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## A Turn for the Worse: Is There Any Hope for a Benefit of the Doubt Standard in Asylum Credibility Assessments Post-Real ID Act

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# A TURN FOR THE WORSE: IS THERE ANY HOPE FOR A “BENEFIT OF THE DOUBT” STANDARD IN ASYLUM CREDIBILITY ASSESSMENTS POST-REAL ID ACT?

ANA MARIA BARTON\*

*Asylum law practitioners face few challenges more difficult than clearing the evidentiary hurdles standing between their asylum-seeking clients and the formidable immigration judge controlling their case. The greatest of these hurdles is that of garnering initial credibility in the immigration judge’s eyes. Unfortunately, the United States has made this task even more daunting for asylees by adopting the inflexible standards embodied in the REAL ID Act of 2005. By contrast, the Office of the United Nations High Commissioner for Refugees (UNHCR) promotes affording asylum applicants the “benefit of the doubt.” This paper compares these two models for determining asylum credibility, and proposes ways in which U.S. immigration judges can practice giving the benefit of the doubt under the constraints of the new legislation.*

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INTRODUCTION

It is no small secret that credibility assessments in asylum and refugee law are perhaps the most crucial and outcome-determinative element of an asylum applicant's case.<sup>1</sup> Credibility is the initial hurdle that must be cleared before the merits of an applicant's case are ever reached. Yet, credibility calculations are some of the most unpredictable and elusive determinations that an immigration judge (IJ) must make, due to the inherently subjective nature of what ultimately conveys trustworthiness and believability in an applicant's asylum story. It is sometimes difficult to understand why one applicant may be credible while the next, describing virtually the same pattern of persecution, is not. The challenge of consistency in making these decisions<sup>2</sup> is surely not taken lightly from either side of the bench.

Concerns over the significant weight that credibility plays in asylum cases and the lack of uniformity in measuring this quality are not unique to the United States—these concerns have been registered internationally as well. The Office of the United Nations High Commissioner for Refugees (UNHCR), in response to requests by state parties to the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention),<sup>3</sup> provides guidelines for implementing international refugee law at a national level in its *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Handbook).<sup>4</sup> The Handbook, rooted in the spirit of the Refugee Convention, takes into account the humanitarian concerns at the heart of refugee law.<sup>5</sup> As such,

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1. Gregory Laufer & Stephen Yale-Loehr, *Straining Credibility: Recent Developments Regarding the Impact of the REAL ID Act on Credibility and Corroboration Findings in Asylum Cases*, 12 BENDER'S IMMIGR. BULL. 74, 74 (2007). See also Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006).

2. See Tania Galloni, *Keeping it Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1040-42 (2008).

3. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

4. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter HANDBOOK], available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

5. Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing*

the UNHCR espouses a liberal and asylum-applicant-friendly standard, erring on the side of giving asylum seekers “the benefit of the doubt” when they are unable to meet evidentiary burdens.<sup>6</sup>

Despite this articulated international standard, however, the United States has never explicitly embraced the notion of giving asylees the benefit of the doubt,<sup>7</sup> and U.S. courts have instead resorted to creating their own divergent tests and precedent.<sup>8</sup> Recently, the separation between U.S. and international practice has grown even wider due to national security concerns. In reaction to the ease with which terrorists gained access to the United States via asylum status, Congress enacted the REAL ID Act of 2005, and for the first time set into law uniform credibility guidelines to be applied in asylum cases.<sup>9</sup> Proponents of the REAL ID Act claim that Congress simply codified the existing common law,<sup>10</sup> but in doing so, it flatly eliminated alternative credibility standards that had been developed among federal sister circuit courts. Most importantly, though, for issues where there was a split in precedent, the REAL ID Act consistently adopted the more stringent position.<sup>11</sup> The effect this law will have on the future of credibility determinations, if any, has generated a lot of scholarly debate<sup>12</sup> and is beginning to come to light as the first wave of cases under the REAL ID Act is decided.

This paper juxtaposes the practice of asylum credibility determinations within the United States with the internationally recognized methods endorsed by the UNHCR; more specifically, it pits the REAL ID Act against the UNHCR’s “benefit of the doubt” standard.<sup>13</sup> As will be demonstrated, key changes in U.S. law under the REAL ID Act push the United States further away from

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*Claims to Refugee Status 2* (UNHCR Reg'l Office for the Baltic and Nordic Countries, Working Paper No. 68, 2002) available at <http://www.unhcr.org/research/RESEARCH/3db7c5a94.pdf>.

6. HANDBOOK, *supra* note 4, ¶ 196.

7. See Joanna Ruppel, *The Need For a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 38-39 (1992).

8. Galloni, *supra* note 2, at 1037-53.

9. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C. (2006)); H.R. REP. NO. 109-72, at 160-61, 166-68 (2005), *reprinted in* 2005 U.S.C.C.A.N. 285-87, 291-94.

10. H.R. REP. NO. 109-72, at 165-67, *reprinted in* 2005 U.S.C.C.A.N. 290-93.

11. See *infra* Part II.

12. See, e.g., Deborah Anker et al., *Any Real Change? Credibility and Corroboration After the REAL ID Act*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 357, 357 (2008) (“[T]he bill’s authors largely encoded existing case law relating to credibility and corroboration.”); Cianciarulo, *supra* note 1, at 103 (“[T]he Real ID Act has the potential to have a severely negative impact on the U.S. asylum system . . .”).

13. This paper only addresses IJ credibility assessments as reviewed by federal circuit courts; it does not discuss credibility analyses that take place during other stages of refugee and asylum law, such as in expedited removals and credible fear interviews.

parity with the more generous protocol of giving asylum seekers the benefit of the doubt. Where there used to be judicial flexibility and rigorous review of unfavorable credibility rulings, the REAL ID Act now provides IJs with more grounds on which to uphold adverse holdings.

The first section of this paper describes the UNHCR's benefit of the doubt standard. Because the United States is a party to the Refugee Convention<sup>14</sup> and U.S. courts have looked to the Handbook as persuasive authority,<sup>15</sup> it is the base against which the United States' deviation will be measured. Next, the key legal changes for asylum seekers in the wake of the REAL ID Act are highlighted by way of statutory language and relevant case law. The third section then compares where the United States currently stands in relation to the benefit of the doubt standard, and makes suggestions for how to shrink the growing gap between U.S. and international law. In the fourth and final section, this paper explains why it is still better policy for the United States to follow the benefit of the doubt framework rather than the REAL ID Act's harsher credibility criteria.

## I. THE BENEFIT OF THE DOUBT: AN INTERNATIONAL STANDARD

Refugee and asylum law is a relatively new body of international law which developed out of the need to address changing international circumstances giving rise to groups of displaced persons. The United Nations confronted this evolving trend with the 1951 Refugee Convention<sup>16</sup> and 1967 United Nations Protocol relating to the Status of Refugees (Protocol).<sup>17</sup> Having ratified the Protocol in 1968, the United States incorporated much of its language into Congress' 1980 Refugee Act<sup>18</sup> in order to comply with the international treaty.<sup>19</sup> However, the Refugee Convention is silent on how state parties must internalize its provisions procedurally; it leaves the design and implementation of refugee law to individual governments.<sup>20</sup> In an effort to create consistent standards and approaches to refugee law across state parties, the UNHCR espouses international standards for assessing refugee

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14. Ruppel, *supra* note 7, at 30-31.

15. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

16. United Nations Convention Relating to the Status of Refugees, *supra* note 3.

17. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

18. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. (2006)).

19. Ruppel, *supra* note 7, at 30-31.

20. Gorlick, *supra* note 5, at 1.

and, by extension, asylum status.<sup>21</sup> Clearly, it is not possible to have identical mechanisms of refugee law around the world, but the UNHCR has grown in importance as an authority in creating a common understanding of what the Refugee Convention requires of its member states.<sup>22</sup> A principal way in which the UNHCR has furthered this goal of international harmony is through the dissemination of its policy papers and Handbook, which was prepared in order to assist parties to the Refugee Convention and has been recognized as persuasive authority by several judicial systems, including the U.K. House of Lords<sup>23</sup> and U.S. federal courts.<sup>24</sup>

Much of the UNHCR's legal doctrine is modeled after and influenced by the development of international human rights law, which overlaps with refugee law in many respects.<sup>25</sup> The UNHCR emphasizes that, as a general matter, refugees should be afforded a more lenient standard when it comes to meeting legal burdens of proof in establishing their status in a foreign country: "the humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees *a fortiori* requires that the refugee definition and determination procedures should be interpreted and applied in a liberal manner."<sup>26</sup> The burden naturally falls on an applicant to show why he or she meets the definition of refugee,<sup>27</sup> but the special circumstances from which a refugee emerges should be taken into account as well as the evidentiary limitations that necessarily follow in the aftermath of a hurried escape from persecution. One way in which to do this is by granting refugees and asylum seekers the benefit of the doubt.

The UNHCR adopts this benefit of the doubt standard throughout its Handbook. Paragraph 196 states that

[o]ften . . . an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. . . . In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.<sup>28</sup>

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21. *Id.*

22. *Id.* at 2.

23. *Id.*

24. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

25. Gorlick, *supra* note 5, at 1.

26. *Id.* at 3.

27. HANDBOOK, *supra* note 4, ¶ 196.

28. *Id.* The notion of leniency for evidentiary burdens is reiterated in Paragraph 197: "The requirement of evidence should thus not be too strictly applied in view of the difficulty

Paragraph 203 goes on to state that “[a]fter the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. . . . It is therefore frequently necessary to give the applicant the benefit of the doubt.”<sup>29</sup> The Handbook then summarizes what an examiner should do when it comes to establishing facts, stressing that he or she should “[a]ssess the applicant’s credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case.”<sup>30</sup> The UNHCR does, however, limit granting the benefit of the doubt to those situations where the presented evidence comports with generally known facts and the examiner is satisfied with the applicant’s general credibility.<sup>31</sup>

Importantly, this article would be remiss not to recognize that the Handbook does not explicitly call for the application of the benefit of the doubt standard when making credibility determinations *per se*.<sup>32</sup> However, the reasoning for applying the benefit of the doubt standard to evidentiary burden issues should extend with the same vigor to the credibility stage of an asylum case. The UNHCR already implicitly endorses leniency when it comes to credibility, not only through the spirit of the treaty, but also in its language: “[i]f we accept that the concept of ‘persecution’ should be interpreted and applied in a generous manner, then there is an inherent logic in not setting too high of a standard in order for a victim of persecution to *prove* his or her claim.”<sup>33</sup> An essential element of a successful asylum seeker’s claim is that he or she be deemed credible;<sup>34</sup> therefore, by extension of the UNHCR’s aforementioned vision, the relevant credibility standard should not be too great. Because the benefit of the doubt is already at play when there is a lack of evidence, it is easily transposed to the question of credibility. Moreover, certain training materials created by the UNHCR “provide that ‘[w]hen the credibility of [a] claimant is in

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of proof inherent in the special situation in which an applicant for refugee status finds himself.” *Id.* ¶ 197.

29. *Id.* ¶ 203.

30. *Id.* ¶ 205(b)(ii).

31. *Id.* ¶ 204.

32. A UNHCR report states that “[g]iven the difficulty or impossibility in establishing all the facts of a refugee claim, and in consideration that the claim presented satisfies the refugee definition, then the benefit of the doubt may be properly exercised *provided a certain credibility threshold is met*.” Gorlick, *supra* note 5, at 9 (emphasis added). Thus it follows from this statement that the benefit of the doubt is afforded to those asylum seekers that have already satisfied a credibility minimum.

33. *Id.* at 3.

34. *Id.* at 12.

doubt, the claimant will receive the benefit of the doubt.’”<sup>35</sup>

In addition, the UNHCR is explicit when it comes to disapproving of strict methodologies for determining credibility, calling instead for a balancing test that includes a number of factors such as reasonableness, coherence, internal and external consistency of a story, and demeanor.<sup>36</sup> Although particular aspects of a case may, upon first impression, seem to reduce credibility, they “may be capable of rational explanation and should be assessed in each individual case in the broader context of refugee status determination.”<sup>37</sup> Further, the UNHCR specifically rejects basing an adverse credibility finding on immaterial inconsistencies: “Inconsistencies, misrepresentations or concealment of certain facts should not lead to a rejection of the asylum application where they are not material to the refugee claim.”<sup>38</sup> This approach mirrors giving an applicant the benefit of the doubt and being receptive to clarifications. This open-mindedness should be afforded to instances of questionable behavior by an applicant, such as the withholding of personal information when initially asked, the destruction of passports and other identification, and the inability to list other countries visited while in transit.<sup>39</sup>

Taken as a whole, the international standard is one of understanding and leniency towards refugee and asylum applicants. Even though the UNHCR does not couch its credibility guidelines in terms of giving the benefit of the doubt, that is exactly what it seems to encourage.<sup>40</sup> It is not difficult to see that the Refugee Convention already leans toward a more inclusive definition of who counts as a refugee.<sup>41</sup> Without drowning out the importance and role of credibility, the UNHCR suggests that the examiner of an applicant’s case should exercise discretion in favor of the asylum seeker rather than against him.

## II. THE REAL ID ACT: A U.S. CREDIBILITY STANDARD

The track record of credibility determinations in the United States is not one of consistency but one that more closely resem-

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35. Ruppel, *supra* note 7, at 32 (quoting *The Interview and the Decision-Making Process*, in *Supplementary Refugee/Asylum Adjudication Guidelines on Refugee Definition and Assessment of Credibility for INS Training* Oct 1989, app. A, ¶ 13 (UNHCR, Washington, D.C.)).

36. Gorlick, *supra* note 5, at 12-13.

37. *Id.* at 13.

38. *Id.*

39. *Id.* at 12.

