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STUDENT COMMENTS

ADJUDICATING THE RELIGIOUS BELIEFS OF AN ASYLUM SEEKER: WHEN THE "WELL-FOUNDED FEAR" STANDARD LEADS COURTS ASTRAY

Maritza Black[*]

This note discusses the standard that should be applied for asylum seekers who are fleeing religious persecution in their home country. In order to gain asylum in the United States, applicants must meet the standard of a refugee, meaning that, among other things, they must demonstrate that they have a well-founded fear of returning to their country of origin.[1]

Well-founded fear has been defined as when the applicant has a "subjectively genuine and an objectively reasonable fear."[2] *The subjective fear is established when an applicant is found to have testified credibly concerning their fear of return. The objective standard is more difficult to define but has been likened to the reasonable person standard, when "a reasonable person in his circumstances would fear persecution" upon return to the native country.*[3] *This standard is inconsistent with the way in which other religious legal issues are typically addressed, and becomes impossible to apply when an individual fears religious persecution such as black magic, voodoo, or witchcraft that is incompatible with the Western perspective of a reasonable fear. Evaluating another culture's religious beliefs through the lens of a reasonable person standard results in blanket discrimination against non-Western ideologies.*

The Supreme Court's long-standing approach to determining an individual's religious beliefs is that it is only appropriate to determine the sincerity of the belief, not the underlying veracity of the belief itself.[4] *The same standard should be applied towards asylum seekers whose fear of returning to their home country is rooted in their religious beliefs.*

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[1] 8 U.S.C. §1101(a)(42)(A) (2014).

[2] INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987); Arriaga-Barrientos v. INS, 937 F.2d 411, 413 (9th Cir. 1991).

[3] *In re* Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987).

[4] *See* United States v. Ballard, 322 U.S. 78 (1944).

INTRODUCTION

Consider the following situations of three Nigerian asylum seekers:

1. Adija learned that her husband belongs to the Ogboni, a secret society believed to have supernatural powers. As part of his initiation he must give up a family member chosen by the Ogboni to be the victim of human sacrifice. The Ogboni have chosen Adija and she believes that if she does not willingly allow herself to be sacrificed, the Ogboni will kill her anyway. She is presenting her testimony before the immigration judge, and when asked why she is afraid to return to Nigeria she explains that her life is in danger there because the Ogboni can kill her by merely touching her.
2. Adebisi fled Nigeria after his father was murdered, making him next-in-line to become the chief of the Esubete. He refused this role because the inauguration process involved allowing the Esubete elders to perform a religious ritual on him that will subject him to their

control, giving them the power to kill him through the use of voodoo. When the immigration judge asks if he went to the police, he explains that he did not because he was cursed, and if he reported anything to the police the curse would cause him to die.[5]

3. Edionseri sought refuge in the United States after he was ostracized by his community in Nigeria due to his foul odor that led the community to believe he was demonic. He believes that the odor is caused by the demons that possess him. During his testimony, he describes his troubled life: a wizard killed his father when he was a teenager, the devil sent a wizard to transform him into a false prophet, and he suffered an eye injury after a spirit threw glass into his eye.[6]

Although at first glance it appears that these applicants' asylum claims would be based on religious persecution, their claims would likely instead fall under the category of *membership in a particular social group*, because their fear is not that they will be persecuted *on account of* their religious beliefs, but because of their social situations. For example, Adija fears persecution because she belongs to a specific societal group *family members chosen by the Ogboni for sacrifice*, not because of her religious beliefs themselves.

Even though these asylum seekers are not claiming a fear of persecution on account of their religion, the well-founded fear standard that is used for adjudicating asylum claims will cause them to face issues of religious discrimination during the adjudication of their asylum claims, resulting in a high likelihood that their claims will be denied. The topic of this note presents a potential remedy for this issue by presenting an alternative to the current standard that mitigates the potential for religious discrimination.

Under the current standard, the immigration judge will adjudicate these claims by evaluating whether the asylum seekers' fears are *objectively reasonable*.[7] This determination will then be used to decide whether they must return to their home countries. Because this determination comes early

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[5] Hypothetical based on facts from Adebisi v. INS, 952 F.2d 910 (5th Cir. 1992) (denying asylum based on applicants failure to establish a well-founded fear of persecution).

[6] Hypothetical based on facts from Edionseri v. Sessions, 860 F.3d 1101, 1104 (8th Cir. 2017) (denying applicant's claim to asylum because "the word 'persecution' in the governing statute does not include harms inflicted by supernatural forces or beings").

[7] IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, 785 (16TH ED. 2016).

in the adjudication process, it maintains a gatekeeping function that prevents the judge from having to adjudicate the *messier* aspects of asylum claims, such as the category or *nexus* elements of the claimed fear.

Ideally, in making the determination of whether a fear is *objectively reasonable* the judge would look at a wealth of information, including research on the cultural, social, and religious norms in the applicants' home country, to determine how a reasonable person in the applicants' situation would act. In reality, due to restraints on time and resources, the immigration judge will likely make the decision based on the applicant's testimony alone, leaving a wake of uncertainty concerning what standard the judge is using to determine what is considered to be an objectively reasonable fear.[8]

Why are immigration judges making decisions about the objective reasonableness of an individual's belief? The answer lies within the complex history of asylum law, in a standard that was left unclear to allow the courts to control the asylum process by creating their own tests.[9] Although the Board of Immigration Appeals ("BIA") has attempted to clarify the issue by establishing a specific, two-prong test, there remains confusion about the manner in which this test should be applied.[10]

This note argues that the current approach adopted by the BIA requiring immigration judges to analyze a person's religious beliefs through the lens of a *reasonable person* raises constitutional concerns and creates a litany of problems such as inconsistencies between circuit courts and the manifestation of cultural bias. Additionally, properly determining the test presented in the objective prong of the current standard would require an abundance of time and resources, which are already in short supply in immigration court.

This note then presents a potential solution to these problems: the adoption of the rule presented by the Supreme Court in *United States v. Ballard* that prohibits the Court from making an inquiry into the veracity of the individual's religious belief, instead only permitting an inquiry into whether or not the belief is sincerely held (hereinafter referred to as the

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[8] *See, e.g.*, Musa v. Lynch, 813 F.3d 1019 (7th Cir. 2016) (finding the immigration judge erred by not finding for applicant due to lack of evidence because the applicant's credible testimony alone is sufficient).

[9] Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 574 (2003).

[10] INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

Ballard standard).[11] The *Ballard* standard should be applied in place of the objective *reasonable person* standard when an asylum seeker is claiming a fear based on a religious belief.

Part I of this note will give a brief overview of the elements an individual must show in order to be granted asylum, focusing on the history of the *well-founded fear* standard. The current evidentiary standard in asylum law will also be discussed to give context to how evaluating an applicant's credibility plays a key role in the asylum adjudication process. Part II will present the current standard articulated by the BIA for determining whether an individual's fear is *well-founded*, look at the issues it has caused when adjudicating asylum claims, and examine the constitutionality of this standard. Part III will present the solution of adopting the *Ballard* standard and explain how the proposed standard would remedy the issues raised by the current standard and ensure that asylum seekers' claims are evaluated in a constitutional and consistent manner. Finally, this note will conclude by exemplifying how the proposed standard would increase impartiality and eliminate cultural bias when adjudicating asylum claims by applying the proposed standards to the hypotheticals given above.

