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# Abandoning the Subjective and Objective Components of a Well-Founded Fear of Persecution

Grace Kim\*

## ABSTRACT

*Current asylum law requires that asylum seekers prove that they have a “well-founded fear of persecution.” However, a “well-founded fear”—the evidentiary standard in asylum cases—has remained ambiguous and difficult to apply in asylum cases. In *Cardoza-Fonseca*, the Supreme Court held that an asylum seeker can establish a well-founded fear with less than a 50% probability of future persecution. Although the Supreme Court sought to clarify the meaning of a well-founded fear, the decision has complicated the evidentiary standard by implying that it consists of two parts: the subjective component and objective component. The “subjective” component—the asylum seekers’ subjective fear of being persecuted if they return to their home countries—is superfluous because this component is rarely contested. The subjective component is essentially a non-issue because asylum seekers can prove this component by stating that they are afraid to go back to their home countries. The objective component—whether asylum seekers’ fears are objectively reasonable—remains unclear. Moreover, courts have misapplied the well-founded fear standard and interpreted the objective component in inconsistent ways. Thus, this Note argues that the Supreme Court should eliminate the subjective component in the well-founded fear analysis and assume that asylum seekers have a genuine fear if they submit an application. In addition, the Supreme Court should simplify the objectively reasonable fear analysis to “a reasonable possibility of persecution,” which would be a 10% chance of persecution. A reasonable possibility of persecution would emphasize how a well-founded fear points to a threshold or probability of persecution rather than a separate, convoluted analysis.*

## INTRODUCTION

Luz Marina Cardoza-Fonseca, a thirty-eight-year-old woman from Nicaragua, faced deportation because she first entered the United States as a visitor and overstayed her visa.<sup>1</sup> In response, she requested asylum in the United States because her life would be threatened

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<sup>1</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987); *Cardoza-Fonseca v. U.S. INS*, 767 F.2d 1448, 1450 (9th Cir. 1985).

if she returned to Nicaragua.<sup>2</sup> Her brother had been imprisoned and tortured because of his oppositional political activities against the Sandinistas government, and Cardoza-Fonseca believed that the Sandinistas knew that they fled together.<sup>3</sup> Her asylum case led to the Supreme Court decision in *INS v. Cardoza-Fonseca*, a ground-breaking case that attempted to clarify the meaning of a “well-founded fear of persecution,” the evidentiary standard in asylum cases.<sup>4</sup> The Supreme Court affirmed the Ninth Circuit’s holding by a plurality and held that the “well-founded fear” standard was a more generous standard than the “clear probability” or “more likely than not” standard of proof, which requires an asylum seeker to prove that their claims occurred by more than a 50% chance.<sup>5</sup> In other words, the well-founded fear standard is a burden of proof that requires some probability above 0% but not as high as 50%.<sup>6</sup> However, the Court did not definitively decide what amount of evidence would be necessary to show that an asylum seeker met the requisite burden of proof.<sup>7</sup> Thus, while Cardoza-Fonseca was able to significantly improve her chances at obtaining asylum, she and other applicants faced an uncertain future, as the lower courts could decide how generously they would apply this standard.

The Court also held that a well-founded fear included both a subjective and objective component, both of which the asylum seeker must establish.<sup>8</sup> The “subjective” component describes asylum seekers’ subjective fear of being persecuted if they return to their home countries.<sup>9</sup> The “objective” component refers to the objective situation that asylum seekers must establish through evidence to help corroborate the subjective mental state.<sup>10</sup> Although a well-founded fear is necessary in both past persecution and future persecution claims, in past persecution claims, the asylum applicant already has a presumption of having a well-founded fear, albeit a rebuttable one.<sup>11</sup> The subjective and objective components become more important factors in future persecution claims.<sup>12</sup> In practice, the subjective and objective components have become separate components that an asylum seeker must prove in future persecution claims in addition to the other statutory elements of being a refugee: persecution, the nexus/causation, and the five protected grounds.<sup>13</sup> The Court’s explanation regarding the subjective and objective components to a well-founded fear of future persecution further complicates an already ambiguous standard.<sup>14</sup>

These additional components that asylum seekers must prove are problematic because the subjective component is superfluous, and the objective component is confusing for courts to apply. First, while the subjective component is less problematic, since parties rarely contest the subjective component in asylum cases, it becomes unnecessary in the

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<sup>2</sup> *Cardoza-Fonseca*, 480 U.S. at 424.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 427–50.

<sup>5</sup> *Id.* at 425, 431, 450.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 449–50.

<sup>8</sup> *Id.* at 430–31.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 440.

<sup>11</sup> See Humberto H. Ocariz & Jorge L. Lopez, *Practical Implications of INS v. Cardoza-Fonseca: Evidencing Eligibility for Asylum under the “Well-Founded Fear of Persecution” Standard*, 19 U. MIAMI INTER-AM. L. REV. 617, 644 n.189 (1988).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 644.

<sup>14</sup> *Cardoza Fonseca*, 480 U.S. at 430–31.

overall analysis of whether an applicant should be granted asylum.<sup>15</sup> The subjective component is essentially a non-issue because the asylum seekers can prove this component by stating that they are afraid to go back to their home country.<sup>16</sup> Ocariz and Lopez discuss the implications of *INS v. Cardoza-Fonseca* in their article, *Practical Implications of INS v. Cardoza-Fonseca: Evidencing Eligibility for Asylum under the “Well-Founded Fear of Persecution” Standard*, stating that “an alien’s fear is generally not questioned” and a court’s discussion of a person’s fear “is no more than formalism.”<sup>17</sup> Ocariz and Lopez explain how the United National Handbook assumes that unless a person just wants to seek adventure, no one would normally abandon one’s home and country without some compelling reason.<sup>18</sup>

Second, the objective component of the well-founded fear standard leads to confusion because the Supreme Court has not sufficiently clarified how to apply the objective element.<sup>19</sup> The Court simply stated that it did not “attempt to set forth a detailed description of how the well-founded fear test should be applied.”<sup>20</sup> Instead, the Court stated that there should be “case-by-case adjudication,” which respects the agency’s interpretation of any ambiguity Congress intentionally created through the language of well-founded fear.<sup>21</sup> This ambiguity has led to lower courts inconsistently applying the objective component in asylum claims.<sup>22</sup>

As shown in Part II, the Court’s decision has led the Board of Immigration Appeals (BIA) and various circuit courts to use the objective component of a well-founded fear to repetitively analyze all three of the elements for meeting refugee status—the persecution, the protected grounds the alien is claiming, and the nexus or causation between the persecution and protected category—within the well-founded fear analysis.<sup>23</sup> However, in future persecution claims, the “objectively reasonable fear” is supposed to be a minimal burden of proof that can be framed as a *probability* of an asylum seeker facing persecution if he or she returns to his or her home country.<sup>24</sup> Courts often conflate the well-founded fear analysis, which refers to the future probability of persecution, with the rest of the analysis regarding the elements of being a refugee.<sup>25</sup> Thus, the confusion of how to apply the well-founded fear standard can lead courts to engage in a more convoluted analysis of objectively reasonable fear. The Supreme Court should clarify that a well-founded fear is

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<sup>15</sup> Ocariz & Lopez, *supra* note 11.

<sup>16</sup> *Id.* at 645.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The UN Handbook is a document that explains the UN procedures and criteria for determining refugee status and other matters.

<sup>19</sup> *Infra* Part II.

<sup>20</sup> *INS v. Cardoza Fonseca*, 480 U.S. at 448.

<sup>21</sup> *Id.* There are various agencies that handle immigration affairs: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and Department of Homeland Security (DHS). See U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/> (last visited Feb. 2, 2021); U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/> (last visited Feb. 2, 2021); U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/> (last visited Feb. 2, 2021); DEP’T OF HOMELAND SEC., <https://www.dhs.gov/> (last visited Feb. 2, 2021).

<sup>22</sup> *Infra* Part II.

<sup>23</sup> *Infra* Part II.

<sup>24</sup> See *INS v. Cardoza Fonseca*, 480 U.S. 421 (1987).