40. See Ruppel, *supra* note 7, at 32.

41. See *United Nations Convention Relating to the Status of Refugees*, *supra* note 3.



bles jurisdictional roulette. Courts and individual judges have developed varying patterns of assessing credibility, some of which are significantly harsher for asylum applicants than others.<sup>42</sup> This variation is possible because, until recently, IJs operated without set credibility guidelines and under minimal judicial review.<sup>43</sup> The ad hoc nature of these determinations is largely a function of the “personal biases and degrees of cross-cultural competency” of IJs as well as “the amount of persuasion required by each.”<sup>44</sup> Ultimately, “[i]t is within the adjudicator’s discretion either to resolve her doubts in favor of the applicant or to reject the claim.”<sup>45</sup>

Concerns over the consistency and accuracy of credibility findings in asylum adjudication gave rise to the newest wave of legislation on the matter.<sup>46</sup> This stage of asylum proceedings has been reformed under the REAL ID Act of 2005,<sup>47</sup> as signed into law by the President on May 11, 2005, and applies to all asylum cases filed after that date.<sup>48</sup> The REAL ID Act, however, is really a product of national security concerns. One of its primary goals is to eliminate fraudulent asylum claims and thereby prevent terrorists from using asylum as a means of access to the United States.<sup>49</sup>

The REAL ID Act has not escaped controversy. While proponents of the REAL ID Act state that it merely codifies the common law,<sup>50</sup> many organizations protested the passing of the bill because of the detrimental effect it would have on valid asylum claimants.<sup>51</sup> The consequences of this new law are expected to hit hardest on

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42. Galloni, *supra* note 2, at 1040-42. Notorious for its harshness, the Eleventh Circuit is “the only circuit court never to have reversed an adverse credibility finding in a published opinion” as of the writing of this paper. *Id.* at 1038.

43. Ruppel, *supra* note 7, at 3.

44. *Id.* at 4.

45. *Id.* at 26.

46. H.R. REP. NO. 109-72, at 167 (2005), *reprinted in* 2005 U.S.C.C.A.N. 292; Anker et al., *supra* note 12, at 357.

47. The REAL ID Act encompasses more than amendments to asylum credibility proceedings, but the other provisions are not relevant for the purposes of this paper and so will not be discussed.

48. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C. (2006)); Laufer & Yale-Loehr, *supra* note 1, at 74.

49. Anker et al., *supra* note 12, at 357; MICHAEL JOHN GARCIA, ET AL., CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005, at 2 (2005) [hereinafter CRS REPORT], available at <http://www.fas.org/sgp/crs/homesecc/RL32754.pdf>. The House Report which discusses the Act states: “As the 9/11 Commission determined, terrorist aliens have exploited our asylum laws to enter and remain in the United States.” H.R. REP. No. 109-72, at 160 (2005), *reprinted in* 2005 U.S.C.C.A.N. 285.

50. Anker et al., *supra* note 12, at 357.

51. Letter from over eighty organizations and individuals, to Senate Conferees (Apr. 21, 2005) (urging the Senate to oppose Sections 101 and 105 of the REAL ID Act), available at <http://www.humanrightsfirst.org/asylum/realid/pdf/sign-on-letter-042105.pdf>.

bona fide asylum seekers,<sup>52</sup> who already have an uphill battle to prove their cases, starting from the moment they are detained.<sup>53</sup> Furthermore, the hurried manner in which the REAL ID Act was pushed through the House of Representatives before reaching the Senate, which in turn considered attaching the bill to a supplemental appropriations bill, raised brows as this may have left little time for due consideration before being passed.<sup>54</sup>

The remainder of this section describes the differences in asylum credibility standards in the United States pre- and post-REAL ID Act. The comparison spotlights (1) the basic credibility factors available to an IJ in reaching a determination, (2) the extent to which corroborative evidence may be required, and (3) judicial review of these holdings. Although much of the language of the REAL ID Act indeed reflects the existing asylum common law, the legislation embodies a handful of significant departures from preceding practices which will result in an undeniable negative effect upon the fate of future asylum seekers—an effect that moves the United States away from parity with the UNHCR.

### A. Credibility Factors

Prior to the REAL ID Act of 2005, there were no set standards for how to determine an asylum applicant's credibility; rather, the criteria emanated from the Board of Immigration Appeals (BIA) and federal court case law.<sup>55</sup> The following list of factors were most often cited as indicative of credibility: demeanor, specificity of the applicant's testimony, internal consistency of statements (written and oral), plausibility of the story, consistency with the commonly known facts and conditions of the country of origin, as well as other evidence presented in the case.<sup>56</sup>

In contrast to the loosely structured system of determining credibility that had been developed by the courts, the REAL ID Act lays out a concrete method of analysis. It includes all of the factors previously relied upon by IJs, but organizes these criteria under a

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52. See AMNESTY INT'L, USA, THE REAL ID ACT OF 2005 AND ITS NEGATIVE IMPACT ON ASYLUM SEEKERS, ISSUE BRIEF, (2005), available at [http://www.amnestyusa.org/uspolicy/pdf/realid\\_0305.pdf](http://www.amnestyusa.org/uspolicy/pdf/realid_0305.pdf).

53. Rachel L. Swarns, *U.N. Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11, available at <http://www.nytimes.com/2004/08/13/world/threats-responses-immigration-un-report-cites-harassment-immigrants-who-sought.html>. A United Nations study found that "many inspectors held negative views of asylum seekers, viewing them as frauds . . . result[ing] in instances where inspectors intimidated asylum seekers or treated them with derision." *Id.*

54. AMNESTY INT'L, USA, *supra* note 52.

55. Anker et al., *supra* note 12, at 361.

56. *Id.* at 361; Ruppel, *supra* note 7, at 6.

totality of the circumstances test:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (*whenever made and whether or not under oath*, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, *without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor.<sup>57</sup>

Naturally, the REAL ID Act does not completely eliminate all subjectivity on the part of the examiner; this would be impossible given that credibility is, at heart, a calculation of believability. However, by setting the factors IJs may consider—many of which can be measured objectively—into statutory language, the REAL ID Act narrows the margin for arbitrary results. In addition, because IJs must now apply a totality of the circumstances test, no one factor carries greater importance than the next.

At first blush, it may seem like there are no glaring differences between the REAL ID Act and the common law it is modeled after. However, there is a significant deviation that cannot be overlooked. Namely, the REAL ID Act allows for *any* inaccuracies in an applicant's account to be taken into consideration, "without regard to whether [the] inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."<sup>58</sup> This represents a drastic departure from the case law.<sup>59</sup>

As a general trend, prior to the REAL ID Act, "federal courts of appeals . . . rejected a black-and-white consistency analysis and . . . issued decisions instructing the lower courts to approach these

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57. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (emphasis added).

58. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

59. Jill A. Apa & Sophie I. Feal, *Two Steps Forward, One Step Back: The Future of Credibility Findings by Circuit Courts in Asylum Cases Under the REAL ID Act of 2005*, 11 BENDER'S IMMIGR. BULL. 376, 379 (2006).

perceived discrepancies in a more rational manner.”<sup>60</sup> In this light, “[i]nconsistencies [that did] not enhance an applicant’s claim of persecution” had “little to no bearing on an applicant’s credibility.”<sup>61</sup> In other words, only inconsistencies central to a claim were detrimental to a credibility finding;<sup>62</sup> most circuits held that if an inconsistency did not go to the heart of the claim, it was insufficient to support an adverse credibility finding.<sup>63</sup> For example, the Ninth Circuit held in *Paramasamy v. Ashcroft* that a rape victim’s failure to volunteer details concerning her sexual assault to a male airport interviewer, even though this information later surfaced during her merit hearing, did not amount to an inconsistency supporting an adverse credibility determination.<sup>64</sup>

The BIA’s approach to inconsistencies within an asylum case was similar, yet more approving of the use of less significant discrepancies in assessing credibility. As described in *In re A-S*,<sup>65</sup> the BIA only required the presence of an actual inconsistency within the record of a case, that said inconsistency provide a cogent reason for an adverse credibility finding, and that the applicant have failed to explain the inconsistency when given the opportunity.<sup>66</sup>

The drafters of the REAL ID Act incorporated the BIA’s position into federal law,<sup>67</sup> thereby rejecting and overruling circuit court holdings such as *Paramasamy v. Ashcroft*, which dismissed minor or trivial inconsistencies or omissions.<sup>68</sup> The effect of this change in the law can be harmful to asylum applicants, as seen in *Chen v. U.S. Attorney General*, where the applicant was deemed not credible based on a few trivial inconsistencies.<sup>69</sup> In *Chen*, the applicant would have likely prevailed under the pre-REAL ID Act standards of the Eleventh Circuit.<sup>70</sup>

Interestingly, even though the REAL ID Act adopted the BIA’s approach, the statute does not precisely mirror the *In re A-S* test;

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60. *Id. See, e.g.,* Pergega v. Gonzales, 417 F.3d 623, 627 (6th Cir. 2005) (reversing an adverse credibility finding based on the principle that “[i]f discrepancies cannot be viewed as attempts by the applicant to enhance his claims of persecution, they have no bearing on credibility.”).

61. Ruppel, *supra* note 7, at 10 (citations omitted).

62. Laufer & Yale-Loehr, *supra* note 1, at 75-76.

63. Galloni, *supra* note 2, at 1047 n.64. Galloni cites cases from the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits. *Id.* Even the Eleventh Circuit, known for its narrow review of credibility determinations, followed this standard, although it never expressly adopted it. *Id.* at 1047.

64. 295 F.3d 1047 (9th Cir. 2002).

65. 21 I. & N. Dec. 1106 (B.I.A. 1998).

66. *Id.* at 1109; Anker et al., *supra* note 12, at 363.

67. Anker et al., *supra* note 12, at 364.

68. 295 F.3d 1047 (9th Cir. 2002). *See also* AMNESTY INT’L, USA, *supra* note 52, at 2.

69. 463 F.3d 1228 (11th Cir. 2006).

70. Laufer & Yale-Loehr, *supra* note 1, at 80.

that is, it fails to include the requirement that an applicant be given the opportunity to explain an inconsistency in the record before the rendering of a final credibility determination.<sup>71</sup> It is not yet clear whether this rehabilitative measure will continue to be regularly afforded to asylees under the REAL ID Act.<sup>72</sup>

### B. Corroborative Evidence

Another change in asylum law brought about by the REAL ID Act has to do with corroborative evidence for an asylum seeker's testimony. Although corroborative evidence is not necessarily an element of credibility, these concepts run in tandem and therefore should be discussed together. Even if an asylum seeker is deemed to be credible, he or she might still be required to produce factual corroboration of his or her testimony; alternatively, corroboration can serve to secure an IJ's wavering credibility assessment. Because the extent to which corroboration may be required is a function of the degree of credibility manifested by an asylee, corroboration presents yet another credibility-related hurdle for an asylum applicant to overcome.

Before the REAL ID Act, no explicit standard existed for determining whether and when corroborative evidence was needed to support an applicant's testimony;<sup>73</sup> rather, judicially fostered guidelines helped resolve this issue. The BIA and circuit courts all agreed that while the failure to provide corroborative evidence might affect an applicant's credibility, a lack of corroborative evidence alone could not justify an adverse ruling.<sup>74</sup> Disagreement arose, however, with respect to the next phase of asylum proceedings, namely, the burden of proof and sufficiency of the evidence determinations. Although it was universally accepted that credible testimony alone could, in some cases, suffice to sustain an applicant's burden of proof, the BIA and circuit courts differed as to when that testimony alone was sufficient to carry the burden of proof versus when corroboration was necessary.<sup>75</sup> In other words, there was disagreement between the BIA and circuit courts as to when personal testimony alone satisfies the burden of proof and

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71. Compare 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) with 21 I. & N. Dec. at 1109.

72. Apa & Feal, *supra* note 59, at 384-85. See, e.g., Xue v. B.I.A., 439 F.3d 111 (2d Cir. 2006) (holding that the IJ's failure to allow the petitioner to explain inconsistencies "contravenes basic principles of asylum law established by our prior holdings, and requires us to vacate the adverse credibility determination").

73. Laufer & Yale-Loehr, *supra* note 1, at 76.

74. *Id.*

75. CRS REPORT, *supra* note 49, at 4.

when an adjudicator could appropriately require corroboration.<sup>76</sup>

The BIA's position on this issue is described in the governing case of *In re S-M-J*.<sup>77</sup> The BIA there stated that, where it would be reasonable to expect corroborating evidence, such evidence *must* be provided or an explanation given for its absence.<sup>78</sup> The applicant was expected to provide evidence of country conditions as well as of the specific facts being relied upon.<sup>79</sup> The BIA explained that the absence of requested corroborative evidence could result in a ruling that an applicant did not meet his or her burden of proof.<sup>80</sup>

Conversely, the Ninth Circuit took the position that an applicant's testimony always fulfills his or her burden of production if it is unrefuted, credible, direct, and specific.<sup>81</sup> Although a lack of corroborating evidence may support an adverse credibility finding, it may not be grounds for a denial based merely on insufficiency of evidence.<sup>82</sup> In *Ladha v. INS*,<sup>83</sup> the court reiterated its "consistent rule" that when an applicant is deemed credible, then his or her testimony "is sufficient to establish the facts testified without the need for any corroboration."<sup>84</sup> This position was reaffirmed five years later in *Unuakhaulu v. Gonzales*.<sup>85</sup>

Not all circuits followed the Ninth Circuit's lead—the Second, Third, and Seventh Circuits held that corroborating evidence may still be required in both the credibility and burden of proof phases of an asylum proceeding.<sup>86</sup> Even so, the Second Circuit attempted to correct the BIA's corroboration approach in order to better comport with regulations and international standards by emphasizing that a lack of corroborative evidence does not automatically defeat an asylum claim, and requiring lower courts to explain both why corroboration was reasonably expected and why the applicant's explanations for the absence of such evidence were dismissed.<sup>87</sup>

The REAL ID Act addresses this split in authority and clearly

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76. Laufer & Yale-Loehr, *supra* note 1, at 76.