I. SEEKING ASYLUM IN THE UNITED STATES–EVIDENTIARY STANDARD AND THE ELEMENT OF WELL-FOUNDED FEAR

When an applicant presents a case for asylum, the burden is on the applicant to show that he or she meets the definition of a refugee, defined as:

> [A]ny person who is outside any country of such person's nationality….[and] who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. [12]

This definition of a refugee is the backbone of all asylum claims. Asylum applicants must show that they meet this definition before they can

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[11] 322 U.S. 78, 88 (1944) ("[W]e conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.").

[12] 8 USC § 1101(a)(42)(A) (2014).

be granted asylum, regardless of whether they are applying for affirmative or defensive asylum.[13] The applicant also must be able to provide credible testimony, because the testimony itself is often the only form of evidence offered to the immigration judge.[14] This is permitted due to the lower evidentiary standard found in immigration courts because applicants seeking asylum have fled their country of origin with little to no possessions and cannot be expected to retrieve traditional forms of evidence such as medical records, police reports, or witness testimony.[15] The immigration judge's finding of an applicant's credibility allows the judge to admit or deny the applicant's subjective perceived beliefs when adjudicating asylum claims.

In addition to providing the definition of a refugee, the Refugee Act of 1980 also established a new procedure for granting asylum.[16] One of the primary goals of the Refugee Act of 1980 was to bring the United States into compliance with the United Nations Protocol Relating to the Status of Refugees.[17] Indeed, the refugee definition mirrors that of the United Nations Protocol (but notably adds the language of *well-founded fear*).[18] The Refugee

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[13] 8 USC § 1158(b)(1)(A) (2008) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum . . . ."). This note will not distinguish between affirmative and defense asylum because there is only a procedural difference between the two. For an in-depth analysis on the difference between the two processes, *see Asylum in the United States*, AM. IMMIGR. COUNCIL (May 14, 2018), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

[14] 8 C.F.R. §208.13(a) (2019); *see also* Urgen v. Holder, 768 F.3d 269, 272–73 (2d Cir. 2014) (reversing the BIA's decision for failure to accept applicant's testimony alone, instructing that there is no requirement for additional non-testamentary evidence).

[15] *In re* Barrera, 19 I&N Dec. 837, 845 (1989) ("The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.").

[16] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). For an overview of the 1980 Refugee Act, see Arnold H. Leibowitz, *Global Refugee Problem: U.S. and World Response,* 467 ANNALS AM. ACAD. POL. AND SOC. SCI. 163, 164 (1983) ("The act was significant in four respects: It established a federal policy of continuing refugee admissions; it redefined the term 'refugee' to incorporate the international U.N. Convention definition, it established the principle of asylum in U.S. statutory law; and it established the principle of resettlement assistance for refugees.").

[17] *See* Edward M. Kennedy, The Refugee Act of 1980, 15 Int. Migration Rev. 141, 143 (1981).

[18] United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, Art. 1(2) (defining refugee as one who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a

Act also served to eliminate bias previously found in the asylum process by removing the prior ideological and geographical limitations.[19]

Although the addition of a definition for refugees was one of the most significant portions of the Refugee Act, the definition itself is vague, impliedly to give greater leeway to immigration judges. This is because the definition only determines who is *eligible* for asylum—the ultimate decision to grant asylum lies with the Attorney General.[20] The vagueness of the definition allowed the courts to create their own definitions for the terms used within the definition of a refugee, including well-founded fear, persecution, and particular social group.[21] This has created a number of inconsistencies among the circuit courts that impact how asylum claims are adjudicated. For example, the lack of a clear definition of persecution led the Ninth Circuit to define persecution as "the infliction of suffering or harm…in a way regarded as offensive,"[22] while the Seventh Circuit adopted a more stringent standard, holding that "the behavior in question must threaten death, imprisonment, or the infliction of substantial harm or suffering."[23] The disparity between the courts contributes to the issue of *forum shopping*, where applicants physically move in order to be in a more favorable jurisdiction.[24]

There also has been confusion due to the conflation of terms used in the definition of a refugee and those used in withholding of removal. Thus, it is important to note that this definition of a refugee only applies to asylees and is not considered when seeking alternative means of relief such as withholding of removal.[25] For example, in 1984 the Supreme Court had to

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nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it").

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

[20] INS v. Cardoza-Fonseca, 480 U.S. 421, 444–45 (1987) ("[A]lthough Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.").

[21] Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 574 (2003), *see also* Joni L. Andrioff, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHI. KENT L. REV. 107, 107 (1985).

[22] Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).

[23] Sharif v. INS, 87 F.3d 932, 935 (7th Cir. 1996).

[24] *See, e.g.*, Jason Ullman, *Kadri v. Mukasey: A Legal Blueprint for Extending Asylum to Homosexual Aliens Who Have Not Suffered Physical Persecution*, 18 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 197, 207–208 (2009).

[25] The primary different between asylum and withholding of removal is that asylum is a discretionary form of relief while withholding of removal is mandatory. Additionally, there

clarify that the *well-founded fear* standard in asylum is distinct from the *clear-probability* standard found in withholding of removal, holding that Congress intended the definition of refugee to be broader for withholding of removal should be narrower because it is a mandatory form of relief.[26]

A. Defining What Is a "Particular Social Group"

The area of *particular social group*, with which this note primarily deals, is one of the most complex areas of asylum law. The term was first defined by the BIA in *Matter of Acosta* as membership in a group that is based on *immutable* characteristics; meaning characteristics that a person cannot, or should not be require to, change.[27] This definition was adopted by almost every circuit.[28] However, in 2008 the BIA added new requirements for proving membership in a particular social group: the group must also be "socially visible" and "particularly defined."[29] These terms were not given clear definitions, but instead were explained with additional vague restrictions: "particular" was defined as a group that was not "too amorphous," and one society would recognize as a "discrete class of persons."[30] "Socially visible" was not explained beyond equating it to a group that is generally "recognizable by others in the community."[31]

The particular social group category tends be to utilized as catch-all category for applicants that are fleeing persecution not encompassed by the areas of race, religion, political opinion, or nationality. For example, the asylum seekers from the above hypotheticals would seek asylum based on membership in a particular social group because they are fleeing persecution due to how they are perceived by others in their communities: Adiji from those who believe she should be a human sacrifice, Adebesi from those who believe he should be chief, and Edionseri from those who believe he is

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is a one-year filing deadline in which most applicants must file for asylum within one year of entering the United States. 8 C.F.R. § 208.16 (2019).

[26] INS v. Stevic, 467 U.S. 407, 425–30 (1984).