<sup>25</sup> *Infra* Part II.

not a separate element that must be established when demonstrating future persecution but an evidentiary burden that refers to the *likelihood* of the persecution.

In addition, even though the well-founded fear standard does not require the asylum seeker to show that the probability of persecution is more than 50%, the BIA and the circuit courts have not agreed on what burden of proof this standard actually entails.<sup>26</sup> Given the ambiguity, jurisdictions may choose to interpret this burden of proof as leniently or strictly as they choose, whether that is applying a 5% chance of persecution or a 45% chance of persecution. *Cardoza-Fonseca* suggested that a 10% chance of persecution may be sufficient to show a well-founded fear, and some circuits have adopted this view.<sup>27</sup> In *Cardoza-Fonseca*, the Supreme Court used a hypothetical example to illuminate what could be a well-founded fear of persecution:

Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have a "well-founded fear of persecution" upon his eventual return.<sup>28</sup>

Some courts have chosen to adopt this language while others have completely ignored this part of the Supreme Court opinion.<sup>29</sup>

The BIA has tried to use language stating that an alien has an objective fear if a "reasonable person in their circumstances would fear persecution were they in their home country" in order to clarify the objective standard.<sup>30</sup> Applicants would need "credible, direct, specific evidence" to support their claims.<sup>31</sup> However, the language that the BIA uses is not even applied in all circuit courts.<sup>32</sup> Thus, there is no uniformity regarding the interpretation of the statutory language, and the BIA and the circuit courts adjudicate claims about an asylum seeker's well-founded fear of future persecution in different ways.

Thus, the well-founded fear of future persecution standard should be simplified to mean a reasonable possibility of persecution in light of the circumstances of the asylum seeker. The subjective and objective aspects of a well-founded fear of persecution unnecessarily complicate the analysis. The Supreme Court should eliminate the subjective component in the well-founded fear analysis because the asylum seeker should be presumed to have a genuine fear if the person submits an application. In addition, the Supreme Court should change the objectively reasonable fear analysis to "a reasonable possibility of persecution" in order to simplify the meaning of a well-founded fear of persecution. A reasonable possibility of persecution would emphasize how a well-founded fear points to a threshold or probability of persecution. The Supreme Court should clarify

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<sup>26</sup> *See id.*

<sup>27</sup> *See Al-Harbi v. INS*, 242 F.3d 888 (9th Cir. 2001).

<sup>28</sup> *Cardoza-Fonseca*, 480 U.S. at 431 (quoting ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966)).

<sup>29</sup> *See Infra* Part I.

<sup>30</sup> *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986); *In re C-A-L-*, 21 I. & N. Dec. 754, 759 (BIA 1997); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

<sup>31</sup> *Mogharrabi*, 19 I. & N. Dec. at 444 (quoting *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986)).

<sup>32</sup> *See Infra* Part I(a), (b).

that the objective component is not a separate analysis that must be applied to every element of proving one's refugee status but is an evidentiary burden that refers to the *likelihood* of the future persecution. A "reasonable possibility" of at least a ten-percent chance of persecution, as suggested in the example used in *Cardoza-Fonseca*, should suffice to show a well-founded fear. The ten-percent standard would enable courts to adjudicate decisions based on a specific frame of reference and take into account the humanitarian concerns that inspired asylum law.<sup>33</sup>

Part I provides a general overview of asylum law so that readers can better understand the structure of asylum claims. Part II showcases how the ambiguity regarding the objective component has led to a plethora of confusing administrative and court opinions that do not properly determine whether an asylum seeker has a well-founded fear.<sup>34</sup> Part II will analyze how the BIA and the circuit courts structure their analysis of the objective component of a well-founded fear in future persecution claims and what kind of evidentiary burden the BIA and circuit courts are using to prove a well-founded fear.<sup>35</sup> Part II will also argue that the BIA and various circuit courts' objective fear analysis forces asylum seekers to present the same evidence that proves the substantive three elements of being a refugee, which is redundant and unnecessary. Instead, the well-founded fear element should simply address whether the asylum seeker has a well-founded fear based in reality. Furthermore, the BIA and some circuit courts do not clearly discern which of the three substantive elements are problematic in an asylum seeker's case and have improperly collapsed the three-step analysis under the well-founded fear of persecution. These courts then present a generic argument that the asylum seekers failed to show an objective, well-founded fear.<sup>36</sup> This Part also delves into how the circuit courts interpret the standard for an objective, well-founded fear of persecution in strikingly different ways and how the circuit courts are prone to use the standard that they desire depending on the case.

Part III delves into the repercussions of confusion in the well-founded fear of persecution analysis. It shows how ambiguity has created an additional burden for practitioners and the potential to allow dangerous biases to affect the adjudication process.<sup>37</sup> This Part will explain how the lack of structure and clarity in the courts' evaluation of the objective component leads to both a redundant and confusing analysis that does not properly interpret the well-founded fear that asylum seekers must prove. Part IV provides suggestions for how the interpretation of a well-founded fear can be streamlined for a uniform application in future cases. Part V offers concluding thoughts about the urgency and importance of implementing changes to the application of a well-founded fear.

## I. OVERVIEW OF ASYLUM LAW

Asylum law in the United States is based on international law and its legal obligations under the Refugee Convention.<sup>38</sup> The United States ratified the United Nations Convention relating to the Status of Refugees in 1968, and it adopted the Convention's definition of a

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<sup>33</sup> *Cardoza-Fonseca*, 480 U.S. at 431.

<sup>34</sup> See *Infra* Part II.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 1:1 (2020 ed.).

“refugee” and codified procedures for how to apply for asylum status in the Refugee Act of 1980.<sup>39</sup> Since Congress amended its immigration laws, United States administrative and judicial authorities have developed a complex body of law that elaborates on who can claim asylum status and is legally a refugee.<sup>40</sup>

Under United States law, the grant of asylum is discretionary and is based on the definition of a refugee.<sup>41</sup> The Immigration and Nationality Act defines refugees as aliens who are unable or unwilling to return to their native countries “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.”<sup>42</sup> The definition of a refugee includes three main elements: (1) “persecution,” (2) the “on account of” nexus element, and (3) the statutorily protected grounds, which include “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>43</sup> First, asylum seekers must show that they suffered severe harm that rises to the level of persecution.<sup>44</sup> Severe harm can include physical violence, mental and psychological harm, forced renunciation of beliefs, economic harm, and discrimination generally.<sup>45</sup> The persecution must also involve some absence of state protection, whether that is because the state is unable or unwilling to protect the asylum seeker.<sup>46</sup> Second, the “on account of” nexus element proves causality and shows that the persecution occurred *because* the applicant is part of a protected class.<sup>47</sup> Claimants are not required to establish nexus through direct proof, and circumstantial proof regarding country condition reports, treatment of others in similar circumstances, and past actions or statements of the persecutor may be enough.<sup>48</sup> Third, “race, religion, nationality, membership in a particular social group, or political opinion” are the only grounds upon which applicants can claim asylum.<sup>49</sup> The BIA has described the grounds of persecution as identifying qualities of fundamental difference or immutability, and asylum seekers can claim one or more of these protected grounds.<sup>50</sup>

<sup>39</sup> United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.A.).

<sup>40</sup> ANKER, *supra* note 38.

<sup>41</sup> *Id.* at § 2:1.

<sup>42</sup> Immigration and Nationality Act §101(a)(42), 8 U.S.C.A. § 1101(a)(42) (Westlaw through Pub. L. No. 116-188).

<sup>43</sup> AUSTIN T. FRAGOMEN, JR., ET. AL., FRAGOMEN ON IMMIGRATION FUNDAMENTALS § 6:2 (5th ed. 2015).

<sup>44</sup> ANKER, *supra* note 38, at § 4:12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at § 4:8.

<sup>47</sup> *Id.* at § 5:1.