77. 21 I. & N. Dec. 722 (B.I.A. 1997).

78. *Id.* at 725.

79. *Id.*

80. *Id.*

81. CRS REPORT, *supra* note 49, at 14 (citing *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000); Victor P. White, *U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act*, 8 SAN DIEGO INT'L L.J. 209, 245-46 (2006).

82. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02(9)(d)(i) (2009).

83. 215 F.3d 889 (9th Cir. 2000).

84. *Id.* at 901.

85. 416 F.3d 931, 938 (9th Cir. 2005) (stating that corroborating evidence is not required if the petitioner is credible).

86. Susan Houser, *Asylum Documentation under the REAL ID Act*, IMMIGRATION LITIGATION BULL. (U.S. Dep't of Justice, Washington, D.C.) June 30, 2005, at 1, 4.

87. Apa & Feal, *supra* note 59, at 377-78.

lays out when corroborative evidence is necessary for an asylum applicant to sustain his or her burden of proof:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, *but only if* the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.<sup>88</sup>

Now, corroboration is always required unless the applicant is deemed credible, persuasive, and specific, or if the applicant cannot reasonably obtain such evidence.

The REAL ID Act resolved the conflict between the BIA and the Ninth Circuit by adopting the BIA's position—the more burdensome position for asylum applicants. Its language “refutes *Ladha's* ruling that no corroboration should be required for credible testimony, and . . . codifies *In re S-M-J*.”<sup>89</sup>

Additionally, Congress did not incorporate into the REAL ID Act the limitation imposed by some courts that this corroborative requirement be limited to those facts central to the asylum claim.<sup>90</sup> Some academics also note that the legislation's “drafters failed to explicitly include the ‘reasonableness’ requirement found in leading case law,” thus creating an opportunity for abuse of discretion “in deciding when to require corroboration by making patently unreasonable corroboration demands on asylum applicants.”<sup>91</sup> However, others read the REAL ID Act as having embedded this rea-

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88. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (emphasis added). The REAL ID Act does not address corroboration in the credibility phase of an asylum hearing directly; but, because credibility is a totality of the circumstances test under the REAL ID Act and an IJ's request for corroborative evidence presumably makes such evidence “other evidence of record,” it continues to be a factor in credibility determinations. See Houser, *supra* note 86, at 15.

89. Cianciarulo, *supra* note 1, at 126 (citation omitted).

90. Apa & Feal, *supra* note 59, at 383. See, e.g., *Diallo v. INS*, 232 F.3d 279, 288 (2d Cir. 2000) (stating that “specific documentary corroboration is required only for ‘material facts which are central to [the applicant's] claim’” (quoting *In re S-M-J*, 21 I. & N. Dec. 722 (B.I.A. 1997)) (alteration in original)).

91. Cianciarulo, *supra* note 1, at 116 (citation omitted).

sonableness requirement.<sup>92</sup>

### C. *Judicial Review*

Judicial review is an important step in the asylum process, for it is “a vital safeguard both for the individual asylum seeker . . . and for the United States, which has committed to protect asylum seekers and refugees from persecution,” thus each decision must be “lawful and consistent with this commitment.”<sup>93</sup> Previously, courts of appeal demonstrated “skepticism toward the credibility determinations made by the IJs and BIA,”<sup>94</sup> in part because of the latter’s tendency to rubberstamp IJ opinions without engaging in an independent analysis of each case’s record.<sup>95</sup> While judicial review per se was not greatly altered under the new legislation, it remains highly deferential to an IJ’s holding. As of now, the question remains whether this skepticism will be erased or exacerbated given the changes under the REAL ID Act.

Adverse credibility rulings prior to the REAL ID Act’s adoption in 2005 were subjected to a substantial evidence standard of review.<sup>96</sup> Thus, as long as a lower court’s determination was sufficiently specific and cogent, it was affirmed.<sup>97</sup> Even so, boilerplate language that an applicant’s testimony was vague, unresponsive, or simply inconsistent was deemed unacceptable, as it did not provide enough reasoning for reviewing courts to uphold.<sup>98</sup> The Ninth Circuit further required that adverse findings be legitimate and substantial, as opposed to based on speculation.<sup>99</sup> Although seldom done due to the highly deferential standard of review, reviewing courts had a history of overturning credibility findings that violated these judicially enacted standards<sup>100</sup>—an IJ’s reluctance to make a clear credibility ruling may have left his or her decision vulnerable to reversal.<sup>101</sup> However, determinations based on an applicant’s unfavorable demeanor during his or her hearing

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92. Galloni, *supra* note 2, at 1060-61. Galloni is optimistic that the REAL ID Act’s provisions regarding corroborating evidence include the same reasonableness limits as the case law preceding it. *Id.*

93. *Id.* at 1039-40.

94. Apa & Feal, *supra* note 59, at 376.

95. See, e.g., *Paramasamy v. Ashcroft*, 295 F.3d 1047 at 1048, 1050-52 (“The integrity of the adjudicative process depends on judges reviewing each case on its merits. That integrity is called into question when boilerplate findings masquerade as individualized credibility determinations.”).

96. Galloni, *supra* note 2, at 1047-49.

97. Apa & Feal, *supra* note 59, at 376-77.

98. *Id.* at 377.

99. Laufer & Yale-Loehr, *supra* note 1, at 76 n.22.

100. *Id.* at 76.

101. Apa & Feal, *supra* note 59, at 377.



logically received greater deference on appeal since an IJ, as a first-hand witness to the testimony, is in the best position to assess the intangible qualities that ultimately generate credibility.<sup>102</sup>

The REAL ID Act preserves this standard of review for credibility determinations, that is, it requires substantial evidence and specific reasons for an adverse finding.<sup>103</sup> Moreover, for judicial review regarding the availability of corroborating evidence, there can be no reversal of these findings of fact unless the reviewing judge “finds that a reasonable adjudicator is compelled to conclude that such evidence is unavailable.”<sup>104</sup> Thus, a substantial evidence standard of review also applies to corroboration determinations.<sup>105</sup> Furthermore, the trier of fact is still responsible for articulating how he or she came to his or her credibility opinion,<sup>106</sup> and courts operating under the REAL ID Act should also expect IJs to explain why requiring corroborative evidence is not an unreasonable demand upon an asylum applicant<sup>107</sup>—this expectation of corroboration must continue to rest on more than just an IJ’s hunch.

One difference in judicial review presents itself in terms of presumptions of credibility. The REAL ID Act states: “There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.”<sup>108</sup> This differs slightly from the Ninth Circuit’s holding that, in the absence of an explicit credibility finding, an applicant’s statements are deemed truthful.<sup>109</sup> The REAL ID Act simply clarifies that this presumption is rebuttable.