[27] 19 I&N Dec. 211, 233 (BIA 1985), *overruled on other grounds.*

[28] *See, e.g.*, Niang v. Gonzales, 422 F.3d 1187, 1199 (l0th Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 546–48 (6th Cir. 2003); Mya Lwin v. INS, 144 F.3d 505, 511 (7th Cir. 1998); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994); Fatin v. INS, 12 F.3d 1233, 1239–40 (3d Cir. 1993).

[29] *In re* S-E-G-, 24 I&N Dec. 579, 584 (BIA 2008); *In re* E-A-G-, 24 I&N Dec. 591, 594 (BIA 2008).

[30] S-E-G-, 25 I&N Dec. at 584.

[31] *Id.* at 586.

possessed by demons. Although these claims appear to be based on religion, it is important to distinguish that the religious beliefs relate to the applicants *fear*, not necessarily to the *reason* they are being persecuted—the *on account of* portion of the refugee definition. In order to determine the applicants' eligibility, their fear will have to be evaluated using the well-founded fear standard, meaning that the court will conduct an analysis on their religious beliefs in the same manner that any other fear would be evaluated.

B. The History of What is Considered to be a "Well-Founded Fear"

Similar to the lack of consistency between the circuit court's definitions of persecution and particular social group, there has also been an inconsistent standard for what constitutes a "well-founded fear."[32] In 1987, the Supreme Court recognized that "well-founded fear" was a vague term that could "only be given concrete meaning through a process of case-by-case adjudication", but refrained from describing how the well-founded fear test should be applied.[33] The Court did, however, mention a number of sources available to guide the interpretation of a well-founded fear, such as the Office of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status ("The UNHCR Handbook").[34] The UNHCR Handbook defines "well-founded fear" as when an applicant can "establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."[35] The Court also cites to several scholars who have weighed in on the matter.[36] Out of these scholars, there seems to be a focus on a real chance of persecution, which predicts the objective prong later outlined by the BIA.[37]

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[32] *See* Mary McGee Light, *The Well-Founded Fear Standard in Refugee Asylum: Will It Still Provide Hope for the Oppressed*, 45 DRAKE L. REV. 789, 791 (1997) ("[The well-founded fear standard] is fraught with problems. The standard's vagueness is a source of conflict between the INS and courts.").

[33] INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

[34] *Id.* at 468 n.22 (1987) (recognizing this source as useful; however, mentioning that the source is not binding).

[35] Ch. II B(2)(a) § 42.

[36] Cardoza-Fonseca, 480 U.S. at 468 n.24.

[37] *See, e.g.*, A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 181 (1966) (defining "well-founded fear" as when there is "a real chance that he will suffer persecution").

Ultimately, the only decision from the Supreme Court that specifically addressed the meaning of the well-founded fear standard was the 1987 decision *INS v. Cardoza-Fonseca*, which rejected the BIA's holding that well-founded fear was essentially the same as a clear probability of harm.[38] In *Cardoza-Fonseca* the BIA had affirmed an immigration judge's holding that the respondent, a Nicaraguan citizen seeking asylum on account of political opinion after her brother had been tortured and put into prison, had failed to show a "clear probability" that she would be persecuted upon returning to Nicaragua.[39] The Supreme Court affirmed the Ninth Circuit's holding that distinguished between the clear probability standard and finding that an applicant had a well-founded fear.[40] However, like in *INS v. Luz Marina Cardoza-Fonseca,* the Supreme Court declined to provide a definition for well-founded fear, instead leaving it up to the BIA to create a new standard for how well-founded fear asylum claims should be adjudicated.[41]

II. THE CURRENT STANDARD – "WELL-FOUNDED FEAR" & RELIGIOUS DISCRIMINATION

After the Supreme Court's decision rejecting the BIA's interpretation of well-founded fear, the BIA readdressed the issue in *Matter of Mogharrabi* to determine whether an Iranian fleeing political persecution had a well-founded fear of returning to his country after he was threatened by government officials.[42] The BIA once again attempted to reconcile the incongruent standards used in the circuit courts and create a uniform test for determining whether an applicant's fear is well-founded.[43] To do this, the BIA adopted the well-founded fear test that was being used in the Fifth Circuit.[44] This is the standard that is still used today when an applicant is

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[38] Cardoza-Fonseca, 480 U.S. at 421 (rejecting the BIA's holding in *Matter of Acosta*, 19 I&N Dec. 211, 229 that the "'clear probability standard' and the well-founded fear standard' are not meaningfully different and, in practical application, converge").
[39] *Id.* at 423–424.
[40] *Id.* at 448.
[41] *Id.* at 448–449 ("We do not attempt to set forth a detailed description of how the 'well-founded fear' test should be applied.").
[42] 19 I&N Dec. 439 (BIA 1987).
[43] *In re* Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987).
[44] *Id.* at 443–45 ("We agree with and adopt the general approach set forth by the Fifth Circuit; that is, that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution.").

claiming fear of future persecution.[45]

The BIA's well-founded fear test consists of two prongs: the subjective prong and the objective prong.[46] The subjective prong presents the easier test: it is met when an applicant testifies credibly that they are afraid.[47] This prong is easily satisfied because the immigration judge has likely already made a finding of the applicant's credibility by the time this stage of the asylum adjudication process is reached. Each immigration judge makes a finding of credibility early on in the adjudication process in order to accept or deny the applicant's testimony as evidence.[48]

The objective prong presents a higher standard: the applicant must show that "a reasonable person in his circumstances would fear persecution."[49] Both prongs must be met in order for an applicant to be granted asylum.[50] It is worth noting that even though the second prong is described by the Court as objective, in reality both prongs are highly subjective determinations. In order for a judge to determine that an applicant's fear is reasonable, the judge must make a subjective determination of what other people would fear, and whether that fear is reasonable.

Even though the two-pronged well-founded fear test resolved the issue of which standard should be applied, there remained confusion about how the objective prong should be analyzed. The BIA expounded on this issue in *Matter of Barrera*, two years after the well-founded fear standard was adopted.[51] In this case, the BIA recognized that there were disparate approaches among the circuits regarding the objective prong of the well-

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[45] This test only applies when the applicant is claiming fear of future persecution but cannot show past persecution, because past persecution creates a rebuttable presumption of future persecution. 8 C.F.R. § 208.13(b)(1)(i); *see also* Duarte de Guinac v. INA, 179 F.3d 1156, 1159 (9th Cir. 1999).

[46] INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987); Arriaga-Barrientos v. INS, 937 F.2d 411, 413 (9th Cir. 1991).

[47] Cuadras v. INS, 910 F.2d 567, 570–71 (9th Cir. 1989) (citing Blanco-Comarribas v. INS, 830 F.2d 1039, 1042 (9th Cir. 1987)).

[48] *See, e.g.*, *In re* A-S-, 21 I&N Dec. 1106 (BIA 1998) ("[I]t is also well established that because the Immigration Judge has the advantage of observing the alien as the alien testifies, the Board accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues.").

[49] *In re* Mogharrabi, 19 I&N Dec. 439, 445 (BIA 1987).