<sup>48</sup> RAIIO Combined Training Course, Nexus and the Protected Grounds 19 (Apr. 30, 2013), *available at* [perma.cc/N5J6-Y9AP](http://perma.cc/N5J6-Y9AP) (removed from USCIS website) (“Often, an applicant will not be able to provide direct evidence of motive, since persecutors usually do not announce their motives or explain their actions.”); *see also* Garcia-Martinez v. Ashcroft, 371 F.3d 1066, 1076 (9th Cir. 2004) (“Persecutors do not always take the time to tell their victims *all* the reasons they are being beaten, kidnapped, or killed.” (emphasis in original) (quoting Gafoor v. I.N.S., 231 F.3d 645, 650, 55 Fed. R. Evid. Serv. 1006, 177 A.L.R. Fed. 687 (9th Cir. 2000))); I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992) (“[Petitioner] objects that he cannot be expected to provide direct proof of his persecutors’ motives. We do not require that.”).

<sup>49</sup> AUSTIN T. FRAGOMEN, JR., *supra* note 43.

<sup>50</sup> *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (overruled in part on other grounds by, Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987)) (“Each of these grounds describes persecution

The definition of a refugee also includes a well-founded fear of persecution, which is the standard of proof for asylum claims. Asylum seekers have the burden of proof to demonstrate persecution in asylum proceedings and can broadly assert two different kinds of claims: past persecution and future persecution claims.<sup>51</sup> As mentioned in the Introduction, an applicant who has established a past persecution claim has a presumption of a well-founded fear of future persecution.<sup>52</sup> However, asylum officers or immigration judges can rebut the presumption if the government shows by a preponderance of the evidence that (1) there has been a fundamental change in circumstances or (2) the applicant can relocate to another part of the country and avoid future persecution.<sup>53</sup> As explained above, an applicant seeking to establish a future persecution claim must demonstrate a well-founded fear of persecution according to *Cardoza-Fonseca*, which includes a subjective and objective component.<sup>54</sup>

Applicants can meet their burden of proof through their own testimonies, especially since courts have recognized the difficulty of collecting evidence when asylum seekers are running for their lives.<sup>55</sup> Under the REAL ID Act of 2005, the testimony of an applicant may be sufficient to sustain one's burden of proof without additional corroboration if the trier-of-fact finds that the applicant's testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.<sup>56</sup> Thus, for many asylum seekers who do not have much corroborating evidence, their credibility determinations often decide the fates of their cases. The difficulty of finding corroborating evidence further highlights the importance of clarifying the evidentiary burden required by a well-founded fear of persecution.

## II. THE BIA AND CIRCUIT COURTS' MUDDLED INTERPRETATIONS OF AN OBJECTIVE, WELL-FOUNDED FEAR

This Note analyzes cases from the BIA, the Seventh Circuit, the Ninth Circuit, and the Eleventh Circuit to demonstrate how courts have chosen significantly different interpretations and methods to apply the well-founded fear standard in asylum cases. The BIA decisions show how the BIA reviews cases appealed from an Immigration Judge (IJ) and how it analyzes the "objective fear" component. The case law of the three circuit courts reveals a wide ideological spectrum and demonstrates how each circuit reviews determinations about an asylum applicant's "objective fear" very differently. The Seventh Circuit decisions showcase how a circuit that has a reputation for adopting more moderate views, at least compared to the Ninth Circuit and the Eleventh Circuit, reviews asylum

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aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." (citations omitted); ANKER, *supra* note 38, at § 5.16.

<sup>51</sup> 8 C.F.R. §§ 208.13, 1208.13.

<sup>52</sup> 8 C.F.R. §§ 208.13(b)(1), 1208.13(b)(1) ("An applicant who has been found to have established ... past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").

<sup>53</sup> 8 C.F.R. §§ 208.13(b)(1)(i), 1208.13(b)(1)(i).

<sup>54</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987).

<sup>55</sup> *Dawoud v. Gonzales*, 424 F.3d 608, 612–13 (7th Cir. 2005) (citations omitted);

<sup>56</sup> Immigration and Nationality Act § 208(b)(1)(B)(ii), 8 U.S.C.A. § 1158(b)(1)(B)(ii).

cases.<sup>57</sup> The Seventh Circuit also has a significant amount of experience reviewing immigration cases because of its jurisdiction over Chicago, which has historically been a sanctuary city for immigrants.<sup>58</sup> The Ninth Circuit decisions display how one of the most liberal circuit courts that has often blocked policies that are unfavorable to asylum seekers reviews appeals from the BIA.<sup>59</sup> The Ninth Circuit is also important because it has adjudicated the most asylum cases.<sup>60</sup> The Eleventh Circuit decisions demonstrate how a more conservative circuit, which includes three states in the “Deep South,” decides asylum cases in its jurisdiction.<sup>61</sup> In fact, the Eleventh Circuit has one of the lowest remand rates for asylum cases appealed by asylum seekers.<sup>62</sup>

Circuit courts review cases differently from the BIA because the circuit courts reviewing BIA decisions have to give deference to the factual findings.<sup>63</sup> The courts must evaluate whether the BIA’s findings of fact are supported by “substantial evidence,” which courts have held to mean what a “reasonable factfinder would have to conclude that the requisite fear of persecution existed.”<sup>64</sup> The courts review legal conclusions *de novo*, but they must apply *Chevron* deference for certain agency interpretations of statutes.<sup>65</sup> Nonetheless, comparing the logic of various circuit courts exposes the confusion that arises without a clear standard for well-founded fear and the resulting inconsistencies in evaluating the objective component. Although this case study examines only a fraction of the judicial immigration system, analyzing these circuits will demonstrate how the absence of a clear standard for objective fear has led to disparate results.

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<sup>57</sup> See Pratt School of Information, *Circuit Court Map*, VISUAL FIRST AMENDMENT, <http://visualfa.org/circuit-court-map/> (last visited Dec. 19, 2019).

<sup>58</sup> See Mauricio Peña, *How Does Chicago’s Sanctuary Law Stack Up Against Other Cities*, CHIC. MAGAZINE (July 17, 2017), <https://www.chicagogamag.com/city-life/July-2017/Chicagos-Welcoming-City-Ordinance/>.

<sup>59</sup> See Ross Todd, *9th Circuit Upholds 2 Injunctions Blocking Trump Asylum Changes*, LAW.COM (Feb. 28, 2020), <https://www.law.com/therecorder/2020/02/28/ninth-circuit-upholds-nationwide-injunction-blocking-trump-asylum-changes/>; See Pratt School of Information, *supra* note 57. The U.S. Department of Justice’s statistics also showcase that cities in the Ninth Circuit have some of the lowest denial rates. See U.S. DEP’T OF JUST. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, STATISTICS YEARBOOK FISCAL YEAR 2017 at 28, <https://www.justice.gov/eoir/page/file/1107056/download>.

<sup>60</sup> Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATIONS AND PROPOSALS FOR REFORM 82 (2009); see also U.S. DEP’T OF JUST. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 59, at 9.

<sup>61</sup> See Suzanne Monyak, *Murdered Sisters Not Enough To Win Asylum*, 11th Cir. Says, LAW360, (Jan. 23, 2020, 7:05 PM), <https://www.law360.com/articles/1237065/murdered-sisters-not-enough-to-win-asylum-11th-circ-says>; See Pratt School of Information, *supra* note 57.

<sup>62</sup> RAMJI-NOGALES, *supra* note 60, at 67.

<sup>63</sup> INS v. Elias-Zacarias, 112 S. Ct. 812, 815 (1992).

<sup>64</sup> *Id.*; Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001).

<sup>65</sup> See Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995). The *Chevron* doctrine provides a framework for when courts must defer to agency interpretations of statutes. First, a court must examine whether Congress has clearly spoken on an issue and if the agency’s interpretation follows Congress’s intent. Second, if the statute is silent or ambiguous on an issue, then the court must decide if the agency’s interpretation is based on a permissible interpretation of the statute. An agency has the power to interpret statutes if Congress explicitly left a gap for the agency to fill. In this case, the agency’s interpretation is subject to deference provided that it is not arbitrary, capricious, or manifestly contrary to the statute. If Congress implicitly left a gap for the agency to fill, then courts must defer to the agency’s interpretation as long as the interpretation is reasonable. 6 Administrative Law § 51.01 (2020).