In sum, while the REAL ID Act does not represent a radical change from existing asylum law as a whole, each of the individual departures from precedent marks the parameters of a new standard for credibility determinations in the United States. It is evident that Congress consistently adopted the hard-line position when it came to the significance of immaterial inconsistencies, corroboration requirements, and judicial review, thus making it more difficult for asylum applicants to pass this initial credibility qualification for protection. Unfortunately, the United States turned further away from the more lenient credibility standards embraced

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102. Ruppel, *supra* note 7, at 11 n.40.

103. Galloni, *supra* note 2, at 1057.

104. CRS REPORT, *supra* note 49, at 13.

105. Anker et al., *supra* note 12, at 367.

106. *Id.* at 361.

107. H.R. REP. NO. 109-72, at 165-66 (2005), *reprinted in* 2005 U.S.C.C.A.N. 290-92; Apa & Feal, *supra* note 59, at 383.

108. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

109. CRS REPORT, *supra* note 49, at 8; Apa & Feal, *supra* note 59, at 377.

by the international arena.

### III. CLOSING THE GAP BETWEEN THE REAL ID ACT AND THE BENEFIT OF THE DOUBT

The specific internal changes in U.S. law highlighted above reveal the REAL ID Act's impact upon credibility determinations, making them more severe and difficult to survive. One take on these changes is that the cumulative effect of the REAL ID Act "place[s] an even more onerous burden on asylum applicants, . . . broaden[s] the grounds on which asylum adjudicators may validly deny asylum claims, and . . . further insulate[s] IJ decisions relating to credibility and corroboration findings from appellate review."<sup>110</sup> Putting the thorny issues of the REAL ID Act aside, however, the United States is in greater compliance with the UNHCR's guidelines than its reputation would lead one to believe. Nevertheless, as will be developed below, the fact that the United States now magnifies the significance of minor inconsistencies in an applicant's record and is also more likely to require corroboration than before, coupled with its highly deferential judicial review, further widens the gap between these national policies and giving asylum seekers the benefit of the doubt. The remainder of this section focuses on the individual elements that play a part in credibility determinations in the United States and analyzes how each fares against the UNHCR's benefit of the doubt standard, culminating with suggestions for how the United States can best close the gap between the REAL ID Act and international expectations.

#### A. *Totality of the Circumstances Framework*

The overarching method for determining an asylum applicant's credibility in the United States is currently a totality of the circumstances test, for which the UNHCR advocates.<sup>111</sup> Furthermore, each of the credibility factors identified by the UNHCR<sup>112</sup> is also incorporated into the REAL ID Act, a positive indication that the United States is striving to embrace the international standard. Now that credibility is statutorily codified, there will hopefully be less variance between the BIA and circuit courts—a mutually

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110. Laufer & Yale-Loehr, *supra* note 1, at 77.

111. Gorlick, *supra* note 5, at 12-13. See *supra* Sections I, II.

112. See *supra* Section I. Gorlick, *supra* note 5, at 12 (listing criteria such as "the reasonableness of the facts alleged; the overall consistency and coherence of the applicant's story; corroborative evidence adduced by the applicant in support of his or her statements; consistency with common knowledge or generally known facts; and the known situation in the country of origin").

shared goal at the national and international level.

However, the new legislation does not adequately take into account or address the possibility that credibility determinations are still subject to error based on cultural differences and inconsistencies not truly indicative of credibility.<sup>113</sup> The risk that a high degree of subjectivity and possible bias may influence an IJ's ruling under the REAL ID Act endures since it gives IJs the ability to base decisions on criteria such as demeanor and responsiveness, whereas prior to the REAL ID Act, judicial precedent forbade credibility determinations premised on wholly subjective grounds.<sup>114</sup> For this reason, granting asylees the benefit of the doubt is crucial—it prevents these traits and issues common to asylum seekers from being unfairly prejudicial to an applicant.

Some academics read the REAL ID Act as including a catchall by allowing for the consideration of “all relevant factors.” This category can take into account variables such as language barriers, trauma, and other mitigating factors.<sup>115</sup> But the extent to which IJs will take the time to consider these practical background circumstances, which are not always evident or clearly delineated by the law, will inevitably vary. Thus, while creating a totality of the circumstances framework for asylum credibility analysis represents a step in the right direction, Congress missed its opportunity to comply with the UNHCR and direct IJs to give asylum seekers the benefit of the doubt throughout their proceedings when it wrote the REAL ID Act.

### *B. Weight Given to Trivial Inconsistencies*

Perhaps the greatest difference between the United States and the UNHCR is the importance attributed to small or trivial inconsistencies or omissions in a case which do not go to the heart of an applicant's claim—this can be the decisive factor under the REAL ID Act. The UNHCR directly condemns this kind of scrutiny by asylum examiners<sup>116</sup> as it is the diametric opposite of affording the benefit of the doubt. There is a concern that the REAL ID Act “do[es] not take into account that refugees fleeing torture, rape, and other forms of persecution may be traumatized and may not recall or feel comfortable discussing every detail of the abuses they

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113. These may include, for example, inconsistencies due to language barriers and poor translation, post-traumatic stress, and cultural norms regarding authority figures. Galloni, *supra* note 2, at 1045-46.

114. AMNESTY INT'L, USA, *supra* note 52, at 3.

115. Anker et al., *supra* note 12, at 363.

116. Gorlick, *supra* note 5, at 13.

suffered in their first encounter with an immigration officer.”<sup>117</sup>

While one could argue these inconsistencies make up only a portion of the totality test, the risk that these minor inconsistencies will be weighed detrimentally against an asylum applicant is too great. There is no protection against any single factor being assigned undue significance under the REAL ID Act,<sup>118</sup> thereby permitting unfavorable first impressions of an asylum seeker to overshadow the remaining particulars of a case. Even supporters of the REAL ID Act reluctantly agree that the statute technically allows for adjudicators to base a decision on *any* inconsistencies.<sup>119</sup> More troubling is that, as previously mentioned, it remains unclear whether asylum seekers will continue to have the opportunity to explain and correct these inconsistencies; thus they might detract from credibility more than deserved. Against this backdrop, it is valuable and instrumental to remind IJs that they should give asylees the benefit of the doubt in order to fulfill the spirit of asylum and refugee law and extend protection to those most in need. Otherwise, the REAL ID Act arms IJs with more reasons for throwing cases out before reaching the merits and symbolizes a dividing wedge between the United States and international standards.

### C. Use of Statements Not Made Under Oath

Within the subsection dealing with inconsistencies, the REAL ID Act also encourages IJs to consider the consistency between an applicant’s written and oral statements “whenever made and whether or not under oath.”<sup>120</sup> This category includes statements made to border officials or immigration and customs officials in airports. For many of the same reasons minor inconsistencies should not provide a basis for adverse credibility findings, unsworn statements are equally undeserving of excessive importance.