[50] *See, e.g.*, Jorgji v. Mukasey, 514 F.3d 53, 58 (1st Cir. 2008) (finding that an applicant who feared persecution after witnessing executions many years ago had a subjective but not an objective basis for fear).

[51] 19 I&N Dec. 837, 845 (BIA 1989).

founded fear test, and reemphasized that the BIA was adopting the "reasonable person standard" of the Fifth Circuit, describing it as a "common sense framework" for evaluating an asylum seeker's claims.[52] The BIA also specified that "a reasonable person may well fear persecution even where its likelihood [of persecution] is significantly less than clearly probable."[53] As stated in *Moghrrabi*, the "reasonable person" is a person in similar circumstances to the applicant, and courts are encouraged to look at how other applicants in the asylum seekers situations have been treated in their home country.[54]

But how is an immigration judge to determine what a reasonable person in the applicant's position would fear? What evidence is permitted, and who raises the evidence: the applicant or the prosecuting attorney? What factors are taken in account when creating a theoretical reasonable person in the same position of the applicant? Are issues of class, wealth, social status, religious background, and personal beliefs considered? Is it a reasonable person from the applicant's home country or the exact town of origin? Or could it be a reasonable American if the American were placed in the applicant's position?

There is little direct guidance on any of the ambiguity arising from the reasonable person standard beyond the Supreme Court's holding that as little as a 10% chance of future persecution may be enough to create a reasonable fear.[55] The circuit courts have also failed to clarify these issues, though some have tried to elaborate on how the standard should be applied. The Second Circuit, for example, held that when evaluating the reasonable person standard "the board should be sensitive to the position into which the person is, hypothetically, being placed," but failed to define what "being sensitive" entails.[56] The First Circuit followed precedent stating that the

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[52] *Id.* ("The meaning of the term well-founded fear has been the subject of considerable controversy and litigation.") (internal quotations omitted).
[53] *Id.*
[54] *In re* Mogharrabi, 19 I&N Dec. at 446 ("Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims.").
[55] INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no well-founded fear of the event happening.") (internal quotations omitted).
[56] Carcmamo-Flores v. INS, 805 F.2d 60, 68 (2nd Cir. 1986) ("What is relevant is the fear a reasonable person would have, keeping in mind the context of a reasonable person who is

objective prong must be "nestled on a plausible factual predicate."[57] Beyond these scarce examples, there is an utter lack of clarification on how the "reasonable person" should be interpreted. In an immigration court system that is already fraught with procedural concerns, this ambiguity is worrisome.

The problems exacerbated by the ambiguity of the well-founded fear standard are critical to address because they coincide with weak points in the immigration court system. The discrepancy between courts, the lack of sufficient time and resources, and judicial bias are all negatively affected by the lack of a clear standard for adjudicating the well-founded fear element of asylum claims.

Immigration courts present some of the most severe inconsistencies between jurisdictions, with wide discrepancies occurring among immigration courts and the immigration judges themselves.[58] The discrepancies between the courts can partially be attributed to the disparate rulings that are passed down from circuit courts, which are binding for immigration judges.[59] The lack of uniformity in the asylum adjudication process contributes to the lack of consistency across immigration courts. Deciding the objective prong of an applicant's well-founded fear is a good example of this: even cases with similar fact patterns reach radically different results. Take, for example, the issue of asylum seekers who have family members who stayed behind in the applicant's country of origin. In *Hernandez v. INS*, the Ninth Circuit held that an asylum seeker fleeing El Salvador because he feared he would be

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facing the possibility of persecution, perhaps including a loss of freedom or even, in some cases, the loss of life.").

[57] Orelien v. Gonzales, 467 F.3d 67, 71 (1st Cir. 2006); *see also* Michel v. Mukasey, 287 Fed. Appx. 893 (1st Cir. 2008) (citing Orelien v. Gonzalez to dismiss applicant's fears of being persecuted by former president Jean-Bertrand Aristide's supporters as "unreasonable" and therefore lacking well-founded fear).

[58] *See Judge-by-Judge Asylum Decisions in Immigration Courts FY 2013 2018,* SYRACUSE U.,https://trac.syr.edu/immigration/reports/judge2018/denialrates.html (last visited Mar. 6, 2020) (showing asylum grant rates varying from 1.2% to 92% depending on the location and judge); *see also* Rosenburg et. al, *They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts* , REUTERS (Oct. 17, 2017, 7:02 AM), https://www.reuters.com/article/us-immigration-asylum-specialreport/special-report-they-fled-danger-for-a-high-stakes-bet-on-u-s-immigration-courts-idUSKBN1CM1UG ("An immigrant's chance of being allowed to stay in the United States depends largely on who hears the case and where it is heard.").

[59] *Id.* ("Immigration courts in California and the Pacific Northwest fall under the 9th U.S. Circuit Court of Appeals, and they rule in favor of immigrants far more often than courts in the 4th Circuit, which includes North and South Carolina, Maryland and Virginia, Reuters found.").

assassinated by ex-guerillas for his military service had an objectively reasonable fear even though his family remained safely in El Salvador.[60] Three years later, in *Garcia v. Attorney General*, the Eleventh Circuit denied an asylum seeker's claim of well-founded fear based on death threats he received for his work to "reintegrate youth from the guerilla forces into society," in part because "the fact that several members of Luis's family continue to live in Colombia suggests that Luis's subjective fear of future persecution is not objectively reasonable."[61]

These cases highlight the inconsistent application of the well-founded fear standard, because neither of these cases explains what information is being used to determine what a reasonable person would fear.[62] No discussion is made of what a reasonable El Salvadoran veteran fleeing ex-guerillas or a reasonable social worker from Colombia would fear, discussion that would be of critical importance if the true reasonable person standard were applied.[63]

Perhaps because of the inconsistencies in applying the objective prong of the well-founded fear standard, many courts appear to ignore the reasonable person language altogether. Instead, many courts have interpreted the objective prong as a means of including outside evidence, such as the Department of State Country Reports, in order to refute the applicant's testimony. In 2009 the Tenth Circuit Court found that a homosexual Brazilian man had failed to demonstrate an objectively reasonable claim to asylum, referring to a Ministry of Health report to refute the applicant's claim on grounds that "[t]he unvarnished fact that 180 homosexuals were killed in one year is not remarkable in a country of over 180 million . . . ."[64] The Eighth Circuit Court also employed this approach in *Reyes-Morales v. Gonzalez*, where the judge rejected the claim of an asylum seeker who was fleeing El Salvador due to the civil war violence and tensions between the military and guerillas.[65] The case was rejected because the State Department Country

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[60] Hernandez v. INS, No. 00–70920.I & NS No. A72–174–709, 2002 WL 661712, *1 (9th Cir. Apr. 22, 2002) ("The continuing safety of Hernandez's immediate family is irrelevant to this case.").
[61] Garcia v. U.S. Att'y Gen., No. 04–16396, 2005 WL 2141527, *1–7 (11th Cir. Sep. 7, 2005).
[62] Hernandez, 2002 WL 661712, at *1 ; Garcia, 2005 WL 2141527, at *7.
[63] *See* Hernandez, 2002 WL 661712, at *1 ; Garcia, 2005 WL 2141527, at *1.
[64] Halmenschlager v. Holder, 331 Fed. Appx. 612, 616 (10th Cir. 2009).
[65] 435 F.3d 937, 942 (8th Cir. 2006).