### A. Board of Immigration Appeals Decisions

Soon after the Supreme Court decided *INS v. Cardoza-Fonseca*, the BIA sought to further clarify how a well-founded fear of persecution could be applied in asylum cases. In 1987, in *Matter of Mogharrabi*, the BIA concluded that the asylum seeker Mogharrabi would have a well-founded fear of persecution if he were returned to Iran.<sup>66</sup> The BIA adopted the Ninth Circuit's view that the objective component requires an asylum seeker to use "credible, direct, and specific evidence" to support a reasonable fear of persecution.<sup>67</sup> As an initial matter, the BIA assessed Mogharrabi's credibility and found that the record supported that he was credible, which fulfilled the evidentiary burden to show he had a well-founded fear.<sup>68</sup> The BIA then provided four factors to help define a well-founded fear: (1) the claimant possesses a belief or characteristic the persecutor seeks to overcome, (2) the persecutor is already aware or there is a reasonable possibility the persecutor could become aware that the claimant possesses this belief or characteristic, (3) the persecutor has the capability of punishing the claimant, and (4) the persecutor has the inclination to punish the claimant.<sup>69</sup> If the claimant fulfills all four factors, then an asylum seeker likely has a well-founded fear of persecution.<sup>70</sup>

The four-factor test, although promising, still has the effect of forcing asylum seekers to repeat the same information that they would already have to present to prove other elements of being a refugee.<sup>71</sup> The first factor of whether the applicant has a belief or characteristic the persecutor seeks to overcome is redundant because asylum seekers have to already prove separately that they are being persecuted "on account of" a "race, religion, nationality, membership in a particular social group, or political opinion."<sup>72</sup> Although the remaining factors also attempt to clarify the evidentiary burden of the well-founded fear standard, the last three factors have a repetitive effect because they also address the "on account of" nexus that an asylum seeker has to prove anyway.<sup>73</sup> Thus, due to the structure of the well-founded fear analysis, the asylum applicant must prove similar components twice when trying to prove that she has a well-founded fear and then prove the general statutory elements of being a refugee.

Furthermore, despite the BIA's efforts to clarify the well-founded fear standard in *Matter of Mogharrabi*, the BIA failed to delineate what probability of persecution would satisfy the objective component of the well-founded fear analysis.<sup>74</sup> The BIA here adopted the Fifth Circuit position that a person has established a well-founded fear if "a reasonable person in his circumstances would fear persecution."<sup>75</sup> The BIA further elaborated that an applicant has established a well-founded fear when a "reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable."<sup>76</sup> However, the BIA did not mention the 10% chance of persecution standard

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<sup>66</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 448–49 (BIA 1987).

<sup>67</sup> *Id.* at 444.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 446.

<sup>70</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987).

<sup>71</sup> *Id.*

<sup>72</sup> Immigration and Nationality Act 101(a)(42), 8 U.S.C. § 1101(a)(42); *Mogharrabi*, 19 I.&N. Dec. at 446.

<sup>73</sup> *Mogharrabi*, 19 I.&N. Dec. at 446.

<sup>74</sup> *Id.* at 445.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

derived from the Supreme Court's *Cardoza-Fonseca* hypothetical example, or any numerical probability, as a way to frame the evidentiary burden.<sup>77</sup>

Indeed, the *Mogharrabi* factors have arguably only led to more confusion in how to analyze whether an applicant has a well-founded fear because the factors are not applied consistently in BIA cases or in the circuit courts. The BIA suggests that adjudicators should use these factors moving forward to clarify the analysis regarding a well-founded fear.<sup>78</sup> A January 2019 United States Citizenship and Immigration Services Officer Training manual also recommended using these four factors.<sup>79</sup> However, many of the circuit court cases addressing the objective component of an asylum seeker's fear often do not mention the *Mogharrabi* factors, and the proper use of the objective standard still remains unclear.<sup>80</sup>

In 1997, ten years after *Mogharrabi* was decided, the BIA case *In re C-A-L* showcased the limited and confusing applicability that *Matter of Mogharrabi* has had on future adjudications.<sup>81</sup> In this case, the BIA denied the applicant's appeal from an IJ's decision that denied his application for asylum and withholding of removal.<sup>82</sup> The BIA cited *Mogharrabi* to explain the well-founded fear standard, which is established if the asylum applicant shows "that a 'reasonable person' in his circumstances would fear persecution upon return to his native country."<sup>83</sup> Yet the BIA failed to mention any of the *Mogharrabi* factors.<sup>84</sup> This absence shows the limited applicability of the *Mogharrabi* standard and demonstrates how the well-founded fear standard may be applied differently even within the BIA itself. *Mogharrabi*'s failure to delineate the applicant's burden of proof also permeates this BIA decision. Although the majority opinion would deny applying a higher burden of proof, the dissenting opinion points out that the majority seemed to have denied the asylum seeker's application because it applied a burden of proof that is higher than the one in ten chance of suffering persecution standard that the Supreme Court set forth.<sup>85</sup> Thus, *In re C-A-L* demonstrates how the ambiguity regarding what probability would satisfy the well-founded fear standard allows the BIA to inconsistently apply the well-founded fear standard in each case that it adjudicates.

### B. Seventh Circuit Decisions

The Seventh Circuit also applies the objective component of a well-founded fear on its own terms by not using the BIA's *Mogharrabi* framework and generally defining an objectively reasonable fear as "a reasonable possibility of suffering such persecution."<sup>86</sup> In *Bereza v. INS*, the Seventh Circuit reviewed the objective component of Bereza's future persecution claim and concluded that substantial evidence supported the BIA's decision that Bereza was not entitled to asylum.<sup>87</sup> Bereza claimed that he would be persecuted based

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<sup>77</sup> *Id.*

<sup>78</sup> See RAIIO Combined Training Course: *Well-Founded Fear*, RAIIO (December 20, 2019) [https://www.uscis.gov/sites/default/files/files/nativedocuments/Well\\_Founded\\_Fear\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Well_Founded_Fear_LP_RAIO.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> *Infra* Part II(B), Part II(C), Part II(D).

<sup>81</sup> *In re C-A-L*, 211 I.&N. Dec. 754 (BIA 1997).

<sup>82</sup> *Id.* at 756.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 754.

<sup>85</sup> *Id.* at 767.

<sup>86</sup> *Bereza v. INS*, 115 F.3d 468, 474 (7th Cir. 1997) (quoting C.F.R. § 208.13(b)(2)).

<sup>87</sup> *Id.*

on his political opinion.<sup>88</sup> He presented evidence from his past, explaining that his mother was an anti-Stalinist political prisoner, that he participated in political protests in Ukraine, and that he experienced backlash and discrimination throughout his life.<sup>89</sup>

The Seventh Circuit did not explain which part of Bereza's asylum claim failed the *Mogharrabi* factors as a framework. Instead, it provided a list of evidence that countered Bereza's future persecution claim.<sup>90</sup> The court explained that the Soviet Union was dissolved, and that the Communist party was illegal.<sup>91</sup> The court also referenced a United States State Department report that noted there was little likelihood that the current Ukrainian security forces would mistreat individuals because of their support for Ukrainian independence at some time in the past, even though the security forces were made up of some of the same members as before Ukraine's independence.<sup>92</sup> Here, the Seventh Circuit's analysis is problematic because the court essentially attacked the nexus element of the asylum seeker's claim without stating that the nexus was the element that the asylum seeker had failed to prove. Thus, analyzing whether someone has an objective, well-founded fear of persecution has led to an ineffective analysis in which the court not only re-analyzes the elements of being a refugee but also presents all the weak evidence of an asylum seeker's claim to justify a denial of an application, without specifying which part of the definition of a refugee the asylum seeker has failed to prove.

Regarding the evidentiary burden, the Seventh Circuit defined an objectively reasonable fear as "a reasonable possibility of actually suffering such persecution."<sup>93</sup> In *Bereza*, the Seventh Circuit also addressed the reasonable possibility of suffering persecution but did not elucidate what threshold a petitioner would have to reach in order to show a reasonable possibility.<sup>94</sup> Again, there is no mention of a 10% possibility of persecution that the Supreme Court suggested in its hypothetical or any kind of percentage that would guide the court in determining the asylum seeker's burden of proof.