This provision of the REAL ID Act is problematic because applicants are rarely forthright with information important to their cases or frequently lie because of trauma or distrust of officials.<sup>121</sup> If discrepancies of this nature are then used to impeach an applicant—which is unreasonable practice in the first place<sup>122</sup>—he or

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117. Human Rights Watch, *Immigrants’ Rights under Attack in House Bill (H.R. 10) 156*, Oct. 5, 2004, <http://www.hrw.org/en/news/2004/10/05/immigrants-rights-under-attack-house-bill-hr-10>.

118. See Cianciarulo, *supra* note 1, at 135.

119. Anker et al., *supra* note 12, at 363.

120. 8 U.S.C. § 1158(b)(1)(B)(iii) (2006).

121. Cianciarulo, *supra* note 1, at 131.

122. AMNESTY INT’L, USA, *supra* note 52, at 2.

she starts off with a losing battle even if the applicant can compellingly explain the inconsistency. In effect, this punishes asylum applicants for not knowing any better than to hesitate when questioned upon detainment or for behaving as they would in their native country. The UNHCR Handbook anticipates this dodgy behavior on the part of refugees and encourages examiners to find explanations.<sup>123</sup> Clearly, the “whenever made and whether or not under oath” clause of the REAL ID Act contravenes the spirit of leniency permeating the Refugee Convention and fails to promote the belief in giving the benefit of the doubt.

#### D. Discretion Over the Corroborative Evidence Requirement

The REAL ID Act’s position on corroboration requirements further removes the United States from close alignment with international standards. The statute does not require corroboration of testimony so long as an applicant is deemed credible, persuasive, and specific.<sup>124</sup> Furthermore, the benchmarks within the rule are couched in terms of the trier of fact’s discretion, indicating that a certain degree of subjectivity persists.<sup>125</sup> Although the Ninth Circuit was most in line with the spirit of refugee and asylum protection,<sup>126</sup> Congress ultimately codified the BIA’s more stringent standards under the REAL ID Act,<sup>127</sup> thus curtailing all judicial progression toward giving the benefit of the doubt.<sup>128</sup>

Because corroboration requirements under the REAL ID Act hinge on a threefold inquiry (credibility, persuasiveness, and specificity) and non-core inconsistencies carry greater weight than before, thus triggering more opportunities for incredulity on behalf of the IJ, corroboration will likely be required of asylum applicants more frequently.<sup>129</sup> In fact, there are already signs that this predic-

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123. HANDBOOK, *supra* note 4, ¶¶ 198-99.

124. 8 U.S.C. § 1158(b)(1)(B)(ii) (2006).

125. See Laufer & Yale-Loehr, *supra* note 1, at 78.

126. Cianciarulo, *supra* note 1, at 126.

127. The case law embraced by the REAL ID Act, specifically *In re S-M-J*, was not particularly sympathetic toward asylum seekers. Cianciarulo, *supra* note 1, at 125. Other authorities view the BIA’s approach to corroboration standards (now the U.S. standard) as contrary to international standards because it does not give the benefit of the doubt. CRS REPORT, *supra* note 49, at 4.

128. One supporter of the REAL ID Act believes Congress instilled the benefit of the doubt standard, as proposed by the UNHCR, into its legislation. Anker et al., *supra* note 12, at 366. This paper disagrees with that assessment and finds that *In re S-M-J* and the REAL ID Act are not in line with giving the benefit of the doubt because the international standard requires more than simply eliminating unreasonable corroborative evidence demands—it is an attitude and a message that should transgress the entirety of asylum proceedings.

129. Laufer & Yale-Loehr, *supra* note 1, at 78.

tion is panning out, as “increased expectations and demands for corroboration of applicants’ claims” have been noted.<sup>130</sup> This places a greater strain on asylum applicants since corroborative evidence can be very difficult to obtain.<sup>131</sup> This increased strain would not take place if IJs were giving applicants the benefit of the doubt.

Additionally, the REAL ID Act’s corroboration requirement can be exercised broadly by IJs since it is not limited only to facts central to an asylum applicant’s claim. On this note, one scholar cautions that the REAL ID Act “contains none of the limitations that have recently developed in the federal case law,” and this “absence of reasonable limitations on an immigration court to demand corroborating evidence may lead to troubling rulings with respect to . . . credibility.”<sup>132</sup> The sum effect of the REAL ID Act’s corroboration burden upon asylum seekers is to grant IJs with virtual control over the fate of any case, which may lead to a greater number of denials of asylum cases and frustrate the purpose of the Refugee Convention.

The benefit of the doubt standard does not (and should not) eliminate the requirement that applicants supplement their asylum claims with available evidence—this is not what the UNHCR Handbook urges. Rather, it reduces the role that corroborative evidence should ultimately play in the credibility and burden of proof stages of an asylum case based on the uniquely weak position of refugees and asylees.

### *E. Highly Deferential Judicial Review*

Another way in which the REAL ID Act drives the United States away from comity with international standards is by undermining the appellate process. Currently, lots of deference is owed to IJs, awarding them “essentially unfettered discretion,”<sup>133</sup> and the REAL ID Act has only “strengthen[ed] an immigration judge’s ability to make a negative credibility finding”<sup>134</sup> with its compelled-to-conclude standard of review. Moreover, because the BIA is authorized to give “summary affirmances” of IJ rulings without revealing its decisionmaking,<sup>135</sup> the REAL ID Act’s limitations on judicial review further narrow the possibility for reversal

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130. Anker et al., *supra* note 12, at 358.

131. Ruppel, *supra* note 7, at 2 n.3.

132. Apa & Feal, *supra* note 59, at 383 (citation omitted).

133. Nicole S. Thompson, Comment, *Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?*, 22 EMORY INT’L L. REV. 385, 400 (2008).

134. White, *supra* note 81, at 245.

135. *Id.* at 231.

of an adverse credibility finding on appeal. The danger that “insulating credibility determinations from judicial review will lead to inconsistent results sometimes resulting in the arbitrary denial of asylum”<sup>136</sup> would effectively thwart the UNHCR’s mission of enhancing uniformity across refugee and asylum determinations.

Without a sound appellate process where applicants have the opportunity to have their case reheard by an impartial judge, the United States cannot be regarded as abiding by the general principles of the UNHCR or the spirit of the Refugee Convention. If a fair opportunity for proving an asylum case is not initially had, then this standard of review makes it very difficult to reverse the injustice at a later stage.

Moreover, because the REAL ID Act also provides IJs with the tools to find an asylum applicant incredible based on minor inconsistencies that do not go to the heart of a claim, the law now forecloses reviewing courts from engaging in an analysis of what constitutes a material falsehood or omission.<sup>137</sup> This in turn shrinks the number of issues reviewing courts can examine and will result in fewer reversals of adverse credibility findings, as exemplified in *Lin v. Mukasey*, where the court reluctantly affirmed an adverse credibility finding because it did not have the power to weigh the inconsistencies relied upon by the IJ for itself.<sup>138</sup>

#### F. A Rebuttable Presumption of Credibility

Prior to 2005, the Ninth Circuit automatically accepted a lower court’s credibility determination as valid; now, however, the REAL ID Act reduces this to a rebuttable presumption. This means an asylum seeker’s credibility can be attacked for the first time on appeal, creating even more opportunities for an adverse ruling. The Ninth Circuit’s position was truer to international standards than the REAL ID Act. Although perhaps a trivial and meaningless distinction, this is yet another example of how the United States continues to move away from international harmony when it comes to refugee and asylum law.