Conditions report introduced evidence that the civil war in El Salvador had abated, which, the court held, "provide[d] substantial record evidence to demonstrate that he did not have an objectively reasonable fear of future persecution."[66]

When courts reject an asylum claim based on the applicant's failure to meet the objective prong of the well-founded fear standard but fail to analyze the applicant's claim under the reasonable person standard, one can only conclude that judges are determining what they themselves deem to be reasonable.[67] This is particularly worrisome because immigration judges appear to be more heavily influenced by their individual biases, and the history and design of immigration courts has created conditions in which prejudice and bias seem to run rampant.[68] Discrepancies between individual judges have been attributed to personal characteristics such as gender, career history, and the length of time spent serving as a judge.[69] These discrepancies can be mitigated through the implementation of consistent standards that reduce the number of purely discretional decisions.

Immigration courts often receive criticism for overt and implicit biases that appear more frequently than in other courts. For example, in *Benslimane v. Gonzalez,* Judge Posner lists numerous cases in which the Seventh Circuit sharply rebuked the immigration court for "inappropriate

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[66] *Id.*

[67] *Id.*; Ossa v. U.S. Att'y Gen., 656 Fed. Appx. 455, 457 (11th Cir. 2016) (finding that applicant failed to establish an objectively reasonable fear of persecution because she "failed to show she could not avoid the persecution by relocating within Colombia"); Granados v. U.S. Att'y Gen., 578 Fed. Appx. 866 (11th Cir. 2014) (denying applicant's claim based on an inability to prove an objectively reasonable fear, but making no mention of the reasonable person standard); *but see* Cardona Toro v. Att'y Gen. of U.S., 371 Fed. Appx. 279, 283 (3d Cir. 2010) (denying a claim based on a failure to show an objectively reasonable fear—"there is substantial record evidence supporting the conclusion that a reasonable person in Cardona's circumstances would not fear future persecution in Colombia").

[68] Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, JEFFREY S. CHASE OPINIONS / ANALYSIS ON IMMIGRATION LAW (March 28, 2019), https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi; *see also* TESS HELLGREN ET. AL, THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 10 (2019) ("Judicial bias is rampant within the immigration court system, with immigration judges across the country failing to provide fair, neutral, and consistent adjudication. Radical variations in case outcomes across the country demonstrate that courts are failing to apply immigration law in an impartial and uniform way.").

[69] Rosenburg et al., *supra* note 59. ("The Reuters analysis also found that an immigration judge's particular characteristics and situation can affect outcomes. Men are more likely than women to order deportation, as are judges who have worked as ICE prosecutors. The longer a judge has been serving, the more likely that judge is to grant asylum.").

comments"; "the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge]"; and "hostile and extraordinarily abusive conduct", concluding that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[70] Reprimanding immigration judges is certainly not limited to the Seventh Circuit. In one Third Circuit court case Judge Fuentes remarked that:

> Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect and consideration.[71]

Finally, immigration judges' ability to make informed decisions has eroded under the pressure of the current administration to process cases as quickly as possible. This pressure is further increased by the high number of cases backlogging the court system and a decreased amount of time and resources available to the judge when deciding a case.[72] Efforts to remove the backlog have resulted in the imposition of quotas on immigration judges, forcing them to adjudicate hundreds of removal cases every year.[73] Further, budget limitations have left immigration judges without adequate resources such as law clerks, of which there is currently only one available for approximately every four immigration judges.[74] This lack of time and

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[70] 430 F.3d 828, 829–30 (7th Cir. 2005) (citing Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005); Qun Wang v. U.S. Att'y Gen., 423 F.3d 260, 269 (3d Cir. 2005); Fiadjoe v. U.S. Att'y Gen., 411 F.3d 135, 154–55 (3d Cir. 2005)).

[71] Wang v. U.S. Att'y Gen., 423 F.3d 260, 267 (3d Cir. 2005).

[72] Nick Miroff et al., *Burgeoning Court Backlog of More Than 850,000 Cases Undercuts Trump Immigration Agenda*, WASH. POST (May 1, 2019), https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5_story.html?noredirect=on; *see Immigration Court Backlog Tool*, TRAC Immigration, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Mar. 14, 2020) (noting 975,298 cases pending in 2019).

[73] Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call For Reform,* IMMIGRATION IMPACT (Oct. 1, 2019), http://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/# ("On October 1, immigration judges around the country will arrive at work and face a daunting new task; complete 700 removal cases in the next year or risk official sanction.") [hereinafter Melnick].

[74] Andrew R. Arthur, *The Massive Increase in the Immigration Court Backlog, Its Causes, and Solutions*, CTR. FOR IMMIGR. STUD., July 2017, at 4.

resources means that standards requiring intensive amounts of research and consideration are ill-suited for immigration court. Reducing objective standards that require careful consideration of outside circumstances, such as what would be considered reasonable in a country with which the judge is unfamiliar, and instead focusing specifically on the applicant's situation would make better use of the limited time judges have to decide asylum cases.

These issues in the immigration court system must be addressed before asylum seekers can be guaranteed a trial before an impartial tribunal.[75] The lack of guidelines for adjudicating asylum claims has further opened the door for prejudice and bias in immigration courts, because ambiguity erodes the necessary checks in place to curb discrimination by making it more difficult to determine whether a judge was allowing his or her individual bias to cloud the decision. Without a clear, consistent standard, the circuit courts will continue to develop different standards for determining what is reasonable, worsening the already severe inconsistencies between the circuits.[76] These inconsistencies between the courts are problematic because they incentivize negative behavior such as forum shopping, and reduce the chances of asylum seekers' access to a fair trial.[77]

Allowing immigration judges to determine whether a fear is one that a reasonable person would fear increases their already expansive discretion with little guidance as to what the standard ought to be. Instead of giving immigration judges more discretion, clearer guidelines should be established so that there is a more consistent standard and a lower chance of abuse.

While Congress has taken steps to try to resolve these issues, in order to be truly effective they must be addressed from an internal standpoint: by

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[75] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. *See, e.g.*, Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html ("More than 250 federal immigration judges attended a mandatory anti-bias training session in August, and this summer, the Justice Department announced that 28,000 more employees would go through a similar exercise.").

[76] Even Immigration Judges have commented on the worrying inconsistencies between the Circuit Courts. *See, e.g.*, Dias-Rivas v. U.S. Att'y Gen., No. 17-14847, 2019 WL 1755642, *17 (11th Cir. Apr. 18, 2019) (Jordan, J., dissenting) ("In my view, Ms. Diaz-Rivas' statistics—showing that from 2014 through 2016 asylum applicants outside of Atlanta's immigration court were approximately 23 times more likely to succeed than asylum applicants in Atlanta—are disquieting and merit further inquiry by the BIA.").