In a more recent case, the Seventh Circuit disagreed with the BIA's holding that an asylum seeker did not have an objective basis for her asylum claim, and the Seventh Circuit pointed to how the BIA failed to engage in a robust analysis of the asylum seeker's evidence.<sup>95</sup> In *Oyekunle v. Gonzales*, a Nigerian woman applied for asylum because she feared that her husband and father-in-law would force her to undergo female circumcision if she was returned to Nigeria.<sup>96</sup> Her husband protected her against the procedure at first, but he changed his mind when his father refused to let him inherit his father's farm if he did not circumcise his wife.<sup>97</sup> The BIA relied on a "country report, [a] lawyer's letter, and the husband's apology" to conclude that her fear was not well-founded and had no objective basis.<sup>98</sup>

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<sup>88</sup> *Id.* at 476.

<sup>89</sup> *Id.* at 470–71.

<sup>90</sup> *See Bereza*, 115 F.3d. at 474.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 474 (quoting 8 C.F.R. § 208.13(b)(2)).

<sup>94</sup> *See Bereza*, 115 F.3d at 474.

<sup>95</sup> *Oyekunle v. Gonzales*, 498 F.3d 715, 717 (7th Cir. 2007).

<sup>96</sup> *Id.* at 716.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 716–17.

Interestingly, Circuit Judge Posner, who wrote the opinion for the court, did not frame the well-founded fear analysis in terms of the subjective and objective component.<sup>99</sup> Instead, Posner analyzed whether Oyekunle had a well-founded fear by scrutinizing the evidence the BIA chose to use to support its decision.<sup>100</sup> The Seventh Circuit ultimately determined that Oyekunle's evidence was not inconsistent with her claim of a well-founded fear.<sup>101</sup> Posner commented on how the country report which the BIA relied on had little bearing on the case.<sup>102</sup> The report showed that the Nigerian region where Oyekunle's father-in-law lived had outlawed female circumcision, but the findings did not negate the fact that her father-in-law still wanted to and could circumcise her in another part of Nigeria.<sup>103</sup> In addition, the BIA used the claimant's lawyer's letter from three years prior telling the petitioner to not return to Nigeria until the situation "cooled down" to argue much time had passed and the circumstances in her region may be better.<sup>104</sup> However, Posner noted that the BIA was speculating, and the lawyer's comments from three years prior did not make the asylum seeker's claim more or less probable.<sup>105</sup> Finally, Posner emphasized that the husband's letter of apology did not actually indicate whether the husband would protect his wife if she returned or would succumb to his father's wishes in order to receive the farm as an inheritance.<sup>106</sup> Posner explained that these documents did not discredit the asylum seeker's own testimony, and thus, all of her evidence either supported or was at least consistent with her fear of persecution.<sup>107</sup> Judge Posner's opinion demonstrates how the lack of clarity and guidance regarding the application of the objective component can lead the BIA to insufficiently analyze asylum seekers' claims. Specifically, Posner exposes how the BIA uses one-sided evidence to justify its decision without evaluating the quality of the evidence itself.

Judge Posner also commented that the objective component the BIA relied on is basically analogous to the showing of a well-founded fear. He commented that "requiring that an 'objective basis' be shown for a 'well-founded fear' is redundant; a well-founded, as distinct from a groundless, fear has by definition an objective basis."<sup>108</sup> Posner's comments expose how the objective component has become a separate analysis, even when the point is to meet a threshold in which one has a well-founded fear that is grounded in reality. Thus, Posner writes that "[t]he Board should resist the urge to multiply entities" of analysis, which serve as superfluous elements for asylum seekers to prove and muddles the analysis for future persecution claims.<sup>109</sup> Although Posner does not discuss the fact that the objective component should refer to a certain possibility of facing persecution, his

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<sup>99</sup> Judge Posner only referred to the subjective fear of persecution to say that "the Board did not question the accuracy of her testimony, holding only that it did not demonstrate an objective, as distinct from her subjective, fear of persecution." *Oyekunle*, 498 F.3d at 716. In addition, Judge Posner only referred to the objective component to comment upon how the BIA used the language "objective basis" to analyze the asylum seeker's claim. *See id.* at 717.

<sup>100</sup> *Id.* at 717.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 716.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 716–17.

<sup>107</sup> *Id.* at 718.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

statement captures how the objective analysis has failed to fulfill its intended purpose and taken a life of its own.

The absence of discussion regarding the 10% chance of persecution in *Bereza* and *Oyekunle* is in stark contrast to how another Seventh Circuit case called *Kllokoqi v. Gonzales* articulated its legal standards.<sup>110</sup> The court in *Kllokoqi*, which decided the case two years before *Oyekunle*, remanded the asylum claim because the IJ failed to fully consider all Kllokoqi's arguments.<sup>111</sup> Here, the court defined a well-founded fear as a "reasonable possibility of future persecution," but it explicitly stated that "the applicant may establish a reasonable possibility of future persecution by showing that there is even a 10 percent chance that he will be shot, tortured, or otherwise persecuted."<sup>112</sup> Thus, these decisions showcase how the ambiguity of the well-founded fear standard continues to impact courts like the Seventh Circuit and causes courts to inconsistently define and apply the well-founded fear standard, even within their own jurisdictions.

### C. Ninth Circuit Decisions

Similarly to the Seventh Circuit, the Ninth Circuit explained that a well-founded fear meant a "reasonable possibility" of persecution.<sup>113</sup> However, the Ninth Circuit consistently mentions that a 10% chance of persecution is enough to establish a well-founded fear.<sup>114</sup> In *Melkonian v. Ashcroft*, the Ninth Circuit reviewed whether the asylum seeker's subjective fear of future persecution was objectively reasonable, ultimately finding it was.<sup>115</sup> The asylum seeker was an ethnic Armenian and Christian who lived in Abkhazia, Georgia.<sup>116</sup> At the time, ethnic-Abkhaz Separatists were engaging in ethnic cleansing.<sup>117</sup> He fled across the Russian border to escape kidnaping by Separatists.<sup>118</sup> When the court adjudicated Melkonian's future persecution claim, it stated that the proper inquiry in this asylum case was whether Melkonian's refusal to return to Abkhazia was based on a credible subjective fear of persecution by the Abkhaz, whether the persecution he feared was on account of a statutorily protected ground, and whether the fear was objectively reasonable.<sup>119</sup>

<sup>110</sup> See *Oyekunle v. Gonzales*, 498 F.3d 715, 716–18 (7th Cir. 2007); *Kllokoqi v. Gonzales*, 439 F.3d 336, 344–45 (7th Cir. 2005).

<sup>111</sup> *Kllokoqi*, 439 F.3d at 344.

<sup>112</sup> *Id.* at 345.

<sup>113</sup> See *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001); *Bereza v. INS*, 115 F.3d 468, 474 (7th Cir. 1997) (quoting C.F.R. § 208.13(b)(2)).

<sup>114</sup> See *Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009) ("Because asylum is a discretionary form of relief, the standard for objective reasonableness is fairly low: Even a ten percent chance of future persecution may establish a well-founded fear."); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1212 (9th Cir. 2004) ("Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear."); *Melkonian v. Ashcroft*, 320 F.3d at 1069 ("To satisfy the objective component of the well-founded fear test, an applicant need only produce credible evidence that persecution is a 'reasonable possibility.' (ten percent probability sufficient).") (citations omitted); *Al-Harbi v. INS*, 242 F.3d at 888 ("A well-founded fear does not, however, require proof that persecution is more likely than not; even a ten percent chance of persecution may establish a well-founded fear.") (citations omitted).

<sup>115</sup> *Melkonian*, 320 F.3d at 1069.

<sup>116</sup> *Id.* at 1064.

<sup>117</sup> *Id.* at 1065.

<sup>118</sup> *Id.* at 1064.

<sup>119</sup> *Id.* at 1068.

