do not have to leave their homes to seek freedom and equal opportunities elsewhere. But for now, liberalizing asylum policy for Ahmadis who can verify their place in the Ahmadiyya Muslim Community appears to be the only safe, effective, and practical solution. Hopefully, the United States can implement an immigration policy in the future that is consistent with both the United States' legacy of immigration for the "tempest tossed" and the true goals of the war on terror while not sacrificing the safety of the American people.