[77] For a greater discussion of the issues created by forum shopping, see Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L. LAW. 903, 1005–28 (2011).

ensuring that there are consistent standards within asylum law that encourage immigration judges to apply the law in a uniform, fair manner. Taking away the objective reasonable person standard and instead adopting a consistent standard for analyzing religious beliefs in asylum law would greatly improve the discrepancy, bias, and inefficiency of immigration courts.

However, even if a consistent standard were to be developed—as the BIA attempted to do in *Matter of Mogharrabi*—there remain constitutional concerns in analyzing the reasonableness of an individual's religious belief. As discussed below, case law is clear that the judiciary is not the appropriate forum for religious decisions, especially when the decision turns on the actual beliefs of the individual.[78] Allowing immigration judges to determine whether an applicant's fear that stems from his or her religious belief is reasonable in essence allows the immigration judge to decide whether the individual's religious belief is true, an idea that is contrary to all other religious-based decisions in the American court system.

III. THE SOLUTION – THE STANDARD PRESENTED IN *UNITED STATES V. BALLARD* SHOULD BE ADOPTED IN PLACE OF THE OBJECTIVE PRONG OF THE "WELL-FOUNDED FEAR" TEST IN ORDER TO PROPERLY ADJUDICATE ASYLUM CLAIMS

In 1944 the Supreme Court decided a keystone case for religious freedom: *United States v. Ballard*.[79] Although the subject matter of the case was fairly mundane—the defendants were convicted of mail fraud after distributing religious pamphlets—the holding from this case became one of the most important tenets of constitutional law. In *Ballard*, the Supreme Court affirmed the Ninth Circuit's instructions to the jury to determine only whether the defendant's beliefs were in "good faith," and not to examine the truth or validity of the beliefs themselves.[80] Even though at first blush the holding from *Ballard* appeared to be applicable in a very limited setting, decades of case law following *Ballard* affirm and expand on this rule,

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[78] For additional scholarship concerning whether judges should have *any* authority to make religious-based determinations, *see* Jared A. Goldstein, *Is There a "Religious Questions" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U.L. REV. 497 (2005) [hereinafter Goldstein].
[79] 322 U.S. 78 (1944).
[80] *Id.* at 88.

creating what many scholars view as a broad ban on any inquiry into religious doctrine.[81]

Part of the expansion of the Ballard standard includes a clear prohibition on analyzing the centrality or importance of religious beliefs. In *Hernandez v. Commissioner*, a 1989 tax law case concerning whether the Church of Scientology should be allowed tax deductions for mandated training sessions, the Supreme Court refused to analyze whether a belief was central to the plaintiff's religion, stating:

> The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.[82]

This generous interpretation of the *Ballard* standard was affirmed in *Employment Division v. Smith* when the Court found it to be constitutionally impermissible to make factual inquiries into religious doctrines or practices:

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims" . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.[83]

The *Ballard* standard is not limited to cases that deal directly with infringements on an individual's ability to practice their religion. It has been consistently applied across the legal system, including to administrative law such as tax decisions where the *Ballard* standard has been referenced as a

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[81] *See, e.g.*, Goldstein, *supra* note 78.
[82] Hernandez v. Comm'r., 490 U.S. 680, 699 (1989).
[83] Emp't Div., Dep't Human Res. v. Smith, 494 U.S. 872, 887 (1990) (citing United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

guideline for the IRS when determining whether a deduction may be made for various religious donations.[84] It has been emphasized that no matter how unconventional or bizarre, the court may not "deconstruct" an individual's belief system.[85]

The United States has clearly placed a high value on freedom of religion, and considers freedom of religion to be a fundamental right[86], so it is not surprising that courts have gone to such great lengths to protect it.[87] The *Ballard* standard promotes freedom of religion by shielding religious practitioners from inappropriate judicial interference that would occur if judges were permitted to analyze the substantive content of their beliefs.[88]

A. The Application of the Ballard *Standard in Immigration Court*

Given that the *Ballard* standard has been generously interpreted and is the bedrock for protecting freedom of religion, the question arises: Why is it not being applied to asylum seekers? Although asylum seekers are not entitled to the full range of constitutional rights as U.S. citizens, they are still protected under the Freedom of Religion Clause of the Constitution.[89]

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[84] *See, e.g.*, Hernandez, 490 U.S. at 693 ("Given that, under the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayers' alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious . . .") (citing United States v. Ballard, 322 U.S. 78 (1944)).

[85] Cloutier v. Costco Wholesale, Inc., 311 F.Supp.2d 190, 191 ("While its tenets may be viewed by some as unconventional, or even bizarre, the respect afforded by our laws to individual conscience, particularly in regard to religious beliefs, puts any deconstruction of the Church's doctrine beyond the purview of the court.").

[86] *See, e.g.*, EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados, 30 F.Supp.2d 217, 225 ("Freedom to exercise one's religion lies at the core of our nation's fundamental rights."); *see also* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.").

[87] 22 U.S.C. §§ 6401–6481 (2000) (known as the "IFRA," the International Religious Freedom Act was enacted to promote freedom of religion on a global scale); *see* § 6401(a)(2) ("Freedom of religious belief and practice is a universal human right and fundamental freedom [. . .]").

[88] Ballard, 322 U.S. at 87 ("But if those doctrines are subject to trial before a jury charged with finding their truth or falsity…they enter a forbidden domain.").

[89] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). Constitutional restraints that limit what the government can do rather than protect the rights of individual apply to citizens and noncitizens alike.

> The illegal aliens who are plaintiffs in these cases challenging the statute may claim the benefit of the Equal Protection Clause, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. Whatever his status under the immigration laws, an alien is a person in any ordinary sense of that term.

The issue arises when asylum seekers' fear of returning to their country of origin is grounded in a religious belief, and the judge, applying the objective prong of the well-founded fear standard, must determine whether the belief is objectively reasonable. This forces the judge to make a decision about the validity of the individual's belief, because a belief that is considered to be absurd or implausible will not stand up in court as a reasonable fear. In these situations, an alternative standard is needed so judges are not forced into making a decision that is outside the scope of their jurisprudence.

When adjudicating asylum claims with a religious-based fear, the application of the *Ballard* standard would prevent courts from inquiring into the objectivity of an applicant's religious belief. This is consistent with precedent that the only determination courts should make regarding religious beliefs is whether they are sincerely held. Therefore, if applicants can show they truly fear returning to their home country, their fear should not be dismissed as unreasonable, even if it is based on a supernatural power, belief, or superstition.

B. Difficulties That May Arise When Applying the Ballard *Standard*

Although it appears that this would dramatically lower the standard for asylum claims, showing well-founded fear is only one of many elements that an asylum seeker must prove in order to be granted asylum. Applicants still have to show that they would be persecuted on account of their race, religion, nationality, political opinion, or membership in a social group.[90] As discussed below, lowering this standard would allow the court to spend more time on the areas that are most critical—such as the reason the applicant is being persecuted—instead of implementing a laborious, resource-intensive

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See, e.g., Plyler v. Doe, 457 U.S. 202, 202 (1982) (internal quotations omitted).