When the court analyzed the “objectively reasonable” component, it proceeded to use the reasoning that it should be using to establish the applicable protected classes and the nexus factor (the causation between the persecution and the protected grounds). The court discussed how the Separatists not only persecuted Melkonian because of his failure to fight for them but also because he was part of various other protected classes.<sup>120</sup> The court concluded that he was persecuted because of his “prior support for the Georgians (political opinion), and because he [was] an Armenian (ethnicity) and a Christian (religion).”<sup>121</sup> Thus, the court was not analyzing whether Melkonian’s fear was well-founded; the court was evaluating whether there was a nexus between the protected classes and the persecution. Here, the court’s analysis of the objective component of a “well-founded fear” improperly analyzes the facts underlying the substantive elements instead of confirming or denying that an applicant faced a certain possibility of future persecution based on the established facts.

Interestingly, in *Melkonian*, the Ninth Circuit explicitly mentioned that a 10% probability of persecution would be enough.<sup>122</sup> The court stated that to “satisfy the objective component of the well-founded fear test, an applicant need only produce credible evidence that persecution is a “reasonable possibility” and cited to *INS v. Cardoza-Fonseca* to show that a 10% probability would be “sufficient.”<sup>123</sup> It also noted that a way to support one’s burden of proof is through credible, direct, and specific evidence in the record.<sup>124</sup> In the end, the court used the 10% probability standard to say that the “evidence compels the conclusion that Melkonian has more than met his burden.”<sup>125</sup>

Another Ninth Circuit case similarly addressed the objective component of the asylum seeker’s case by repeating points that asylum seekers already have to show to receive refugee status. In *Al-Harbi v. INS*, the Ninth Circuit held that the asylum seeker fulfilled the objective component of his asylum claim in spite of the fact that he had an adverse credibility determination by the IJ and the BIA.<sup>126</sup> Al-Harbi was a Shia’a Muslim from Iraq who deserted the Iraqi army, rejoined the army later on, and later protested the presidential election in which Hussein was the only candidate.<sup>127</sup> Al-Harbi’s friends who aided him in passing anti-government flyers were arrested, and Al-Harbi eventually fled to Guam.<sup>128</sup>

Because the Ninth Circuit treats the objective component as a separate element that asylum seekers must establish, the objective part of the analysis proves to be a reiteration of what asylum seekers have already tried to demonstrate in different parts of their cases. For example, in *Al-Harbi*, the court applied the well-founded fear standard to each of the three elements needed to prove that one is a refugee, although the court did not explicitly say so. First, the court concluded that substantial evidence supported the claim that the Iraqi government would consider the petitioner a dissident because of his association with the American airlift of Iraqi dissidents, and he would be considered a dissident for this

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<sup>120</sup> *Id.* at 1069.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (citation omitted).

<sup>124</sup> *Id.* at 1065.

<sup>125</sup> *Id.* at 1069.

<sup>126</sup> *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001).

<sup>127</sup> *Id.* at 885.

<sup>128</sup> *Id.*

reason, thereby addressing whether the asylum seeker is in a protected group.<sup>129</sup> Second, the court determined that the asylum seeker would likely face harms that result in the death penalty, thus establishing that the harms did rise to the level of persecution.<sup>130</sup> Third, the court discussed whether Iraq would regard all the evacuees as traitors and persecute them, which appears to be analyzing whether there is a nexus between the persecution and the imputed political opinion.<sup>131</sup> Although the court structured its analysis of an objective fear of persecution in an organized manner, the petitioner essentially had to prove the elements of being a refugee twice because he not only had to prove the three elements of being a refugee, but also had to address the same points regarding level of persecution, statutorily protected groups, and nexus in discussing his objectively reasonable fear of persecution.

However, the court in *Al-Harbi* properly interpreted the objective component as a way to determine the *probability* of persecution, similarly to how the court analyzed *Melkonian*.<sup>132</sup> Rather than listing all the evidence in favor or against the asylum seeker in a haphazard fashion, the court focused on how the evidence made the possibility of persecution more or less likely.<sup>133</sup> The Ninth Circuit stated that “the principal question, then, is whether there is sufficient likelihood that Petitioner would be persecuted for political beliefs that his persecutors would impute to him.”<sup>134</sup> Although the “sufficient likelihood” language in this case is different from the language the court used in *Melkonian*, both cases still used the framework of whether the petitioner’s fear was “objectively reasonable” and whether there was a “reasonable possibility” of persecution.<sup>135</sup> The court also stated that it must evaluate the “likely treatment upon deportation to Iraq” and the “likely possibility of torture and/or execution for his involvement in the U. S.-led operation,” which correctly emphasized that the courts should focus on the *possibility* of facing persecution on account of a protected basis.<sup>136</sup>

The Ninth Circuit set forth an evidentiary burden in *Al-Harbi* that clarified the probability of persecution that the asylum seeker needs to establish.<sup>137</sup> As in other Ninth Circuit decisions, the court stated that it can determine whether an asylum seeker has satisfied the requisite burden of proof by evaluating whether the petitioner has offered “credible, direct, and specific evidence.”<sup>138</sup> This case once again affirmed that “even a ten-percent chance of persecution may establish a well-founded fear.”<sup>139</sup> The Ninth Circuit followed the spirit of the Supreme Court’s ruling in *Cardoza-Fonseca*’s and the Supreme Court’s statements that it is enough if there is a “reasonable possibility” of persecution.<sup>140</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 892.

<sup>131</sup> *Id.* at 893.

<sup>132</sup> See *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001).

<sup>133</sup> See *Al-Harbi*, 242 F.3d at 894.

<sup>134</sup> *Id.* at 891.

<sup>135</sup> See *Melkonian*, 320 F.3d at 1069; *Al-Harbi*, 242 F.3d at 890.

<sup>136</sup> *Al-Harbi*, 242 F.3d at 892, 94.

<sup>137</sup> *Id.* at 891.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 888.

<sup>140</sup> *Id.*

#### D. Eleventh Circuit Decisions

The Eleventh Circuit analyzes the “objective” component differently from the other circuits by stating that asylum seekers have an objectively reasonable fear when they have a “good reason to fear future persecution” and by declining to use a percentage to conceptualize a well-founded fear. In *Usmanov v. United States AG*, the Eleventh Circuit held that substantial evidence supported the BIA’s finding that Usmanov’s fear of persecution was not objectively reasonable and denied Usmanov’s petition for review of the decision.<sup>141</sup> In Uzbekistan, Usmanov gave a TV interview criticizing the government healthcare, was fired from his job, interrogated for hours, beaten, and prevented from working in the medical profession.<sup>142</sup> The Mahalla, neighborhood committees used by the Uzbek government to control the community, would often monitor and visit him.<sup>143</sup> The main question was whether Usmanov had a well-founded fear of future persecution, and specifically, whether his fear of persecution based on imputed political opinion was objectively reasonable.<sup>144</sup>

When the Eleventh Circuit held that substantial evidence supported the BIA’s conclusions, the court listed all the evidence that weighed against Usmanov in no particular order and inappropriately used the objective component to address other elements such as level of persecution, nexus.<sup>145</sup> For example, the court pointed to how Usmanov did not have an “objectively reasonable” fear of persecution but a fear of “mere harassment and intimidation” because the Mahalla visited and asked him questions but did not “threaten or harm him.”<sup>146</sup> By determining in the objectively well-founded fear analysis that Usmanov’s claim involved mere harassment and intimidation, the court concluded that the events he experienced did not rise to the level of persecution without clarifying that the court was analyzing this aspect of his case.<sup>147</sup> The court also referred to how even though Usmanov was physically assaulted during the two to three hour interrogation and was being monitored by the Mahalla, he remained in Uzbekistan for eight years and even returned to Uzbekistan for two months.<sup>148</sup> The court used his extended stay in Uzbekistan after an incident to point to how his fear is not objectively reasonable. However, what the court doubted was whether Usmanov *actually* faced suffering on account of a protected factor (nexus) when Usmanov’s imputed political opinion did not prevent him from living in Uzbekistan for a prolonged period of time.<sup>149</sup> The court also questioned if the government was persecuting Usmanov on account of his imputed political opinion if Usmanov testified saying “the motivation to arrest him would be to extort money from him because the police would assume he was wealthy, having lived in a foreign country.”<sup>150</sup> Here, the court assessed whether Usmanov belongs in a statutorily protected group, not whether his fear is well-founded.