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136. *Id.* at 254.

137. Laufer & Yale-Loehr, *supra* note 1, at 76. See, e.g., *Chen v. U.S. Att’y Gen.*, 463 F.3d 1228 (11th Cir. 2006).

138. 534 F.3d 162, 164 (2d Cir. 2008) (concluding that “an IJ may rely on omissions and inconsistencies that do not directly relate to the applicant’s claim of persecution as long as the totality of the circumstances establish that the applicant is not credible”). *Id.* at 164.

*G. Suggestions for Incorporating the Benefit of the Doubt  
into the REAL ID Act*

Even though the United States has distanced itself from the UNHCR and the notion of giving asylum applicants the benefit of the doubt when it comes to credibility and corroboration requirements, it is still possible to inject this theme into the REAL ID Act. The following list provides suggestions for accomplishing this goal.

*1. Asylum law training.* The first step in promoting the benefit of the doubt in the United States is to train asylum adjudicators regarding its meaning and to teach them how to incorporate it into their practice. Without providing this background, it will be difficult for a judge to recognize that he or she may be subconsciously influenced by personal biases. Once this mindset is shared among the community of asylum law experts and adjudicators, applying the benefit of the doubt standard in credibility determinations will become a routine and self-perpetuating procedure.

*2. Play up the totality of the circumstances.* A key way in which the benefit of the doubt can be exercised under the auspices of the REAL ID Act is by taking advantage of its totality of the circumstances framework. Each criteria identified under the REAL ID Act, including the catchall provision “all relevant factors,” can be considered in the broader context of giving the benefit of the doubt. Breathing this standard into the totality test is not farfetched as examiners must already engage in a case-by-case analysis.

Along these lines, an IJ should be sure not to let any one factor weigh more heavily than a combination of other factors.<sup>139</sup> This presents a way in which to offset the detrimental effect that the REAL ID Act can have on asylees by allowing minor inconsistencies to play such a dominant role in credibility assessments.

*3. Specify “all relevant factors.”* This catchall in the REAL ID Act should be better qualified. During asylum law training, officials and IJs should be instructed to use this category for factors such as language barriers and faulty translations, trauma stemming from the persecution and flight from applicants’ native countries to the United States, and other cultural characteristics, such as customs that make it disrespectful to look an authority figure in the eye.<sup>140</sup> By making this term more explicit, concerns about unfair personal biases being held against asylum applicants are mitigated.

*4. Only consider corroborative evidence for facts central to an asylum claim.* As previously mentioned, prior to the REAL ID Act,

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139. See Galloni, *supra* note 2, at 1054-59.

140. See Anker et al., *supra* note 12, at 363.



some courts only required corroborative evidence for facts central to an asylum claim. Although the REAL ID Act did not adopt this provision *per se*, there is no reason for IJs to discontinue this practice. As one commentator notes:

Adjudicators who favor [a more lenient] approach . . . can still employ a common-sense methodology in cases involving applicants who do not present corroborating evidence. However, an adjudicator who favors the BIA approach or who adopts a purposivist tack, noting that the spirit of the REAL ID Act aims to impose stricter evidentiary standards on applicants, might employ a less expansive reading and require corroborating evidence in the majority of cases.<sup>141</sup>

IJs should be encouraged to engage in this commonsense methodology rather than go down the stricter evidentiary path.

#### IV. WHY THE UNITED STATES SHOULD ADOPT THE BENEFIT OF THE DOUBT STANDARD

Thus far, this paper has focused the ways in which the United States has effectively rejected the UNHCR's benefit of the doubt standard for asylum proceedings. However, in consideration of the fact that national laws are at stake, it is important to ask, practically and realistically, whether giving the benefit of the doubt is truly a better legal policy for the United States. The simple answer is yes. The benefit of the doubt standard is superior to the REAL ID Act's heightened burdens for those seeking asylum protection in the United States. This is the right conclusion for several reasons.

First, the goals of the REAL ID Act—to eliminate ease of access for terrorists to enter the country via asylum status<sup>142</sup>—are not effectively furthered by these changes to U.S. asylum law. Terrorists masked as asylum seekers will be flagged during the rigorous background checks all applicants are subject to, and other legal provisions making terrorists ineligible for asylum status in the United States already exist.<sup>143</sup> Instead, the greater effect of the REAL ID Act is to make it more difficult for those fleeing real per-

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141. GORDON ET AL., *supra* note 82, § 34.02(9)(d)(iii)(B).

142. See *supra* Section II.

143. Letter from Robert D. Evans, Director, Amer. Bar Ass'n Gov'tl Affairs Office, to Congressional Representative (Feb. 9, 2005), available at <http://www.humanrightsfirst.org/asylum/pdf/realid/HR-418-ltr-House-020905.pdf>.

secution to be granted protection because of disqualifications based on superficial credibility analyses. Thus, if the United States were to accept the benefit of the doubt standard, it would actually further two public interests: national security (by way of the positive changes it has already made as a result of the REAL ID Act, such as codifying a totality of the circumstances test) and promoting the humanitarian principles the country stood for when it acceded to the Refugee Convention.<sup>144</sup>

Second, a system rooted in giving asylum applicants the benefit of the doubt and complying with international standards is not an unobtainable ideal, as Canada has illustrated.<sup>145</sup> As a leading world power, the United States should be setting the example for other states to follow. Moreover, refugee and asylum law is not meant to be an adversarial process, rather it presents a unique crossroads of national and international law and humanitarian interests; thus there is no need for strict evidentiary burdens. The ease of applying a cut-and-dry law does not outweigh the detrimental effect the law has on asylum seekers, and it does not necessarily mean there will be less variation in credibility outcomes.

Third, and finally, the United States must endeavor to reduce the number of erroneous credibility findings it renders because of the risks at stake for those applicants who are denied asylum and forced to return to their native countries.<sup>146</sup> Society places great value in “the interests of litigants and the furtherance of fair and equitable adjudication through minimization of erroneous outcomes,” even more so when it comes to the claims presented by an asylum seeker.<sup>147</sup> The best way to minimize erroneous credibility rulings is to err on the side of overinclusiveness at the credibility stage of the process, and weed out fraudulent cases on the merits. This will ensue naturally once the United States follows the guidance of the UNHCR and begins practicing a benefit of the doubt standard.

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144. *Id.*

145. Ruppel, *supra* note 7, at 35-37.

146. *See id.* at 33-35.

147. *Id.* at 33.