[90] As noted in *In re* Mogharrabi:

> It must also be remembered that an alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Thus, for example, aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of their race, religion, nationality, membership in a particular social group, or political opinion. Finally, an applicant for asylum must also show that he merits the relief as a matter of discretion.

In re Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) (internal citations omitted).

standard to decide the objectivity of an applicant's fear. Moreover, the decision to grant asylum is ultimately one of discretion, so although the *Ballard* standard would provide guidance and ensure the judge's analysis is in line with the Constitution, it would still be left to the judge's discretion to decide whether or not to grant asylum.[91]

Another argument against incorporating the *Ballard* standard is that it would further complicate the already problematic process of adjudicating religious asylum claims. Religious asylum claims pose a number of unique difficulties that make them more challenging than other asylum claims because of the limitations imposed on the court. Courts are restricted as to what evidence can be considered when deciding how the sincerity of an asylum seeker's belief should be evaluated[92] or how "orthodox" beliefs should be determined when adjudicating religious persecution claims.[93] Moreover, religious-based asylum claims tend to have even greater disparities than non-religious claims, exemplified by author Carolyn Blum's finding that asylum seekers fleeing religious persecution from allied countries of the United States are less likely to obtain asylum than those fleeing religious persecution from countries that are considered enemies of the United States.[94] Religious claims, which are inherently subjective, exemplify how bias can manifest in judicial decisions when the appropriate checks and balances are lacking. Adding the inability to evaluate the reasonableness of the asylum seeker's belief would further complicate the

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[91] As noted in the Immigration and Nationality Act:

> The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A).

8 U.S.C. § 1158(b)(1)(A) (emphasis added).

[92] *See* Michael Kagan, *Refugee Credibility Assessment and the "Religious Imposter" Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT'L L. 1179 (2010).

[93] Mejia-Paiz v. INS, 111 F.3d 720, 726 (9th Cir. 1996) (Ferguson, J., dissenting) ("[T]he IJ's personal belief that Jehovah's Witnesses do not swear under oath was an improper reason for doubting Mejia-Paiz's credibility.").

[94] Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 Berkeley J. Int'l L. 38, 43–44 (1997).

adjudicative process, a result that directly conflicts with the current administration's goal of resolving asylum claims as quickly as possible.[95]

C. *How Applying the* Ballard *Standard Would Improve the Asylum Adjudication Process*

Even though the application of the *Ballard* standard may present some procedural concerns, the benefits of applying a standard that is consistent with other bodies of law and promotes the freedom of religion outweighs any potential negative impact. Applying the *Ballard* standard to asylum cases would ensure due process compliance, increase consistency between courts, enhance the efficiency and accuracy of the adjudication process, and ensure the protection of the constitutional right to freedom of religion.

Although asylum seekers do not receive the same spectrum of rights as United States citizens, they are entitled to a fair hearing. The 5th Amendment entitles all people to the constitutional right of due process, both citizens and noncitizens alike.[96] If asylum seekers, whose very lives are on

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[95] Asylum claims were intended to be adjudicated in 180 days, but an increasing backlog has slowed the process. *See* Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1) (1952) (directing the Attorney General to set procedural guidelines so asylum claims can be adjudicated in 180 days); *see also* Memorandum from EOIR Director James R. McHenry III, *Guidance Regarding the Adjudication of Asylum Applications Consistent With INA § 208(d)(5)(A)(iii)* 1–2 (Nov. 19, 2018), https://www.justice.gov/eoir/page/file/1112581/download ("[I]t is imperative that EOIR adopt sound strategies for handling asylum cases in a timely manner consistent with the intent of the Immigration and Nationality Act". . . "[B]oth statutory provisions express Congress's strong expectation that asylum applications would be adjudicated within 180 days of filing."). The goal of expediting proceedings has become even more relevant under the current administration. *See* Memorandum from Tracy Short, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* 2 (Aug. 15, 2017) ("The efficient litigation of proceedings before the Department of Justice Executive Office for Immigration Review (EOIR) is a key strategic priority of DHS.") (citing Memorandum from John Kelly, Secretary of Homeland Security, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* 6–7 (Feb. 20, 2017) (discussing the "unacceptable delay" in average processing times before the immigration courts)).

[96] Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) (Discussing the scope of the due process clause which extends even to aliens who are not here legally. "[A]ll persons, aliens and citizens alike, are protected by the Due Process Clause . . . "); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]").

> This Court's prior cases recognizing that illegal aliens are "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase "within its jurisdiction," cannot be distinguished on the asserted ground that persons who have entered the country illegally are not "within the jurisdiction" of

the line, do not have access to a fair and impartial hearing, they are not receiving the due process to which they are entitled.[97] A limitation on judicial bias is critical for a fair trial that complies with the Due Process Clause. As stated by the Supreme Court in *In Re Murchison* "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."[98] Given that uncurbed biases from the immigration judges significantly hinder the opportunity for a fair trial, there must be procedures in place to limit the effect of judicial bias. As Judge Bownes explains in *Davis v. Page,* a case dealing with the ability for students to leave the classroom when a classroom activity violated their religious beliefs, "a judge must strive not to allow his decision to be influenced by his personal appraisal of the claimed religious belief. Circumspection and objectivity are a judicial prerequisite."[99]

Applying the *Ballard* standard would provide this circumspection and objectivity. Shifting the focus from the highly subjective criteria of reasonableness to determinations that are more in line with objective criteria would help mitigate the issue of judicial bias, and thus work to ensure that asylum seekers' due process rights are satisfied through access to an impartial trial.

In addition to rectifying due process concerns, incorporating a clear standard such as the *Ballard* standard would mitigate some of the confusion surrounding the reasonable person standard derived from the objective prong of the well-founded fear test. While at present judges seem unsure of what constitutes a reasonable person, the *Ballard* standard would eliminate this issue by redirecting the focus to the asylum seeker themselves. The clear standard from *Ballard* ensures more consistent results. Especially when dealing with religious beliefs that a judge may not be intimately familiar with,

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> a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase "within its jurisdiction" confirms the understanding that the Fourteenth Amendment's protection extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory.

Plyler v. Doe, 457 U.S. 202, 202 (1982).

[97] Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000) ("[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.").

[98] 349 U.S. 133, 136 (1955).

[99] 385 F.Supp. 395, 402 (D.N.H. 1974).

it is more likely that the judge can accurately determine whether an individual is truly afraid than whether the fear is objectively reasonable, or one that a reasonable person in the applicant's situation would fear. This determination of credibility is typically made in every asylum hearing, both to satisfy the subjective prong of the well-founded fear test and to admit the individual's testimony under the lower standard of evidence.[100] Determining whether an applicant is sincere and honest is something that judges are accustomed to and capable of accurately deciding. Because this determination is already made, the *Ballard* standard would actually increase judicial efficiency by streamlining the asylum process. It stands to reason that applicants who are found to be credible are afraid when they say they are. Taking this assumption at face value eliminates the need for an in-depth analysis of the reasonableness of an applicant's fear.