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<sup>141</sup> *Usmanov v. U.S. Attorney Gen.*, 577 Fed. Appx. 920, 921, 925 (11th Cir. 2014).

<sup>142</sup> *Id.* at 922.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 921, 923.

<sup>145</sup> *See Usmanov*, 577 Fed. Appx. at 923.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *Id.* at 923–24

<sup>149</sup> *Id.* at 923.

<sup>150</sup> *Id.* at 924.

The court treated “objectively reasonable fear” as just another analysis of all the components in the definition of a refugee without even identifying which components it was analyzing. The court should have analyzed each of the elements of being a refugee separately, not in the analysis regarding an “objectively reasonable” fear, if these elements truly were points of contention. Instead, the court engaged in a jumbled analysis that discussed other elements of proving one’s refugee status all under the objective component. Regardless of whether the court reached the correct decision, the court failed to effectively illustrate the meaning of an “objectively reasonable” fear, the very basis upon which the court ultimately denied the petition.

In addition, the Eleventh Circuit mentioned the language of a “reasonable possibility” but did not explain what that meant or how this was different from “more likely than not.”<sup>151</sup> The court stated that the evidentiary burden is having a “subjective and objective fear,” which means that the asylum seeker has to have a “good reason to fear future persecution.”<sup>152</sup> Again, the court reiterated that the asylum seeker must have “specific, detailed facts showing a *good reason* to fear that she will be *singled out* for persecution on account of the statutorily protected factor.”<sup>153</sup> This is drastically different from the language that the Seventh Circuit and Ninth Circuit employed and appears to be a stricter standard than the ones that the other courts used. The Seventh Circuit referred to “a reasonable possibility of actually suffering such persecution” and the Ninth Circuit pointed to how a 10% chance of persecution is sufficient to establish a well-founded fear.<sup>154</sup> The Eleventh Circuit’s language of “good reason to fear that he or she will be singled out for persecution” suggests a higher burden of proof than the Seventh and Ninth Circuit’s interpretations since a “good reason” seems to require more justification than a “reasonable possibility” or a 10% chance of persecution.

The court in *Usmanov* cited *Najjar v. Ashcroft* to find support for its use of “good reason to fear” language to interpret the meaning of an objectively reasonable fear.<sup>155</sup> In *Najjar v. Ashcroft*, a Palestinian Muslim couple were denied asylum because they failed to demonstrate a well-founded fear of persecution on account of any statutory factor that was supported by substantial evidence.<sup>156</sup> In *Najjar*, the court stated that well-founded fear means having a “good reason to fear” persecution.<sup>157</sup> Significantly, the Eleventh Circuit in *Najjar* cited to *Mgoian v. INS*, a Ninth Circuit case, in order to draw authority for its “good reason to fear” language.<sup>158</sup> Yet, the Ninth Circuit directly stated in the *Mgoian* opinion that “the question is whether Mgoian presented sufficient evidence to support a finding of a *reasonable fear of persecution in a similarly situated applicant*.”<sup>159</sup> Furthermore, as seen in the previous cases, the Ninth Circuit has not referenced this language of “good fear” very often in its own cases. Thus, delving into what the circuit courts cite to justify their

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<sup>151</sup> See *id.* at 923.

<sup>152</sup> *Id.* at 923.

<sup>153</sup> *Id.* (first emphasis added) (quoting *Forgue v. U.S. Attorney Gen.*, 401 F.3d 1282, 1286 (11th Cir. 2005)).

<sup>154</sup> See *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003); *Bereza v. INS*, 115 F.3d 468, 474 (7th Cir. 1997) (quoting C.F.R. § 208.13(b)(2)).

<sup>155</sup> *Usmanov*, 577 Fed. Appx. at 923.

<sup>156</sup> *Najjar v. Ashcroft*, 257 F.3d 1262, 1270, 1304 (11th Cir. 2001).

<sup>157</sup> *Id.* at 1289.

<sup>158</sup> *Id.*

<sup>159</sup> *Mgoian v. INS.*, 184 F.3d 1029, 1035 (9th Cir. 1999) (emphasis added).

differing standards not only shows how courts analyze objectively reasonable fear in strikingly different ways but also how the circuit courts are prone to use the standard that they desire depending on the case.

In the end, the Eleventh Circuit fails to mention what the BIA and other circuit courts have stated: an applicant has a well-founded fear of persecution if a “reasonable person in [his or] her circumstances would fear persecution if [he or] she were to be returned to [his or] her native country.”<sup>160</sup> The court also fails to emphasize that an objectively reasonable fear of persecution must be “in light of the circumstances” of the asylum seeker.<sup>161</sup> Finally, the Eleventh Circuit declines to assert that a 10% possibility of persecution would be sufficient to demonstrate a well-founded fear of persecution.

In fact, the Eleventh Circuit's asylum cases serve as an example of how the circuit courts are susceptible to using a standard that is higher than the standard that it should be imposing according to *Cardoza-Fonseca*.<sup>162</sup> In *Sepulveda v. U.S. Atty. General*, the petitioner argued that the IJ applied a heightened standard of “more likely than not,” thus violating the Supreme Court's decision in *INS v. Cardoza-Fonseca*.<sup>163</sup> The Eleventh Circuit simply stated that there was no indication in the record the IJ applied an incorrect standard.<sup>164</sup> The court pointed to how the IJ used the language of “reasonable possibility” rather than the “more likely than not” standard.<sup>165</sup> However, the court did not review what the IJ actually considered in terms of evidence but restated the standard that the IJ supposedly used.<sup>166</sup>

For example, the court in *Sepulveda* did not examine whether the IJ actually imposed a higher burden of proof by demanding more evidence besides the asylum seeker's own accounts of threatening phone calls and death threats and a bomb being placed in her mailbox.<sup>167</sup> The court did not explain at what point the evidence that the IJ demands would violate the *Cardoza-Fonseca* standard and require the asylum seeker to prove that her fear of persecution would more likely than not occur if she returned to Colombia. Part of this lack of specificity is due to the fact that the BIA and the various courts have not come to a conclusion about what probability of persecution an asylum seeker has to establish. The vagueness in the standard allows for such claims about the courts using an improper standard to be brushed aside without much scrutiny.

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<sup>160</sup> *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986). *See also*, *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986); *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

<sup>161</sup> *See id.*

<sup>162</sup> *See Sepulveda v. U.S. Atty. Gen.*, 401 F.3d 1226, 1232 (11th Cir. 2005).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

### III. THE NEGATIVE CONSEQUENCES OF A CONVOLUTED OBJECTIVELY REASONABLE WELL-FOUNDED FEAR

#### A. Challenges for Practitioners

First, the confusing nature of the objective analysis has led to inefficiency for attorneys practicing asylum law.<sup>168</sup> Because the well-founded fear analysis is now split into the two components of a subjective and objective fear, courts have been using the objective component to evaluate all of the asylum seeker's evidence. Because the well-founded fear analysis has become a separate, substantive analysis that is different from proving persecution on account of a nexus factor, attorneys have to use the same evidence in order to establish that asylum seekers have a reasonably objective fear for the well-founded fear analysis *and* separately prove persecution, belonging in a protected class, and the nexus between the two elements.<sup>169</sup> The analysis becomes repetitive because the same evidence is advanced to prove two very similar elements. Furthermore, the vagueness of the well-founded fear standard, and therefore the objective component, has made it difficult for practitioners to know what evidence they must present in their briefs. Practitioners face adverse findings when courts implicitly use a standard that is different from the ones the practitioners are applying, or the courts impermissibly use a standard that violates the more generous standard provided in *Cardoza-Fonseca*.