Applying the Ballard standard would not only increase efficiency but also increase the chances that cases are accurately decided. Immigration judges operate under impossibly high quotas, forcing them to devote insufficient time to each case.[101] The combination of a limited ability to prepare and conduct the case, as well as the fact that immigration judges do not have the requisite social, philosophical, and cultural backgrounds, makes applying the true reasonable person test impossible. A true understanding of what a reasonable person in the applicant's situation would fear would require hours of research and preparation, something that is logistically impossible given the rate at which the judges must process cases. Allowing judges to expand on a prior finding of credibility and reduce the number of other requisite factual inquires would increase both the accuracy and the efficiency of the adjudication process.

Most importantly, judges would not be forced into violating a constitutional tenant by determining the reasonableness of an individual's belief.[102] Evaluating the truthfulness of a religious belief has been termed a

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[100] Immigration and Nationality Act, 8 U.S.C. 1158(b)(1)(B)(ii) (1952) ("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 . . .").

[101] AMERICAN BAR ASSOCIATION, 2019 UPDATE REPORT, REFORMING THE IMMIGRATION SYSTEM 20 (2019) ("With a backlog of 768,257 cases (as of the end of FY 2018) this amounts to approximately 1,851 backlog cases per immigration judge, an untenable level."); *see also* AILA POLICY BRIEF, RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS (2018); Melnick, *supra* note 73.

[102] As articulated in Judge Ferguson's dissenting opinion in *Meija-Paiz v. INS*:

forbidden domain for good reason. Allowing immigration judges to dismiss an asylum claim based on their disbelief of an individual's religion requires a determination that a judge should never be permitted to make—the determination that a religious belief is not "reasonable."[103] Even when the reasonable person standard is properly applied, it fails to meet the constitutional protections implemented by the Supreme Court in *United States v. Ballard*. When dealing with questions of religion, courts are strictly limited to analyzing the importance of the belief to the individual, and forbidden from analyzing the veracity of the belief itself.[104] If these holdings applied in immigration court, the judges' finding of credibility regarding the applicant's subjective claim of fear should be enough to satisfy the well-founded fear standard without conducting an objective analysis by adjudicating the reasonableness of the belief itself.

The United States has long prioritized the protection of rights over the promotion of convenience, especially a right as significant as religious freedom. Constitutional tenets ought to be considered even if doing so will encumber the adjudication process, because the courts are the very bodies charged with protecting these rights. Clear precedent that outlines how these rights should be protected ought to be followed. In immigration court, reforming the well-founded fear standard to comply with these guidelines would not only promote the due process of asylum seekers, but also streamline and improve the overall asylum adjudication process. Although a standard has been developed over the years that attempts to take into account cultural and situational norms, that standard is still fundamentally flawed in that it requires the judge to make an unconstitutional determination.

> A judge violates the First Amendment when he bases his decision not on objective facts but on his personal conclusions as a 'lay theologian.' Whether a person is a devout member of his church is not for the government to decide. It involves religious stereotyping that clouds all rational thinking.

Mejia-Paiz v. INS, 111 F.3d 720, 729 (9th Cir. 1996) (Ferguson, J., dissenting).

[103] *See, e.g.*, *In re* The Bible Speaks, 73 B.R. 848, 866 (Bankr. D. Mass. 1987) ("[A]djudication of his claim would necessarily involve inquiry into the reasonableness of those beliefs, an inquiry which the First Amendment forecloses.") (citing Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 179 Cal.App.3d 450 (1986)).

[104] United States v. Ballard, 322 U.S. 78, 87 (1944) ("But if those doctrines are subject to trial before a jury charged with finding their truth or falsity…they enter a forbidden domain.").

CONCLUSION – MOVING FORWARD & LOOKING BACK

In the event that the *Ballard* standard were implemented, limiting the judicial inquiry into the objective prong of the well-founded fear test, would the outcomes be different for any of the hypotheticals presented in the introduction? Although impossible to say for certain, the answer is likely yes. The *Ballard* standard would prevent these cases from being dismissed merely because the judge was unfamiliar with, or biased against, these types of unfamiliar religious beliefs.

Take, for example, the hypothetical of Adija, who believes that if she returns to Nigeria she will be killed by the Ogboni. In court, she argues that she cannot safely live anywhere in Nigeria, because no matter where she goes the Ogboni will know where she is and how to find her. She explains that her life will be in even greater danger now that she has told the court about the Ogboni—merely mentioning their name is punishable by death. When asked how the Ogboni will know that she has sought asylum in the United States and revealed details of their practice, she says that they are using their powers to watch her, right now, as she testifies.

From a Western perspective, or for anyone outside of this specific set of religious beliefs, these beliefs would be dismissed as unreasonable. Applying a vague standard of reasonableness would almost surely result in the dismissal of her claim. Applying the slightly higher reasonable person standard presents a number of practical difficulties. If Adija represents herself, as most asylum applicants do,[105] how will she convince the judge that these beliefs are prevalent in her community? Even if represented by an attorney who has the time and resources to prepare extensive academic evidence documenting the existence of the Ogboni and the general prevalence of fear towards them throughout Nigeria, will the judge have the opportunity to thoroughly review this evidence and give it the weight it deserves? Should immigration judges be making decisions on what a reasonable Nigerian national may or may not fear?

These same issues are raised in the other two hypotheticals. In the case of Adebisi, how is an immigration judge to know whether it was reasonable for him to be afraid to go to the police without conducting hours

[105] *See* Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L. J. 739 (2002) ("At the affirmative application stage, only one in three applicants is aided by representation.").

of research on the religious beliefs of the Esubete people? In cases that challenge the very notion of what constitutes a religion, such as Edionseri's belief that he would be accused of being possessed by demons, the immigration judge would have to try and figure out who would be a reasonable person in Edionseri's position. The idea that the immigration judge would consider what a "reasonable person from Nigeria who is believed to be possessed by demons" would fear seems outlandish, but this is the very standard that ought to be applied under current case law. Of course, because of the difficulty in applying the reasonable person test, the case law has eroded over time to the broad standard of objective reasonableness, a standard that requires great judicial discretion and thus brings inconsistent results.

The application of the *Ballard* standard mitigates these issues. The ability of the immigration judge to dismiss the case on the basis that Adija is unreasonable is eliminated, focusing the analysis instead on Adija's subjective fear. Is she afraid? If so, then the case moves on to the many other elements that she must prove in order to be granted asylum: she would experience future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and her case merits the judge's discretionary approval. These claims are not easy to prove, but the judge would be able to devote more time adjudicating these other, truly objective standards with time that would otherwise be spent settling the issue of well-founded fear.

In conclusion, the best way to resolve the current issues with adjudicating a well-founded fear is to implement the *Ballard* standard so that immigration judges are not evaluating the reasonableness of an asylum seeker's religious belief. Instead of dismissing religious beliefs as unreasonable, immigration judges should instead focus on adjudicating whether applicants for asylum are sincere in their beliefs. This approach is consistent with precedent from the Supreme Court and the high value placed on protecting freedom of religion.