#### B. Increasing the Likelihood of Bias to Affect Decisions

In addition, failing to clarify the objective fear standard can lead asylum officers and other judges to rely more heavily upon their own biases and personal inclinations rather than a straightforward legal analysis. *Cardoza-Fonseca* left behind a great amount of room for inconsistent proceedings. At most, the more generous evidentiary standard would mean that adjudicators should consider asylum seekers' home country conditions and their state of mind more in asylum cases.<sup>170</sup> However, because of the confusion of how to properly apply the well-founded fear standard, immigration courts, the BIA, and circuit courts are likely to continue to defer to State Department opinions and BIA decisions that often are adversarial towards asylum seekers.<sup>171</sup> This is detrimental in proceedings where the denial of an application could mean condemning a person to death.

The lack of clarity regarding the well-founded fear standard makes asylum seekers even more vulnerable to the implicit biases of immigration judges.<sup>172</sup> They face more obstacles in engaging in meticulous, thoughtful analysis due to their high caseloads, and often are plagued with low motivation resulting from the high levels of stress and burnout.<sup>173</sup> Moreover, the cases they have to adjudicate are legally and factually complex cases, and less experienced judges may unknowingly rely more on mental shortcuts and

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<sup>168</sup> I became aware of this issue when I talked to my clinical professor who is in charge of the Immigration Clinic at Northwestern Pritzker School of Law. Confusion regarding the Supreme Court's interpretation of the "well-founded fear" standard has created redundancies in the legal analysis for asylum cases.

<sup>169</sup> *Supra* Part II.

<sup>170</sup> Anthony Asuncion, Note, *INS v. Cardoza-Fonseca: Establishment of A More Liberal Asylum Standard.*, 37 AM. U.L. REV. 915, 945.

<sup>171</sup> *Id.* at 946.

<sup>172</sup> Fatma E. Marouf, *Crossing The Border: The Future Of Immigration Law and Its Impact On Lawyers: Implicit Bias and Immigration Courts*, 45 New Eng. L. Rev. 417, 418 (2011).

<sup>173</sup> *Id.* at 431–36.

biases rather than proper application of the law.<sup>174</sup> Yet, their decisions hold a lot of power as they are the initial factfinders, and their decisions receive limited review by BIA and the federal court of appeals.<sup>175</sup>

Research confirms that officers and judges are prone to rely on their previous preconceptions, and the lack of clear and consistent standards in asylum proceedings does not ameliorate this dangerous reality.<sup>176</sup> The statistics regarding how asylum officers and judges adjudicate their claims based on gender, previous work experience, and other factors show that the judges are already prone to decide based on their own biases and prejudices.<sup>177</sup> Clear interpretations with precise language would make judges more accountable by forcing them to explain their justifications in a more coherent way and encouraging them to base their decisions on legal standards rather than their own prejudices. The authors of *Refugee Roulette: Disparities in Asylum Adjudication* aptly express how “particularly discomfiting” it is to know that the outcome of a case is strongly influenced by an identity or attitude of the officer or judge when an erroneously denied application will almost always mean being deported back to a country where the person’s life is in danger.<sup>178</sup> Thus, the high stakes in asylum cases mandates a change that will allow for more fair and consistent proceedings.

#### IV. RECOMMENDED CHANGES TO THE WELL-FOUNDED FEAR OF PERSECUTION ANALYSIS

Although the Supreme Court wanted to clarify the meaning of well-founded fear in *Cardoza-Fonseca*, the BIA and the circuit courts have used the Supreme Court’s observations regarding a subjective and objective component in a well-founded fear and transformed it into a separate convoluted analysis in future persecution claims.<sup>179</sup> The unnecessarily elaborate analysis has not only led to inconsistent proceedings within the BIA and the circuit courts but also created additional burdens for asylum seekers who have to proffer the same kind of evidence multiple times in their asylum application. In addition, some courts may still reject applications with any objective evidence that counters an asylum seeker’s claim and find a lack of a well-founded fear, even though some courts interpret a well-founded fear as a 10% chance of persecution.<sup>180</sup>

Courts should stop using the subjective language to interpret the statutory language of a well-founded fear because an asylum seeker’s subjective fear should be presumed if

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<sup>174</sup> *Id.* at 437.

<sup>175</sup> *Id.* at 440.

<sup>176</sup> See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. R., 265 (2010).

<sup>177</sup> *Id.* The article provided the following data: female judges granted asylum 53.8% of the time while male judges granted asylum 37.3% of the time. *Id.* at 342. Judges’ previous work experience also seemed to affect how they adjudicated asylum cases. *Id.* at 346. A judge that had done no work for INS/DHS granted asylum 48.2% of the time, but those who had 11 or more years of experience with these agencies only granted asylum 31.3% of the time. *Id.* The research also showed that those who had government experience (minus INS or DHS experience) were granted asylum at a rate of 39.6%, and those who had no government experience granted asylum at a rate of 47.1% (a difference of 19%). *Id.* at 348. Those with non-profit organizations granted asylum 55.4% of the time, and those with no NPO experience granted asylum 41.4% of the time. *Id.* at 346.

<sup>178</sup> *Id.* at 302.

<sup>179</sup> *Supra* Part II.

<sup>180</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

the person submits an application. This component adds nothing substantive to the analysis; if asylum applicants can make a showing that they fulfilled the evidentiary burden of proving that they have a well-founded fear, then the asylum seekers should be presumed to have a fear of returning to their country. The Ninth Circuit illustrated how the subjective component does not hold much weight in an asylum proceeding when it concluded that applicants could have a subjective fear of returning to their native country even if their own testimonies were not credible.<sup>181</sup> The court relied on the fact that there was evidence that other asylum seekers who evacuated from their country at the same time as the asylum seeker did have a genuine subjective fear.<sup>182</sup> Furthermore, the court states that “most people are sensible enough to harbor a genuine fear of persecution if the actual likelihood of persecution is high,” demonstrating that if there is sufficient objective evidence showing a reasonable person would fear persecution, the subjective fear should be a given.<sup>183</sup>

Second, the Supreme Court should discard the objectively reasonable language. A well-founded fear should simply be interpreted as “a reasonable possibility of persecution.” The Supreme Court should clarify that a well-founded fear is not a separate element that asylum seekers need to prove when establishing future persecution but an evidentiary burden that refers to the *likelihood* of the persecution based on established facts. A reasonable possibility should be determined to be a more generous standard of at least a 10% chance of persecution, as the Supreme Court suggested in *Cardoza-Fonseca* when it stated in a hypothetical example that an adult male person who faced a 10% chance of being put to death or sent to a remote labor camp would have a well-founded fear of persecution upon his return.<sup>184</sup>

Moreover, the central analysis should not be about the 10% chance of persecution but should focus on whether the asylum applicant has established each element needed to prove refugee status. Courts should evaluate each element of refugee status separately and see if a person fears harms that rise to the level of persecution, the person is in a protected group, and there is a nexus between the persecution and the protected group. After producing a structured analysis, the court can briefly determine if the asylum seeker has met the threshold of facing at least a 10% chance of persecution based on whether the asylum seeker has sufficiently established each element of being a refugee. Changing the way courts interpret a well-founded fear would help eliminate the repetitive analysis that is often caused by the objective component.

## CONCLUSION

Although determining whether an asylum seeker has properly met an evidentiary burden is a difficult process, there must still be a threshold that allows adjudicators to have a frame of reference and to decide cases in a more consistent manner. Failing to come to a consensus about the interpretation of well-founded fear will only lead courts to apply the burden of proof that they want in any given case. The ambiguity regarding an objectively reasonable well-founded fear can allow adjudicators to say they are denying an applicant because the applicant’s claim had no objective basis. The objective component can

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<sup>181</sup> *Al-Harbi v. INS*, 242 F.3d 882, 890 (9th Cir. 2001).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Cardoza-Fonseca*, 480 U.S. at 431.

sometimes mask the fact that the adjudicators did not sufficiently analyze the asylum seeker's claim before rejecting the application. The BIA and other judges may also be misapplying the standard that is needed for an objective fear because there is so much ambiguity in the well-founded fear standard. The dangers of using the ambiguous language of an objectively reasonable well-founded fear are too striking to ignore. The disparities in asylum adjudication due to the confusion about how to apply the various components of a well-founded fear cannot progress any further when asylum seekers' lives continue to be jeopardized every day in United States courts.